Update on Developments Under the 2017 Tax Act

ABA EO Committee Meeting – May 10, 2019

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Agenda

What’s New?

• Section 4960 – Excise tax on “excess” executive compensation
  o Notice 2019-9 (Dec. 31, 2018)
• Policy Statement on Tax Regulatory Process (March 5, 2019)
• Additional Topics:
  o Section 512(a)(7) - Qualified transportation fringe benefits
  o Section 4968 - Endowment tax
  o Section 512(a)(6) – UBIT silos
  o New limitations on charitable giving
  o Section 199A - Availability of deduction for combined qualified business income
Section 4960 Tax on Excess Compensation: Overview

Section 4960 imposes an excise tax equal to the corporate rate (21%) on the sum of:

• **Remuneration** paid in excess of $1 million by an applicable tax-exempt organization ("ATEO") or a related organization for the taxable year with respect to the employment of any covered employee; and

• Any **excess parachute payment** paid by an ATEO to any covered employee

Effective for the first **taxable year** beginning after December 31, 2017
Notice 2019-9 (Dec. 31, 2018) provides interim guidance by Treasury and the IRS on the application of the Section 4960 excise tax

• Future regulations to be prospective, and pending further guidance, “taxpayers may base their positions upon a good faith, reasonable interpretation of the statute”

• Guidance on a variety of key questions, including:
  
  o What is an applicable tax-exempt organization?
  o When is an organization deemed to be related – and how is the liability for the excise tax allocated among entities?
  o Who is a covered employee?
  o What constitutes remuneration – and what medical services are excluded from this definition?
  o When is a payment contingent upon separation considered to be an excess parachute payment?
Applicability of Section 4960 to Volunteer Officers

- Many corporate and family foundations have volunteer officers who are also directors, officers or employees of, or holders of significant ownership or profits interest in, a separate entities that are treated as “related” for purposes of Notice 2019-9

- Notice 2019-9 provides that “only an ATEO’s common law employees (including officers) can be one of an ATEO’s five highest-compensated employees”
  - Concern regarding how *unpaid, volunteer* officers would be treated for this purpose -- minor services exception or other grounds to disregard?
  - Other volunteers who are not officers?
Section 4960 - Other Issues

• Timing of income inclusion for 2018

• Inclusion of deferred compensation

• “Control” rules

• Use of split dollar life insurance to limit section 4960 tax
Policy Statement on Tax Regulatory Process

• March 2019 -- Treasury and the IRS issued a joint policy statement
  o Treasury and IRS won’t seek judicial deference for less-formal "subregulatory" guidance (e.g., revenue rulings, revenue procedures, notices, and announcements) in litigation before U.S. Tax Court
  o Encourages taxpayers to rely on subregulatory guidance, stating that "[t]axpayers can have confidence . . . that the IRS will not take positions inconsistent with its subregulatory guidance when such guidance is in effect."
• Treasury and the IRS favor subregulatory guidance for interpretations of existing law applied to a limited set of facts, statutorily prescribed forms of relief, statements of agency procedure or practice, announcements of the intent to issue proposed regulations, or an announcement that has only immediate or short-term value
Policy Statement on Tax Regulatory Process

• Acknowledges that the "[f]ailure to promulgate regulations previewed in notices on a timely basis can cause confusion and uncertainty for taxpayers."
  
  o To address this uncertainty, the statement provides that future IRS notices of intent to issue proposed regulations will provide that "if no proposed regulations or other guidance is released within 18 months after the date the notice is published, taxpayers may continue to rely on the notice."
  
  o Until additional guidance is issued, Treasury and the IRS will not assert a position adverse to the taxpayer based in whole or in part on the notice

• What does this mean for DAF Notice released Dec. 4, 2017?
• Statement says notice-and-comment rule making process is a "best practice" and reaffirms commitment to notice and comment when issuing both "legislative" and "interpretive" rules
  o "legislative" rules arise "when Congress simply provided an end result, without any guidance as to how to achieve the desired result or when a statutory provision does not provide adequate authority for the regulatory action taken." IRM 32.1.1.2.7 (Aug. 2, 2018)
  o "Interpretive" rules include those issued to advise the public of the agency's construction of the statutes it administers. IRM 32.1.1.2.6 (Sept. 23, 2011). This new policy is aimed at reaffirming their commitment to a tax regulatory process that "encourages public participation, fosters transparency, affords fair notice, and ensures adherence to the rule of law."
What is Keeping College and University Attorneys up at Night?

• Qualified transportation fringe benefits
  • Section 512(a)(7); Notice 2018-99
  • Candidate for repeal
  • Parking conundrums
  • Shuttle buses and transit passes

• Section 4968 Endowment Tax; Notice 2018-55
  • Who is a student?
  • Carryover basis
  • What is investment income?
  • What expenses may be deducted?
  • What is a related organization?
What is Keeping College and University Attorneys up at Night?

• Section 512(a)(6) siloing of unrelated businesses: Notice 2018-67
  • Investment income
  • NOL carryforwards
  • Global Intangible Low-Taxed Income excluded from UBTI

• New limitations on charitable giving
  • Increased standard deduction
  • Section 170(l) – athletic seating
  • Increased estate tax exemption amount
  • New 60% of AGI limit for cash contributions
Section 199A – Deduction for Combined Qualified Business Income

• Section 199A provides a deduction for combined qualified business income from a partnership, S corp, sole proprietorship, trust or estate to individuals and certain trusts and estates
  
  o Combined qualified business income is (1) qualified business income (“QBI”), plus (1) qualified REIT dividends and qualified publicly traded partnership (“PTP”) income

• What are the potential implications?