July 29, 2019

Delivered via e-mail

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Re: Follow-Up Submission on Interim Guidance under Section 4960: Distinguishing Volunteers from Employees

Dear Carol and Vicki:

The American Benefits Council ("the Council") appreciated the opportunity to meet with representatives of the Treasury Department and Internal Revenue Service (IRS) on July 12, 2019, to discuss the comments[1] we submitted on Notice 2019-09, which provides interim guidance on the excise tax imposed on excess compensation paid by tax-exempt organizations under new Section 4960.[2] During the meeting, we discussed providing you with a follow-up submission regarding certain issues that were raised, including especially questions regarding how to determine whether a volunteer is a common law employee. This letter serves as that submission.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

[1] Our comments of April 2, 2019 are attached for your convenience.

[2] Unless indicated otherwise, all references to "section" herein refer to sections of the Internal Revenue Code ("Code").

I. SUMMARY OF CONCERN DESCRIBED IN THE COUNCIL'S APRIL 2, 2019 COMMENT LETTER

In our April 2 comments on Notice 2019-09, we requested that the Treasury Department and IRS clarify that neither an applicable tax-exempt organization ("ATEO") nor a related organization of the ATEO will be subject to the excise tax under Section 4960 with respect to any officers of the ATEO who serve solely in a volunteer capacity. The Council's members are concerned about the scenario in which a highly-paid employee of a for-profit entity serving as a volunteer officer of the for-profit entity's private foundation (i.e., for no additional direct or indirect compensation) could result in the for-profit entity owing a substantial excise tax. The potential burden that the Section 4960 excise tax poses is particularly acute for those for-profit entities that provide volunteer officers on a rotational basis because the statute treats any employee who was ever a covered employee (beginning in 2017 or later) as forever continuing to be a covered employee.

As we discussed, some of the Council's member companies have indicated that, due to the tremendous new tax burden that would result, they would have no choice but to terminate their private foundation if Treasury and IRS guidance were to result in a private foundation's volunteer officers being swept into the definition of covered employee by reason of the compensation the volunteers receive as employees of the for-profit entity. We do not believe that the termination of a private foundation due to this reason is a result that anyone would like to see occur.

II. BONA FIDE VOLUNTEERS ARE NOT COMMON LAW EMPLOYEES

Based on the authorities, we believe that individuals who serve as officers of an ATEO and who do not receive any compensation for their volunteer services are, like other bona fide volunteers, not considered common law employees. As such, they are not employees of the ATEO for purposes of Section 4960. According to Notice 2019-09, "only an ATEO's common law employees (including officers) can be one of an ATEO's five highest-compensated employees." Thus, if Treasury/IRS guidance provides that volunteer officers will not be considered common law employees of an ATEO, then it follows that they are not covered employees for purposes of Section 4960, and any remuneration the volunteers receive from related entities (for services performed for those related entities) will not be taken into account for purposes of calculating the excise tax under Section 4960 with respect to that ATEO.

The Common Law Test of Employee Status Presupposes a Finding of Compensation

In general, the determination of whether an employer-employee relationship exists for purposes of the Code is made by applying the common law test.[3] In this regard, the tax withholding regulations describe the common law test as follows:

> Generally such relationship exists when the person for whom services are performed ***has the right to control and direct the individual*** who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.[4] [Emphasis added.]

However, the IRS addressed the inapplicability of this test to volunteers in GCM 34026 (January 24, 1969). In the GCM, the IRS describes the Treasury regulation's description of the common law test in Treas. Reg. Section 31.3121(d)-1(c)(2) (as provided above) as "obviously presuppos[ing] that a legal relationship of a contractual nature exists between the parties being considered and ***provid[ing] a basis for distinguishing whether that relationship is that of employer-employee or contractee-independent contractor***" (emphasis added). The IRS further states that this particular rule "***is thus not concerned with such persons as volunteers*** or trespassers who obviously lack any contractual relationship with the party designated as the one 'for whom services are performed'" (emphasis added).

In other words, the IRS takes the position in GCM 34026 that the common law test of employee status is not intended to be used in the context of a volunteer.[5] Applying this position to Section 4960, we believe that the common law test of employee status does not apply to unpaid volunteer officers of an ATEO, because they lack the relationship with the ATEO needed to be an employee.

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[3] *See, e.g.*, Code section 3121(d) ("For purposes of this chapter, the term 'employee' means… any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee…."); *Marckwardt v. Comm'r*, 62 T.C.M. (CCH) 262 (1991) ("Common-law concepts determine the existence of an employer/employee relationship for tax purposes."); Treasury Reg. section 1.403(b)-2(b)(9) ("Employee means a common-law employee performing services for the employer, and does not include a former employee or an independent contractor."); GCM 33927 ("[T]he common law tests are applied in determining whether the employer-employee relationship exists for purposes of the Code.").

[4] Treasury Reg. section 31.3121(d)-1(c)(2).

[5] As discussed, our members are concerned with situations that involve unpaid volunteer officers. Volunteers who receive payments or other benefits in exchange for their services may require additional analysis to determine whether they are more appropriately treated as an employee or independent contractor.

This conclusion is further supported by the two applicable withholding tax regulations, which provide as follows:

> Generally, an officer of a corporation is an employee of the corporation. However, *an officer of a corporation who as such … performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not considered to be an employee* of the corporation.[6] [Emphasis added.]

One of the regulations is interpreting a statutory provision that defines an employee to include:

> (1) any officer of a corporation; or
> (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee[7]

These authorities tell us the following. First, officers who are bona fide volunteers are not employees, consistent with our analysis above. Second, it would not make sense to include non-officer volunteers as employees under Section 3121(d)(2) if officer volunteers are excluded under Section 3121(d)(1). Why, then, does the regulation not explicitly exclude non-officer volunteers from employee status? Because there is no need to exclude volunteers from the common law employee reference in Section 3121(d)(2): volunteers are not common law employees in the first place.

Threshold-Remuneration Test for Volunteers in Employee Discrimination and Other Litigation

Beyond the tax law context, several Circuit Courts have similarly determined for purposes of Title VII of the Civil Rights Act of 1964 and other federal statutes that the proper analysis of whether a volunteer is an employee does not simply consist of applying the common law test of an employer-employee relationship.[8] Rather, the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have adopted a threshold-remuneration test under which the court first considers whether any remuneration (including significant indirect benefits that are not incidental to the service performed,

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[6] Treas. Reg. section 31.3401(c)-1(f); *see also* Treas. Reg. section 31.3121(d)-1(b) (providing nearly identical language).

[7] Code section 3121(d)(1) and (2).

[8] *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (adopting the common law test for determining who qualifies as an "employee" under ERISA).

e.g., job-related benefits) was received.[9] If there is a showing of remuneration, then the common law test is applied to determine whether the individual is an employee or an independent contractor. But if no remuneration is shown, then there is no plausible employment relationship under which the volunteer would be considered an employee.[10]

The Sixth and Ninth Circuits have taken a slightly different view that remuneration is not essential to the finding of an employment relationship, but that it should be considered as another factor in addition to the typical common law test factors when determining whether a volunteer should be treated as an employee.[11] However, even the Sixth Circuit has acknowledged that a lack of remuneration "weighs against a finding that [plaintiffs] are employees."[12]

Request for Confirmation that Volunteer Officers of an ATEO are not Employees

In light of the authorities cited above, we request that the Treasury Department and IRS issue guidance under which, for purposes of Section 4960, an employee of a for-profit employer who performs services for a related ATEO will not be treated as a common law employee of the ATEO if the individual does not receive any compensation for his or her service for the ATEO.[13]

As discussed at our meeting, it is not our intent to facilitate evasion of the tax applicable under Section 4960. We recognize that there may be situations where a for-profit company technically pays the salary of an ATEO officer but in substance the officer is really an employee of the ATEO. To address this potential for evasion, we recommend two rules:

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[9] *See, e.g., Graves v. Women's Professional Rodeo Ass'n, Inc.*, 907 F.2d 71 (8th Cir. 1990) ("Compensation by the putative employer to the putative employee in exchange for his services…is an essential condition to the existence of an employer-employee relationship"); *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997) (stating that the court finds use of the common law agency framework as "flawed" because it "ignores the antecedent question of whether O'Connor was hired"); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (involving an unpaid medical student); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998) (involving an unpaid officer-director); *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211 (4th Cir. 1993) (considering the "indirect but significant remuneration" provided to a volunteer firefighter); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431 (5th Cir. 2013).

[10] *Juino*, 717 F.3d at 437-38 (summarizing the Court's analysis of the threshold-remuneration line of cases).

[11] *Bryson v. Middlefield Volunteer Fire Dept., Inc.*, 656 F.3d 348 (6th Cir. 2011); *Fichman v. Media Center*, 512 F.3d 1157 (9th Cir. 2008).

[12] *Sister Michael Marie, et al. v. Am. Red Cross, et al.*, 771 F.3d 344, 354 (6th Cir. 2014).

[13] This guidance should apply without regard to the job performed by the volunteer, which could include serving as the ATEO's General Counsel.

- First, if an unpaid ATEO officer's status as a volunteer is a subterfuge to evade the tax under Section 4960, then compensation earned by the "volunteer" attributable to services for the ATEO shall be taken into account under Section 4960 and such officer shall be treated as an employee of the ATEO.

- Because of the difficulty of administering a rule based on the existence of a subterfuge, we recommend the establishment of the following safe harbor. If an individual spends 10% or less of his or her working time during a specified 12-month period performing services for the ATEO, and the individual neither receives, nor is entitled to receive, nor has the expectation of receiving any direct remuneration in exchange for performing such services for the ATEO, then the subterfuge rule shall not apply and the individual will be treated as a bona volunteer of the ATEO and not as an employee.

The above approach would be consistent with existing IRS guidance that contemplates the employee status of a volunteer. In the guidance that we are aware of where a volunteer is treated as an employee, the facts generally involve a volunteer's receipt of monetary payments or other benefits that go beyond, for example, simply reimbursing the purported volunteer for expenses.[14] If such facts were to exist in the context of a Section 4960 analysis, then the rule that we are proposing would not be available because the volunteer has received remuneration in exchange for the services provided. Instead, further analysis would be required to determine whether the volunteer should be treated as an employee (or independent contractor).

III. REQUEST FOR PROSPECTIVE GUIDANCE

As discussed during the July 12th meeting, it is very important for taxpayers that any further guidance issued under Section 4960 apply on a prospective basis only, and that, consistent with Notice 2019-09, until such guidance is issued, taxpayers may take positions that are based upon a good faith, reasonable interpretation of the statute.

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[14] *See, e.g.*, CCA 200302045 (volunteer emergency responders offered partial property tax abatements and exemptions); PLR 9536012 (officers of a union remained on the payrolls of their regular employers while devoting all or nearly all of their time to union duties, and the union often reimbursed the employers for the hours lost); PMTA 2007-00591 (contemplating payments from an employee relief fund to volunteers); CCA 200911034 (indicating the provision of benefits to volunteers).

Thank you for your consideration of our additional comments. If you would find it helpful to discuss any of these matters with us, please contact me at 202-289-6700 or ldudley@abcstaff.org.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy

cc:
Theodore Lieber
William McNally
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ATTACHMENT

April 2, 2019

Delivered via Regulations.gov

Internal Revenue Service
CC:PA:LPD:PR (Notice 2019-09)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on Interim Guidance under Section 4960 (Notice 2019-09)

Dear Sir/Madam:

The American Benefits Council ("the Council") appreciates the opportunity to submit comments on Notice 2019-09, which provides interim guidance on the excise tax imposed on excess compensation paid by tax-exempt organizations under new Internal Revenue Code Section 4960.[1] As discussed below, **we are writing to ask the Treasury Department and the Internal Revenue Service (IRS) to clarify that an applicable tax-exempt organization (ATEO) will not be subject to the excise tax imposed by Section 4960 with respect to officers who serve in a solely volunteer capacity with the organization**. For the reasons described below, an adverse position on this issue (1) is inconsistent with the statute and (2) would very likely result in the termination of some ATEOs that do so much to benefit the public and the causes they support.

The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of workers, retirees and families. Council members include over 220 of the world's largest corporations as well as organizations serving employers of all sizes. Collectively, our members directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

[1] Unless indicated otherwise, all references to "section" herein refer to sections of the Internal Revenue Code.

SUMMARY

As described in more detail below, the Council offers the following recommendations for approaches that the Treasury Department and IRS should take in providing clarification that an ATEO or related organization will not be subject to the excise tax imposed by Section 4960 with respect to ATEO officers who serve in a solely volunteer capacity:

- **Volunteers are not employees.** We ask that, consistent with the statute, the Treasury Department and IRS clarify that individuals who serve as officers of an ATEO and do not receive any compensation, directly or indirectly, for their volunteer services are not considered employees of the ATEO for purposes of Section 4960.

- **Alternative 1: Covered employee status is determined based only on ATEO compensation.** If the Treasury Department and IRS choose not to clarify that a volunteer officer of an ATEO is not considered an employee of the ATEO, then, we urge the Treasury Department and IRS to provide, based on the statute, that the determination of an ATEO's covered employees is made without regard to any remuneration received by an ATEO's employee from a related entity with respect to services the individual performs for a related entity.

- **Alternative 2: Excise tax is based only on compensation for services to ATEO.** In the event that the Treasury Department and the IRS issue guidance providing that unpaid, volunteer officers of an ATEO are considered "employees" of the ATEO for purposes of Section 4960 and that any remuneration paid to such volunteers by a related entity is counted for purposes of determining whether they are "covered employees" of the ATEO, then we would urge the Treasury Department and IRS to establish an anti-abuse rule that would only take into account remuneration paid for services to the ATEO.

TAX-EXEMPT ORGANIZATIONS SERVED BY VOLUNTEER OFFICERS

The Council's members are concerned about the manner in which Section 4960 will be applied to the following situation in particular. As the Treasury Department and IRS are aware,[2] a number of tax-exempt organizations have officers who are volunteers and are not paid, directly or indirectly, for their services to the organization. A common example of this is one in which a for-profit corporation has established a private foundation. It is not unusual for the for-profit entity – in addition to funding the private foundation – to ask talented employees of the for-profit entity to serve as officers of the foundation in a volunteer capacity.

[2] *See* EXEMPT ORGANIZATIONS: COMPENSATION OF OFFICERS, https://www.irs.gov/charities-non-profits/exempt-organizations-compensation-of-officers (last visited March 21, 2019) ("Many exempt organizations have officers who are volunteers and not paid for their services.")

These volunteer officers are often highly accomplished and successful individuals, including mid- and upper-level managers and executives of the for-profit entity.[3] The private foundation benefits significantly from the insight, knowledge and perspectives that these individuals bring to their roles as officers. In addition, the individuals typically continue to perform their employment duties with respect to the for-profit entity and do not receive additional compensation from the for-profit entity as a result of their part-time volunteer service to the private foundation.

In some situations, these individuals may serve as officers of the private foundation for many years. But in other situations, the for-profit entity may ask its employees to serve on a more temporary basis, such as a one-year or two-year period, after which the employee is expected to return to solely performing his or her role with the for-profit entity. For large for-profit entities in particular, including some of the Council's members, this rotational approach may be used to allow more employees the opportunity to contribute their talents to the private foundation. A rotational approach also offers greater flexibility to all parties involved based on the strategic, leadership, or management needs of the private foundation, the business needs of the for-profit entity and the capacity of the individual to serve in a volunteer position in addition to his or her responsibilities to the for-profit entity.

ADVERSE CONSEQUENCES OF APPLYING SECTION 4960 TO ATEOS WITH RESPECT TO VOLUNTEER OFFICERS

As described below, the Council believes that the excise tax imposed by Section 4960 is best interpreted as *not* applying to an ATEO with respect to an officer who is serving solely in a volunteer capacity. Although the language of Notice 2019-09 suggests that the Treasury Department and IRS may already share this view, our members are nevertheless concerned that any additional guidance issued by the Treasury Department and IRS under Section 4960 address the remaining lack of clarity on this point and, more importantly, not adopt a contrary view.

The potential guidance that concerns the Council's members is any guidance under which (1) a volunteer officer would be treated as an employee of the ATEO and (2) the volunteer officer's remuneration received from a related entity (for services performed for the related entity) would be required to be taken into account for purposes of both determining covered employee status and calculating the excise tax. It is not uncommon for individuals who serve as volunteer officers of an ATEO to be highly paid by a related for-profit entity for their continuing services to the for-profit entity. Any guidance that operates as described above would be very problematic if the volunteer

[3] Such individuals may or may not be "covered employees" for purposes of Section 162(m) with respect to the for-profit entity in cases where the for-profit entity is a publicly held corporation.

officers are paid more than $1 million a year by the for-profit entity for their services to the for-profit entity.

The adverse consequences of such guidance are best illustrated using the above example in which a for-profit entity asks its employees to serve as volunteer officers of its private foundation on a temporary or rotational basis. If the Treasury Department and IRS issue guidance that applies Section 4960 in the manner described in the preceding paragraph, then in many cases the private foundation's covered employees for a taxable year would consist largely or entirely of its volunteer officers. As a result, any of these individuals earning over $1 million for their services to the for-profit entity will cause the for-profit employer to owe excise tax under Section 4960.

The prospect of facing an excise tax liability with respect to up to five volunteers is daunting. But that is just the beginning. The statute treats any individual who was ever a covered employee (beginning in 2017 or later) as forever continuing to be a covered employee. Within a matter of years, a for-profit entity that uses a rotational approach to encourage its employees to serve as volunteer officers of its private foundation could find itself with dozens of employees with respect to whom the for-profit entity is liable for an ever-increasing amount of tax under Section 4960.

These consequences are exacerbated even more for a for-profit entity that encourages mid-career employees to serve as volunteer officers of its foundation, because those individuals may continue in their employment with the for-profit entity for many years after they become a covered employee with respect to the foundation. At some point in the not-too-distant future, any charitable inclinations or other benefits the for-profit entity and the public enjoy from the private foundation will be largely overshadowed by this new tax burden. As a result, some of our members have indicated that, in the event that the Treasury and IRS issue guidance that would produce this result, their for-profit entity would likely terminate its private foundation and attempt to provide charitable giving in a different, less effective and less efficient manner.

Although we understand the policy reasons behind Congress enacting Section 4960 and we support measures aimed at thwarting abusive compensation schemes, we do not believe that Congress intended for Section 4960 to be interpreted in a manner that becomes so burdensome in the situation described above that for-profit entities would view terminating their private foundation as the only viable path forward. And, as discussed below, we believe that such an interpretation is contrary to the statute.

REQUEST FOR GUIDANCE THAT AVOIDS SEVERE ADVERSE IMPLICATIONS FOR CERTAIN ATEOS WITH VOLUNTEER OFFICERS

As noted above, the Council does not believe that the statute requires the application of Section 4960 in a manner that will produce the very adverse result described above for ATEOs that have volunteer officers who are also employed by a related entity. In this regard, we have the following recommendations for approaches that the Treasury Department and IRS could take in providing the clarification needed to avoid the harm described above in a manner that is entirely consistent with the statute.

1. Clarify that unpaid, volunteer officers are not considered "employees" of the ATEO.

The most straightforward approach that we recommend for purposes of avoiding severe harm to ATEOs with volunteer officers is to clarify that individuals who serve as officers of an ATEO and do not receive any compensation, directly or indirectly, for their volunteer services are not considered employees of the ATEO for purposes of Section 4960.

Section 4960(c)(2) defines "covered employee" in part as "any *employee* (including any former employee) of an applicable tax-exempt organization" (emphasis added). Thus, by definition, an individual cannot be a covered employee of an ATEO unless that individual is first established to be an employee of the ATEO. Section 4960, however, does not provide a definition of "employee."

In Notice 2019-09, the IRS provides that "only an ATEO's common law employees (including officers) can be one of an ATEO's five highest-compensated employees." The phrase "including officers" indicates that the officers being referred to are a subset of the ATEO's common law employees. In other words, the notice suggests that an officer of an ATEO could not meet the definition of covered employee unless the officer is also a common law employee of the ATEO (as opposed to an unpaid volunteer or an independent contractor). The Council strongly supports this result.

Yet because Notice 2019-09 is not entirely clear on this point, questions have been raised as to the relevance, if any, of the definition of "employee" in other sections of the Code, such as sections 3401 and 3121, for purposes of Section 4960. Sections 3401(c) and 3121(d), which define employee for purposes of chapter 24 (Collection of Income Tax at Source on Wages) and chapter 21 (Federal Insurance Contributions Act), respectively, provide in part that the term employee means an "officer of a corporation." Treasury regulations, however, provide that:

> Generally, an officer of a corporation is an employee of the corporation. However, *an officer of a corporation who as such … performs only minor services and*

who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not considered to be an employee of the corporation.[4] [Emphasis added.]

These authorities tell us a few things. First, without sections 3401(c) and 3121(d), volunteer officers would not be employees. Otherwise, sections 3401(c) and 3121(d) would serve no purpose. This, in turn, tells us that the general rule under the Code is that volunteer officers are not employees, except to the extent that they are specifically treated as employees by a Code provision, like sections 3401(c) and 3121(d). But because neither Section 3401(c) nor Section 3121(d) applies for purposes of Section 4960, the conclusion is inescapable that volunteer officers are not employees for purposes of Section 4960. The inapplicability of the definition of "employee" in Section 3401(c) in particular is especially apparent because Congress specifically cross-referenced the definition of "wages" in Section 3401(a) for purposes of defining the term "remuneration" in Section 4960(c)(3), yet Congress did not include a similar cross-reference to Section 3401(c) for purposes of defining who constitutes an "employee" under Section 4960. Had Congress intended for the definition of "employee" in either sections 3401(c) or 3121(d) to apply for purposes of Section 4960, Congress would have provided for such a result.

Second, even if an argument could be made that Treasury and the IRS have the authority to treat volunteer officers as employees for purposes of Section 4960, which we do not believe is the case, the Treasury Department and IRS clearly have the authority *not* to do so, especially since they exercised that authority even in the context of multiple statutory provisions that treat officers as employees.[5] At a minimum, Treasury and the IRS should exercise that same authority under Section 4960 in situations like those described above with respect to part-time temporary volunteer officers.

2. Clarify that an ATEO's covered employees are determined without regard to remuneration received by an employee from a related organization.

If the Treasury Department and IRS choose not to clarify that a volunteer officer of an ATEO is not considered an employee of the ATEO, then, in the alternative, we urge the Treasury Department and IRS to provide that the determination of an ATEO's covered employees is made without regard to any remuneration received by an ATEO's employee from a related entity with respect to services the individual performs for a related entity.

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[4] Treas. Reg. Section 31.3401(c)-1(f); *see also* Treas. Reg. Section 31.3121(d)-1(b) (providing nearly identical language). In addition, the IRS generally recites the language of this regulation in its webpage regarding the compensation of officers of exempt organizations. EXEMPT ORGANIZATIONS: COMPENSATION OF OFFICERS, *supra* note 2.

[5] *See* Treas. Reg. Section 31.3401(c)-1(f); Treas. Reg. Section 31.3121(d)-1(b); Treas. Reg. Section 31.3306(i)-1(e).

Section 4960(c)(2)(A) provides that an individual is a covered employee of an ATEO if the individual "is one of the 5 highest compensated employees of the organization for the taxable year." The statute is silent with respect to how an ATEO should identify its five highest compensated employees. Notice 2019-09 provides that the five highest compensated employees should be determined based on remuneration paid, which is the same standard used for purposes of computing the excise tax. In other words, "To identify its five highest-compensated employees, the ATEO must include remuneration paid for the taxable year by any related organization, including remuneration paid by a related for-profit organization … for services performed as an employee of such related organization."[6]

We encourage the Treasury Department and IRS to reconsider the position taken in the notice. If Congress had intended for all remuneration, as described in Section 4960(c)(3)-(4), to be taken into account for purposes of determining which employees are the five highest-compensated employees of an ATEO, Congress clearly could have provided for that result by using the term "remuneration" in the definition of covered employee. But Congress did not do so and instead used the term "compensation." There is no statutory basis to conclude that "compensation" from a related entity should be attributed to an ATEO for purposes of determining an ATEO's covered employees, especially in light of the statutory provision adopting this position with respect to remuneration, but not compensation. We therefore request that the Treasury Department and IRS interpret Section 4960(c)(2)(A) as simply requiring the identification of the five employees to whom the ATEO pays the most compensation. Under this approach, a volunteer officer of the ATEO who is unpaid would be excluded from the ATEO's list of covered employees.

3. Establish an anti-abuse rule under which remuneration received by a covered employee from a related entity is not included to the extent that such remuneration is paid for services the covered employee performs for a related entity.

In the event that the Treasury Department and the IRS issue guidance providing that unpaid, volunteer officers of an ATEO are considered "employees" of the ATEO for purposes of Section 4960 and that any remuneration paid to such volunteers by a related entity is counted for purposes of determining whether they are "covered employees" of the ATEO, then we would urge the Treasury Department and IRS to establish an anti-abuse rule that would provide a path forward for the parties involved in a non-abusive situation such as the one we described above.

Section 4960(c)(4)(A) provides, "Remuneration of a covered employee by an [ATEO] shall include any remuneration paid with respect to employment of such employee by

[6] Section I(C) of Notice 2019-09.

any related person or governmental entity." It is not clear from this provision whether remuneration includes (1) any remuneration paid by any related person or governmental entity *with respect to the employee's employment by the ATEO*, or (2) any remuneration paid by a related person or governmental entity *with respect to the employee's employment by the related person or governmental entity*. In light of this ambiguity in the statutory language and the authority provided to the Secretary of the Treasury to prescribe regulations to prevent abusive situations, we believe that it would be appropriate for the Treasury Department and IRS to incorporate an anti-abuse rule into the determination of a covered employee's remuneration.

The Council recommends that such an anti-abuse rule should provide that any remuneration paid to an employee of an ATEO by a related entity will not be included for purposes of calculating the excise tax under Section 4960 to the extent that such remuneration is paid solely for services performed by the individual as an employee of the related entity and there is no evidence that the arrangement is intended to avoid the excise tax. Such a rule would effectively distinguish between abusive and non-abusive situations, thus protecting non-abusive ATEOs from the inappropriately adverse consequences described above.

* * * * *

We ask the Treasury Department and IRS to use one of the approaches recommended above in order to avoid an inappropriate extension of Section 4960 to ATEOs with volunteer officers that would produce counterproductive results that are not consistent with the statute.

Thank you for your consideration of our comments. If you would find it helpful to discuss any of these matters with us, please contact me at 202-289-6700 or ldudley@abcstaff.org.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement & Compensation Policy