AMERICAN BENEFITS COUNCIL

August 10, 2020

Submitted via regulations.gov

The Internal Revenue Service
CC:PA:LPD:PR (REG–122345–18)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Attention: Tax on Excess Tax-Exempt Organization Executive Compensation (RIN 1545-BO99)

Dear Sir or Madam:

The American Benefits Council ("the Council") appreciates the opportunity to comment on the regulations proposed by the U.S. Department of the Treasury and Internal Revenue Service (IRS) under Internal Revenue Code ("Code") Section 4960, which imposes an excise tax on remuneration in excess of $1 million that is paid by an applicable tax-exempt organization (ATEO) for the taxable year with respect to the employment of any covered employee.[1] As discussed below, the Council *strongly supports* the proposed regulations insofar as they clarify the application of Section 4960 with respect to officers of a tax-exempt organization who serve as such solely in a volunteer capacity but who receive remuneration from a related for-profit entity for services the individual performs as an employee of the for-profit entity.

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] 85 Fed. Reg. 35,746 (June 11, 2020).

BACKGROUND AND PREVIOUS COMMENTS SUBMITTED BY THE COUNCIL

As noted, Code Section 4960 imposes an excise tax on remuneration in excess of $1 million that is paid by an ATEO with respect to the employment of any "covered employee." Very generally, a covered employee for this purpose means any employee or former employee of an ATEO if the employee (1) is one of the five highest-compensated employees of the ATEO for the taxable year, or (2) was a covered employee of the ATEO for any preceding taxable year beginning after December 31, 2016. The remuneration of a covered employee by an ATEO includes any remuneration paid with respect to employment of such employee by *any related person*. If remuneration from more than one employer is taken into account pursuant to the preceding sentence, then Section 4960 provides that each such employer shall be liable for its proportionate share of the excise tax.

The IRS provided initial guidance under Section 4960 through Notice 2019-09. In comments submitted to the IRS on Notice 2019-09,[2] the Council described its members' concern about the manner in which Section 4960 might be applied in certain situations in which a tax-exempt organization has officers who are volunteers and who are not paid, directly or indirectly, for their services to the organization. For example, a for-profit corporation that has established a private foundation may, in addition to funding the private foundation, ask certain employees of the for-profit entity to serve as officers of the foundation in a volunteer capacity (i.e., without additional compensation for their part-time volunteer service to the private foundation). In some situations, those individuals may serve as volunteer officers of the tax-exempt organization for many years, but in other cases the for-profit corporation may ask its employees to serve on a more temporary or rotational basis.

We further noted in our comments that, because it is not uncommon for these individuals serving as volunteer officers of an ATEO to be highly paid by a related for-profit entity (for their services to the for-profit entity), it would be very problematic if a for-profit entity finds itself with a potentially very significant tax liability under Section 4960. We shared our members' concerns that the resulting tax burden could even be so great that for-profit entities would view terminating their private foundation as possibly the only viable path forward. The Council therefore urged the IRS to provide guidance clarifying that neither an ATEO nor a related for-profit entity would be subject to the Section 4960 excise tax in such situations as described above.

PROPOSED REGULATIONS

The IRS noted in the preamble to the proposed regulations that, in consideration of concerns such as those described above, the IRS was "propos[ing] exceptions to the

[2] The Council submitted comments to the IRS on Notice 2019-09 on April 2, 2019 and July 29, 2019.

definition of 'employee' and 'covered employee' and the rules for identifying the five highest-compensated employees."[3] The IRS further explained that the proposed exceptions are "intended to ensure that certain employees of a related non-ATEO providing services as an employee of an ATEO are not treated as one of the five highest-compensated employees of the ATEO, provided that certain conditions related to the individuals' remuneration or hours of service are met."[4] In this regard, the proposed regulations include a "limited hours exception" and a "nonexempt funds exception" (among other exceptions) under which an individual would be disregarded for purposes of determining an ATEO's five highest-compensated employees for a taxable year if the conditions described for either exception (or both) are met.[5]

The Council's members strongly support the inclusion of the limited hours and nonexempt funds exceptions in the final regulations, as we believe that they (1) reflect congressional intent regarding the scope of the application of the new excise tax and (2) will provide appropriate relief to employers with respect to the concerns the Council raised in its previous comments.

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Thank you for the opportunity to express our support for the regulations proposed under Code Section 4960 with respect to the aspects discussed above. Should you have any questions or wish to discuss our comments further, please contact me at ldudley@abcstaff.org.

Sincerely,

Lynn D Dudley

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

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[3] 85 Fed. Reg. 35,750.

[4] *Id.*

[5] Proposed Treas. Reg. § 53.4960-1(d)(2)(ii) and (iii).