

The University of Texas School of Law  
37<sup>th</sup> Annual Nonprofit Organization Institute

## Ask the Experts: A Few Hot Topics

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## The Issues We Are Seeing

- The “hot topics” faced by public charities vary widely based on each charity’s specific activities.
- There are a handful of issues being raised more generally across the board.
- We will discuss a few of those, as well as questions/topics submitted during the course of the conference.
- And, of course, we will play “stump the experts” and take questions from the audience.

# First Up: Section 4960

- Enacted as part of tax reform in 2017
- In taxable years beginning after 2017, imposes an excise tax (currently at 21%) if an EO pays to a “Covered Employee”:
  - “Remuneration” in excess of \$1 million, or
  - “Excess parachute payments”
- Remuneration from a “Related Organization” is treated as paid by the EO
- Guidance
  - Notice 2019-09
  - Still awaiting regulations

\*The law actually refers to “Applicable Tax Exempt Organizations,” which includes all 501(a) organizations and certain other entities.

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# Section 4960: Remuneration

- “**Remuneration**” = Section 3401(a) wages (i.e. W-2 wages), with two tweaks:
  - Excludes designated Roth contributions
  - Includes amounts included under section 457(f) (re: ineligible deferred compensation plans)
- Remuneration **counted in year it vests** within meaning of section 457(f)
  - Vests when “no substantial risk of forfeiture”
  - This is true even if the remuneration isn’t subject to 457(f) in the first place
- Includes remuneration from a **Related Organization** to an employee of the EO, even if:
  - the EO pays no compensation to the employee
  - the remuneration does not relate to employment at the EO

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## Section 4960: Related Organization

- An organization is a “**Related Organization**” of an EO if:
  - It controls or is controlled by the EO
  - It is controlled by one or more persons that control the EO
  - It is a supported or supporting organization of the EO
  - It establishes, maintains or makes contributions to an EO that is a VEBA
- An organization “**controls**” the EO if:
  - > 50% of directors or trustees of the EO are representatives of, or controlled by, the organization; or
  - if the organization is itself an EO, > 50% of the directors or trustees of the organization are either representations of, or controlled by, the EO
- Can break control by creating a “self-perpetuating” board for the EO

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## Section 4960: Covered Employee

- Who is an “**employee**”?
  - Under Notice 2019-09, common law principles apply
  - Directors should not count, but officers generally do
  - Section 3401 “minor services” exception—unclear whether it applies to Section 4960
  - IRS has informally indicated that it may provide more guidance on officers
- Who is a “**Covered Employee**”?
  - 5 most highly compensated employees in any taxable year of the EO beginning after 2016 (taking into account compensation from Related Organization)
  - Once a Covered Employee, always a Covered Employee
    - This can be true even if the employee stops working for the EO, if the employee continues to receive compensation from a Related Organization

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""Office Hours" - Key Issues and Questions Facing Public Charities"