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IRS Issues Final Regulations for Tax on Excess Tax-Exempt Organization Executive Compensation

The IRS has issued final regulations ([TD 9938](#)) under Section 4960, which imposes an excise tax on remuneration in excess of \$1 million and any excess parachute payment paid by an applicable tax-exempt organization to any covered employee. (Section references are to the Internal Revenue Code of 1986, as amended (the Code).) The final regulations adopt the proposed regulations (see our prior coverage [here](#)) with some modifications, notably to the nonexempt funds exception by providing an expanded measurement period for employees providing services on a percentage basis and disregarding the so-called “downward attribution” for eligibility. Under Section 4960(a), an “applicable tax-exempt organization,” which includes an organization exempt from tax under Section 501(a), (ATEO) must pay a 21% excise tax on (1) remuneration in excess of \$1 million paid to a “covered employee” (excess remuneration) plus (2) any “excess parachute payment” paid to a covered employee during the tax year. The final regulations provide rules for determining: (i) the amount of remuneration paid for a taxable year for purposes of identifying covered employees and calculating the excise tax; (ii) whether excess remuneration has been paid and in what amount; (iii) whether a parachute payment has been paid and in what amount; and, (iv) the allocation of liability for the excise tax among related organizations. The final regulations apply to taxable years beginning after Dec. 31, 2021, but taxpayers may choose to apply them to taxable years beginning after Dec. 31, 2017 and before Dec. 31, 2021.

Note that the Treasury Department and the IRS will continue to consider whether Section 4960 should apply to Federal instrumentalities for which the enabling acts provide for exemption from all current and future Federal taxes. Until further guidance is issued, a Federal instrumentality for which an enabling act provides for exemption from all current and future Federal taxes may treat itself as not subject to tax under Section 4960 as an ATEO or related organization. However, if that Federal instrumentality is a related organization of an ATEO, the remuneration it pays must be taken into account by that ATEO.

IRS Extends Safe Harbors for REMICs and Certain Investment Trusts

The IRS, in [Revenue Procedure 2021-12](#), has extended to Sept. 30, 2021, the expiration dates of certain safe harbors for real estate mortgage investment conduits (REMICs) and certain investment trusts as set forth in Revenue Procedures [2020-26](#) and [2020-34](#) due to the ongoing COVID-19 pandemic. (See our prior coverage [here](#) and [here](#).) Revenue Procedure 2020-26 provides safe harbors for determining the Federal income tax status of REMICs and investment trusts that hold mortgage loans. Under the safe harbors, certain modifications of mortgage loans in connection with forbearances are not treated as replacing the unmodified obligation with a newly issued obligation, as giving rise to prohibited transactions, as resulting in a deemed reissuance of the REMIC regular interests, or as manifesting a power to vary. In addition, under another safe harbor in the revenue procedure, REMICs are not treated as having improper knowledge of an anticipated default on the grounds that they acquired a mortgage loan with respect to which the borrower had requested or agreed to a forbearance. Revenue Procedure 2020-34 provides safe harbors for determining the Federal income tax status of certain investment trusts that hold real property. Under the safe harbors, certain modifications of mortgage loans in connection with forbearance programs described in Rev. Proc. 2020-26 are not treated as manifesting a power to vary. Additionally, certain modifications of real property leases and the acceptance of additional cash contributions

related to the COVID-19 pandemic are not treated as manifesting a power to vary.

IRS Issues Final Regulations on Nondeductibility of Penalties and Fines

The IRS has issued final regulations ([TD 9946](#)) under Section 162(f) regarding the deduction of certain fines, penalties, and other amounts, and under Section 6050X relating to the information reporting requirements with respect to such fines, penalties, and other amounts. (See our prior coverage [here](#).)

IRS Issues Final HRA Integration Regulations

The IRS has issued final regulations (TD 9949) that clarify the application of the employer shared responsibility provisions and certain nondiscrimination rules under the Code to health reimbursement arrangements (HRAs) and other account-based group health plans integrated with individual health insurance coverage or Medicare (individual coverage HRAs), and to provide certain safe harbors with respect to the application of those provisions to individual coverage HRAs. The final regulations affect employers, employees and their family members, plan sponsors, and health insurance issuers that offer individual health insurance coverage.



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