Council on Foundations

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July 31, 2026

Internal Revenue Service
Attn: CC:PA:01:PR (Notice 2026-36)
Room 5503
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Recommendations for Notice 2026-36

To Whom It May Concern:

The Council on Foundations (the Council) is writing to provide comments to the Department of the Treasury (Treasury) and the Internal Revenue Service's (IRS) notice of intent to issue proposed regulations under Internal Revenue Code (Code) section 4960 pertaining to the tax on excess tax-exempt organization executive compensation. The Council offers recommendations based on the practical implications of how the changes in the One Big Beautiful Bill Act (OBBBA) and the proposed regulations will affect the philanthropic sector.

The Council is a nonprofit membership association that serves as a guide for philanthropies as they advance the greater good. Building on our 75-year history, the Council supports approximately 1000 member organizations in the United States and around the world to build trust in philanthropy, expand pathways to giving, engage broader perspectives, and co-create solutions that will lead to a better future for all.

Our foundation members, and the organizations they help fund, would benefit significantly from the recommendations outlined below:

- An employee that is not paid by an applicable tax-exempt organization (ATEO) should not be a "covered employee" and remuneration not paid by an ATEO should not be subject to tax under Code section 4960.
- In the alternative, the exceptions to the definition of "five highest-compensated employees" pursuant to Treasury regulation section 53.4960-1(d) should apply to the definition of "covered employees" and should further apply to the determination of remuneration paid pursuant to Treasury regulation section 53.4960-2(b)(2).

To assist Treasury in developing guidance, the Council has compiled information as well as examples of situations our members have encountered that support the recommendations above.

Background On Code Section 4960

When Code section 4960 was initially enacted, the House Ways and Means Committee identified two related policy concerns: (1) preventing excessive executive compensation from diverting tax-exempt resources from their intended purposes and (2) aligning the tax treatment of excessive compensation paid by tax exempt and for-profit employers. The Committee explained that:

> [T]ax-exempt organizations enjoy a tax subsidy from the Federal government because contributions to such organizations are generally deductible and such organizations are generally not subject to tax (except on unrelated business income). As a result, such organizations are subject to the requirement that they use their resources for specific purposes, and the Committee believes that excessive compensation (including excessive severance packages) paid to senior executives of such organizations diverts resources from those particular purposes. The Committee further believes that alignment of the tax treatment of excessive executive compensation (as top executives may inappropriately divert organizational resources into excessive compensation) between for-profit and tax-exempt employers furthers the Committee's larger tax reform effort of making the system fairer for all businesses.[1]

Code section 4960(a) imposes a tax on "the remuneration paid…by an [ATEO] for the taxable year with respect to employment of any covered employee in excess of $1,000,000." Prior to the enactment of OBBBA on July 4, 2025, Code section 4960(c)(2) defined a "covered employee" to mean "any employee (including any former employee) of an [ATEO] if the employee – (A) is one of the 5 highest compensated employees of the organization for the taxable year, or, (B) – was a covered employee of the organization (or any predecessor) for any preceding taxable year beginning after December 31, 2016." In other words, if an ATEO pays remuneration in excess of $1,000,000 in a taxable year to one of its five highest-compensated employees or to someone who was previously one of its five highest-compensated employees, tax is due on the excess compensation.

Treasury regulation section 53.4960-1(d)(2) provides additional guidance regarding which individuals are included in an ATEO's five highest-compensated employees, stating that such individuals are "identified on the basis of the total remuneration paid during the applicable year to the employee for services performed as an employee of the ATEO or any related organization." Therefore, when determining whether an individual is one of an ATEO's five highest-compensated employees, the regulations direct the ATEO to aggregate remuneration paid by the ATEO and by any related organization. Certain individuals who fit into exceptions in Treasury regulation section 53.4960-1(d)(2) are disregarded for purposes of determining an ATEO's five highest-compensated employees. These exceptions include the limited hours exception, the nonexempt funds exception, and the limited services exception. See Treas. Reg. §§ 53.4960-1(d)(2)(ii)-(iv).

Treasury regulation section 53.4960-2(b) provides additional guidance regarding what it means for remuneration to be paid by an ATEO, stating that "remuneration paid…by a related organization to an ATEO's employee during an applicable year for services performed as an employee of the related organization is treated as remuneration paid…by the ATEO, except as otherwise provided in §53.4960-1(d)(2)(ii) and (iii)." The result of these regulations is that when calculating the tax due under Code section 4960, the tax is imposed on the excess over $1,000,000 of the total remuneration received by the employee, whether from the ATEO or from a related organization.

OBBBA changed the definition under Code section 4960(c)(2) to provide that a "covered employee" means "any employee of an [ATEO] (or any predecessor of such an organization) and any former employee of such an organization (or predecessor) who was such an employee during any taxable year beginning after December 31, 2016." This had the effect of expanding the definition of "covered

[1] House Rep. 115-409, 333 (Nov. 13, 2017).

employee" beyond the five highest-compensated employees and rendering the exceptions in the regulations to whether an individual was one of an ATEO's five highest-compensated employees inapplicable to the new definition.

Given this change in definition, the regulations will need to be revised accordingly. The Council believes Treasury has an opportunity to update the regulations to both reflect the policy rationale identified in the legislative and regulatory history of Code section 4960 and better address the concerns of our members in light of the scenarios they most often encounter, including scenarios that were not addressed by Treasury's prior regulations relating to Code section 4960.

Common Scenarios for Our Members

Our members include private foundations created and funded by for-profit corporations or other taxable companies (company foundations) as well as private foundations created and funded by endowments from a specific family (family foundations). Company foundations are often formed to support fields related to a company's business activities or to support communities where a company operates. Family foundations are often formed to support the causes important to a particular family and may receive services from family offices that in turn oversee other family-owned businesses.

In the case of company foundations, the related company often asks or directs its employees to provide volunteer services to the company foundation. In the case of family foundations, the related family office or family-owned businesses may also ask their employees to provide volunteer services to the family foundation. In both cases, these services may be provided on an uncompensated or minimally compensated basis to avoid any implication of self-dealing and to ensure the foundation's resources are available for charitable purposes.

Under the existing regulations, our members have experienced what the Council believes is taxation inconsistent with the policy behind Code section 4960. The following three examples illustrate three of these common scenarios.

Scenario 1: Company employee does foundation work

Company A is a publicly-held for-profit corporation and establishes Company A Foundation. The Chief Executive Officer (CEO) of Company A serves as President of Company A Foundation, the General Counsel (GC) of Company A serves as Secretary of Company A Foundation, and the Chief Financial Officer (CFO) of Company A serves as Treasurer of Company A Foundation. Company A Foundation pays each officer a modest $5,000 in remuneration each year for their respective services. Company A Foundation also has five employees, including an Executive Director, a Grants Manager, and a Bookkeeper. Company A Foundation pays the Executive Director $300,000 in remuneration, the Grant Manager $200,000 in remuneration, and the Bookkeeper $100,000 in remuneration.

Company A pays the CEO $10,000,000 in remuneration, the GC $3,000,000 in remuneration, and the CFO $7,000,000 in remuneration, each for their respective services to Company A.

Under the pre-OBBBA framework, CEO, GC, CFO, Executive Director, and Grants Manager are the five highest-compensated employees, and therefore covered employees for purposes of Code section 4960. Further, in computing the tax due, the tax is imposed not only on the amounts paid by Company A

Foundation, but also upon the amounts paid by Company A for services unrelated to Company A Foundation. The Council believes this is inappropriate, as the funds paid by Company A to the CEO, GC, and CFO for their services to Company A are unrelated to the functions each carried out for Company A Foundation and do not divert funds from the charitable purposes of Company A Foundation.

Scenario 2: Prior foundation employee moves to company

Company B is a family business created by Founder, who serves as CEO of and owns a controlling interest in Company B. Founder also created Family B Foundation, of which Founder's wife is President, Founder's son is Secretary, and Founder's daughter is Treasurer. Founder's wife, son, and daughter are paid nominal remuneration for their services to Family B Foundation, which constitute more than limited services, and Family B Foundation has no other employees.

Founder's daughter resigns as Treasurer of Family B Foundation in 2023 and joins Company B as CFO. Company B pays Founder's daughter $2,500,000 in remuneration for her services to Company B.

Under the pre-OBBBA framework, while at Family B Foundation, Founder's daughter, Founder's wife, and Founder's son were all Family B Foundation's highest-compensated employees. Therefore, while at Family B Foundation, Founder's daughter was a covered employee. When Founder's daughter left Family B Foundation and moved to Company B, she continued to be a covered employee under Code section 4960 because she was a covered employee in a preceding tax year. Therefore, when she was then paid $2,500,000 by a related organization, a tax would be imposed on this compensation. The Council believes this is inappropriate, as Founder's daughter is not providing any services to Family B Foundation at this time and her remuneration is solely related to her services for (and paid by) Company B.

Scenario 3: Officers of foundation are unpaid

The facts are the same as Scenario 2, except that none of Founder's wife, son, and daughter are paid any remuneration for their services to Family B Foundation. Under the post-OBBBA framework, Founder's daughter, Founder's wife, and Founder's son are covered employees due to their status as officers who perform more than limited services, even though none receive remuneration for those services. Again, when Founder's daughter leaves Family B Foundation to move to Company B, she would continue to be a covered employee and the $2,500,000 paid to Founder's daughter by a related organization would result in a tax imposed on this compensation. The Council believes this is inappropriate, and that Founder's daughter should not have been classified as a covered employee in the first place given Family B Foundation never paid her remuneration for her services.

Recommendations

First recommendation: An employee that is not paid by an ATEO should not be a "covered employee," and remuneration not paid by an ATEO should not be subject to tax under code section 4960.

The concerns illustrated by the scenarios above arise despite the final regulations Treasury previously adopted with respect to Code section 4960. Given Treasury's need to adopt new regulations to address the change in Code section 4960, the Council recommends that Treasury take this opportunity to reassess and simplify the regulations to ensure these common issues are resolved logically. Therefore, the Council recommends that Treasury adopt regulations that provide that, for purposes of determining an ATEO's covered employees, any employee of a related organization who is not paid by the ATEO should not be included in the ATEO's "covered employees." Further, we recommend that only remuneration paid (directly or indirectly) by the ATEO, or, at a minimum, only remuneration related to the employment of an employee by an ATEO, including remuneration paid by a related organization, be taken into consideration for purposes of computing the tax under Code section 4960(a).

Neither including individuals who are not employees of an ATEO in determining an ATEO's covered employees nor including remuneration unrelated to employment of an employee by an ATEO for purposes of computing the tax under Code section 4960(a) is required by the statutory text, and, further, doing so is inconsistent with the policy rationale identified in the legislative and regulatory history of Code section 4960.

Under Code section 4960(c)(2), only an ATEO can have a "covered employee" and, therefore, only compensation paid by the ATEO, directly or indirectly (such as through reimbursement of another entity) should be considered. At most, only compensation attributable to services rendered by the employee to the ATEO should be relevant. Further, Code section 4960(c)(4)(A), which provides that "remuneration of a covered employee by an ATEO shall include any remuneration paid *with respect to employment of such employee* by any related person or governmental entity" (emphasis added), should be read in conjunction with Code section 4960(a)(1), which provides that the tax is imposed on "so much of the remuneration paid…by an [ATEO] for the taxable year with respect to employment of any covered employee", resulting in the following interpretation: "remuneration of a covered employee by an [ATEO] shall include any remuneration paid by any related person or governmental entity with respect to ***<u>the [ATEO's]</u>*** employment of such covered employee." This interpretation, based on the plain language of Code section 4960, would ensure that all remuneration with respect to a covered employee's employment *by an ATEO*, including remuneration paid by a related organization *relating to such employment by the ATEO*, is included in computing the applicable tax.

In Scenario 1 above, this would have the effect of determining that each of the CEO, GC, CFO, Executive Director, Grant Manager, and Bookkeeper are "covered employees" of Company A Foundation. However, with respect to the CEO, GC, and CFO, only the remuneration received from Company A Foundation, and not the unrelated remuneration received from Company A, would be included in computing any tax due under Code section 4960.[2]

In Scenario 2 above, this would have the effect of determining that though Founder's wife, son, and daughter all continue to be covered employees of Family B Foundation, the remuneration paid to Founder's daughter by Company B for her services to Company B does not constitute remuneration paid by Family B Foundation, and therefore no tax is due under Code section 4960 (as long as Founder's daughter does not receive remuneration from Company B for services provided to Family B Foundation).

Finally, in Scenario 3 above, this would have the effect of initially determining that none of Founder's wife, Founder's son, and Founder's daughter are covered employees of Family B Foundation as they received no remuneration for their services to Family B Foundation. Therefore, when Founder's daughter

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[2] The Council notes that to the extent Company A did pay remuneration to the CEO or another officer for such individual's services to Company A Foundation, the coordination provision of Code section 4960(c)(6) would apply to ensure any remuneration for which a deduction was not allowed under Code section 162(m) would not be taken into account for purposes of Code section 4960.

moves to Company B, her remuneration is irrelevant to the tax computed under Code section 4960 because she is not a covered employee.

In all cases, this would avoid the illogical result of taxing remuneration paid by persons who are not ATEOs for services that are entirely unrelated to an ATEO. Further, we believe this is consistent with Congress's stated policy objective of protecting tax-exempt assets.

Alternative Recommendation: The exceptions to the definition of "five highest-compensated employees" pursuant to regulations section 53.4960-1(d) should apply to the definition of "covered employees" and should further apply to the determination of remuneration paid pursuant to regulations section 53.4960-2(b)(2).

If Treasury and the IRS determine not to follow the Council's recommendation above, the Council recommends that Treasury adopt regulations that apply the current exceptions from the definition of "five highest-compensated employees" under Treasury regulation section 53.4960-1(d) to the new definition of "covered employees". Further, the Council recommends that similar exceptions are included for purposes of determining remuneration under Treasury regulation section 53.4960-2(b)(2).

By including a limited hours exception, nonexempt funds exception, and limited services exception to the definition of "covered employees", Treasury and the IRS could at least provide exceptions consistent with the existing Regulations approach to defining "five highest-compensated employees." The Council notes, however, that this does not provide any relief for our Founder's daughter in Scenario 2, who was determined to be a covered employee in the past and therefore continues to be a covered employee for future tax years. To address this concern, the Council believes adding a similar limited hours exception, nonexempt funds exception, and limited services exception to Treasury regulation section 53.4960-2(b)(2) would be appropriate. In doing so, if one of these exceptions applies, the remuneration paid by the related organization should not be included in the definition of "remuneration paid by the ATEO" such that it is not considered in computing any applicable tax. When an individual previously has been classified as a covered employee, but would not be so classified in a subsequent year (but for the previous classification) based on one of these exceptions, the Council does not see a policy justification for including the remuneration paid by the related organization for purposes of computing the Code section 4960(a) tax in the subsequent year.

Conclusion

Thank you for considering this input as part of the rulemaking process. To discuss the Council's recommendations in further detail or to explore options of how to collaborate with the philanthropic sector at large, please reach out to me at govt@cof.org.

Sincerely,

Jenn Holcomb
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Council on Foundations