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IRS Notice Offers Good News for State Colleges and Universities (at Least for Now).

In January 2019, the Internal Revenue Service (IRS) issued Notice 2019-09, which provides interim guidance for Section 4960 of the Internal Revenue Code of 1986. As a reminder, Section 4960 imposes an excise tax of 21 percent on compensation paid to a covered employee in excess of $1 million and on any excess parachute payments paid to a covered employee. A "covered employee" is one of the organization's top-five highest-paid individuals for years beginning after December 31, 2016. An organization must determine its covered employees each year, and once an individual becomes a covered employee, that individual will remain a covered employee for all future years.

Of particular interest to state colleges and universities is the answer to Q–5 of the notice. It provides that the Section 4960 excise tax does not apply to a governmental entity (including a state college or university) that is not tax-exempt under Section 501(a) and does not exclude income under Section 115(l). What does this mean? Basically, if an institution does not rely on either of those statutory exemptions from taxation, the institution will not be subject to the excise tax provisions of Section 4960. This exclusion from Section 4960 means the institution could compensate its athletic coaches (or other covered employees) in excess of the $1 million threshold and not be subject to the 21 percent excise tax.

As we discussed previously, some institutions rely on political subdivision status for tax purposes. Importantly, the notice also provides that any institution relying on its political subdivision status to avoid taxation, as opposed to relying on either of the above-mentioned exemptions, will be subject to the Section 4960 excise tax if the institution is "related" to any entity that does rely on either of the exemptions.

Although the IRS's guidance is helpful in determining Section 4960's application to state colleges and universities, it appears not to reflect "Congressional intent." On January 2, 2019, the Committee on Ways and Means of the U.S. House of Representatives released a draft technical corrections bill that seeks to correct "technical and clerical" issues in the Tax Cuts and Jobs Act of 2017. The corrections bill seeks to clarify Section 4960's application by stating that any college or university that is an agency or instrumentality of any government or any political subdivision, or that is owned or operated by a government or political subdivision, is subject to Section 4960. Given the current state of affairs in Washington, D.C., we are not confident that the corrections bill's expanded application to state colleges and universities will ever come to fruition, but we will continue to monitor the situation.

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