TEGE | EXEMPT ORGANIZATIONS COUNCIL

Comments on Forms and Related Instructions for

Forms 990-T, 990, 990-PF, 4720, and 1065 (K-1)

September 16, 2019

This document collects the feedback from individuals participating in the TEGE Exempt Organizations Council's subcommittees on tax reform since the enactment of Public Law No. 115-97 (the "Tax Cuts and Jobs Act" or "TCJA"). It is a follow-up to conversations held among members of the TEGE Exempt Organizations Council and representatives of the Internal Revenue Service ("IRS") Office of Associate Chief Counsel and Treasury Department ("Treasury") about implementation of the TCJA. This document provides comments and identifies the need for further guidance on the Forms 990-T, 990, 990-PF, 4720, and 1065 (K-1).

The TEGE Exempt Organizations Council was formed to (i) open and maintain lines of communication between the Tax Exempt & Government Entities Division (the "Division") of the IRS and the practitioner community, (ii) provide the Division with the thinking of the practitioner community on procedural and systemic matters, (iii) provide practitioners a forum to share their concerns with the IRS regarding both policies and specific tax issues and procedures, (iv) educate the practitioner community and the exempt organizations community.

The Council's members and participants include attorneys, certified public accountants, and other practitioners and professionals in the exempt organizations community (including in-house practitioners and professionals).

The comments below do not necessarily represent the views of the TEGE Exempt Organizations Council or any particular Council member. The preparers of these comments were not engaged by any client for the purpose of submitting these comments or otherwise to influence the development or outcome of regulatory guidance.

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EXHIBIT A 16

I. Updating Eligibility for the Special Reporting Rule under Form 990, Schedule B to Include Certain Deemed Publicly Supported Organizations

A. Description of current law

Pursuant to a general rule, tax-exempt organizations submitting Schedule B must report all contributions totaling $5,000 or more from any one contributor. However, Schedule B establishes a special rule for Section 501(c)(3)[1] organizations that meet the 33 1/3% support test of the Treasury Regulations under Sections 509(a)(1) and 170(b)(1)(A)(vi) enabling these organizations to report total contributions of the greater of (1) $5,000 or (2) 2% of the amount on Form 990, Part VIII, Line 1h or Form 990-EZ, Line 1 (regarding certain forms of revenue). Deemed publicly supported Section 501(c)(3) organizations described in Sections 170(b)(1)(A)(i) through (v), such as hospitals and educational institutions, do not qualify for this special rule.

B. Reasons for proposed change

The proposed change is designed to reduce the burden associated with obtaining an exhaustive list of contributors that does not target useful information, such as substantial contributors to a Section 501(c)(3) organization.

C. Description of proposed change

The special rule established under Schedule B of the Form 990 should be updated to apply to deemed publicly supported organizations, such as hospitals and certain educational institutions, described under Sections 170(b)(1)(A)(i) through (v).

II. Clarifying the UBTI Treatment of Income from Partnerships and S Corporations

A. Description of current law

Notice 2018-67 proposes a safe harbor for reporting business income from partnership interests under Section 512(a)(6). For those taxpayers seeking to utilize the safe harbor (rather than make their own reasonable good faith interpretation of the statue, which is also permitted), there is a question whether an exempt organization can aggregate partnership and S corporation interests for purposes of Section 512(a)(6). The instructions for Part I, Line 5 of the Form 990-T indicate that exempt organizations must include their distributive share of income or loss from unrelated trades or businesses of partnerships <u>and</u> S corporations on Part I, Line 5 of the Form 990-T.

B. Reasons for proposed change

The proposed change is designed to bring greater clarity to the aggregation rules where exempt organizations have both partnership and S corporation interests.

[1] Unless otherwise noted, all Section references are to the Internal Revenue Code of 1986, as amended.

C. Description of proposed change

The Form 990-T Instructions should clarify whether exempt organizations with interests in both partnerships and S corporations can aggregate the income arising from these interests in a manner consistent with the guidance under Notice 2018-67 or future IRS guidance.

III. Developing a Labeling System for New Schedule M to the Form 990-T

A. Description of current law

The instructions to the Form 990-T require an organization with more than one unrelated trade or business to complete Part I and Part II of the Form 990-T and to complete and attach a separate Schedule M for each additional unrelated trade or business. In addition, if more space is needed on Schedule M, preparers of the Form 990-T must attach separate sheets.

B. Reasons for proposed change

The proposed change is designed to reduce the administrative burdens for the IRS and the Treasury Department associated with tracking an extensive number of schedules that exempt organizations with several separate unrelated trades or businesses may submit.

C. Description of proposed change

The IRS and Treasury Department should create a labeling system for each Schedule M to the Form 990-T that clearly links each schedule to each separate trade or business. For example, the labeling system could include control numbers such as 0001, 0002, etc. that could also be included on any attached schedules and statements corresponding to the particular trade or business.

IV. Clarifications Needed to Enable Taxpayers to Calculate and Accurately Report the Qualified Transportation Fringe Benefit UBIT on the Form 990-T

A. Description of current law

New Section 512(a)(7) increases UBTI by any amount for which a deduction is not allowable because of Section 274 and which is paid or incurred by the organization after 2017 for any qualified transportation fringe (as defined in Section 132(f)), or any parking facility used in connection with qualified parking (as defined in Section 132(f)(5)(C)). This rule does not apply to the extent the amount paid or incurred is directly connected with an unrelated trade or business which is regularly carried on by the organization. The instructions to the Form 990-T do not offer any guidance on the calculation of UBTI for purposes of Section 512(a)(7).

Part III, Line 34 of the Form 990-T and the accompanying instructions require exempt organizations to report amounts paid for disallowed fringe benefits after computing the siloed UBTI under Section 512(a)(6). This has the effect of putting the amount paid for disallowed fringes that are not attributable to an unrelated trade or business under Section 512(a)(7) in its own silo. However, Notice 2018-67 states that these amounts are not an unrelated trade or business and therefore Section 512(a)(6) does not apply to such amounts, so they should not be in a silo. Notice

2018-67 suggests that the amounts paid for disallowed fringes should be computed first before the silos in calculating UBTI, not last.

Separately, Notice 2018-99 provides a four-step safe harbor reasonable method to determine the amount of UBTI increase for employers who own or lease parking spaces used by their employees.

B. Reasons for proposed change

This proposed change is designed to create greater consistency between the Form 990-T and Notices 2018-67 and 2018-99 with respect to the treatment of amounts paid for qualified transportation fringes that may be includable in unrelated business income.

C. Description of proposed change

The Form 990-T and the accompanying instructions should be revised to allow UBTI arising from qualified transportation fringes to be offset by losses arising from any trade or business, regardless of whether that loss is confined to a silo by operation of Section 512(a)(6). We recognize that this may not be the intent of the Notice; however, the Notice is internally inconsistent because it states that UBTI from qualified transportation fringe benefits is not subject to siloing under section 512(a)(6) and then proceeds to silo UBTI from qualified transportation fringe benefits by computing them after and separately from other UBTI that is siloed under 512(a)(6). This error of statutory interpretation can be remedied by netting UBTI from qualified transportation fringe benefits first, before application of the business silos. An alternative, but administratively more difficult solution, would be to allocate the qualified transportation fringe UBTI among the business silos pro rata, or using an allocation based on the extent that the UBI activity has employees for which there is a parking inclusion.

Further, the Form 990-T and accompanying instructions should clarify that employee pre-tax payments to the exempt organization for parking or other qualified transportation fringe benefits do not "taint" the benefits they purchase and do not cause amounts that otherwise have no cost associated with them to increase the organization's UBTI. For example, if the organization has no costs associated with employee parking because it complies with the safe harbor set forth in Notice 2018-99, then the purchase of such parking by an employee using pre-tax dollars should not give rise to UBTI.

In addition, the Form 990-T and accompanying instructions should be revised to clarify that ordinary and necessary business expenses paid or incurred by the filing organization for its own benefit are not subject to UBIT and should not be reported on Form 990-T. For example, reimbursements to employees for parking costs incurred while on company business, such as attending an off-site conference, are not qualified fringe benefits under Section 132 and therefore are not subject to tax under Section 512(a)(7).

V. Introducing a Simplified Electronic Form 990-T-EZ for Organizations Filing the Form 990-T Solely on the Basis of Section 512(a)(7)

A. Description of current law

As a result of Section 512(a)(7), exempt organizations that incur UBTI of $1,000 or more attributable to expenses for certain qualified transportation fringe benefits must file the Form 990-T, even if there is no other basis for filing the form. As a result, many organizations that have not had to file the Form 990-T historically will need to file the form.

B. Reasons for proposed change

This proposed change is designed to reduce the paperwork burden associated with filing and reviewing Forms 990-T submitted by organizations only on the basis of Section 512(a)(7).

C. Description of proposed change

The IRS and the Treasury Department should consider developing a simplified electronic filing system for exempt organizations that file a Form 990-T solely on the basis of Section 512(a)(7). This system could be similar to that used for the Form 990-N, and payments could be remitted via pay.gov.

NOTE: Currently the software available for 990-T preparation does not allow for the complete return to be prepared in the 990-T module, particularly for trusts. For example, items that often cannot be completed in the 990-T software include: foreign tax credits, passive activity loss limitations, and other items that require separate schedules to compute. The Taxpayer First Act, which requires electronic filing of Form 990-T, will be difficult to implement without cooperation of the 990-T software vendors.

VI. Redesigning the Form 990-T

A. Description of current law

The 2018 Form 990-T has been released following the TCJA and includes new provisions designed to capture a more complicated reporting regime arising from the TCJA.

B. Reasons for proposed change

This proposed change is designed to help streamline the tax reporting process for exempt organizations, including those that have not historically needed to file the Form 990-T.

C. Description of proposed change

The IRS should redesign the Form 990-T for simplicity. For example, the first page of the Form 990-T could summarize UBTI overall, with the computation of tax due. Organizations only reporting the proxy tax and/or the qualified transportation fringe tax and organizations whose gross receipts were less than $10,000 would only need to complete this summary page.

In addition, organizations with multiple trades or businesses would attach schedules to the Form 990-T corresponding to each trade or business. Rather than having to complete separate Schedules M for each activity and potentially other schedule(s), all information for one trade or business activity would be reported on one schedule. For example, some of the common trades or businesses, such as advertising, would have their own schedule. What is now Schedule J would be incorporated into the new schedule for purposes of reporting advertising income on one schedule. This same schedule could incorporate Part II, lines 14 – 31 (deductions) from the existing Form 990-T.

Finally, for other income not identified by type (i.e., what is now reported in Part I, Line 1 or Line 12 of the Form 990-T), there would be a standard schedule for organizations to use to describe the activity and report deductions, and provide any other necessary information.

VII. Allowing One Organization to File the Form 4720 on Behalf of Itself and its Related Organizations

A. Description of current law

Organizations subject to the new tax on excessive compensation under Section 4960 must file the Form 4720 to pay the tax. Although the tax could apply to a tax-exempt organization and one or more of its related organizations, including taxable organizations, each organization must file the Form 4720 separately.

B. Reasons for proposed change

The proposed change is designed to streamline reporting.

C. Description of proposed change

The Form 4720 and instructions should be updated to allow for a single, joint filing on behalf of the applicable tax-exempt organization and its related organizations with respect to all excess remuneration paid to its covered employees within the meaning of Section 4960. This joint return should materially improve tax administration by enabling a group of affiliated organizations with common employees to ensure that the correct amount of tax is paid without duplication or deficiency.

VIII. Defining a "Covered Employee" Under the Form 4720 Instructions

A. Description of current law

The instructions for Part V, Line 15 of the Form 990 (regarding the new excise tax under Section 4960) require preparers to see the instructions for Form 4720 if the applicable tax-exempt organization paid to any covered employee more than $1,000,000 in remuneration or paid an excess parachute payment during the year.

The Form 990 instructions define "employee" to include common law and statutory employees, but the instructions to the Form 4720 do not define "covered employee" in the same way.

- The Form 990 instructions define "employee" as "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee, and any other individual who is treated as an employee for federal employment tax purposes under section 3121(d). See Pub. 1779 for more information."

- The Form 4720 instructions state that "[a] covered employee means any employee of an ATEO (including any former employee) that is one of the ATEO's five highest compensated employees for the tax year or was the ATEO's (or a predecessor's) covered employee for any preceding tax year beginning after 2016."

Depending on how payrolls and employment relationships are structured, assuming "covered employee" means common law or statutory employee could produce very different results for circumstances that aren't materially different, in fact.

B. Reasons for proposed change

The proposed change is designed to provide greater clarity and more consistency with respect to reporting information regarding "covered employees" on Part V, Line 15 of the Form 990.

C. Description of proposed change

We recognize that proposed regulations are currently in preparation and that the Form 990 and instructions will ultimately need to reflect the policy choices in those regulations. In the interim, however, please consider including the following in the definition of "covered employee" in the Form 4720 Instructions: "For purposes of this definition, all employees who are treated as employed by a single employer under Treas. Regs Section 1.414(c)-5 shall be treated as employed by a single employer for purposes of Section 4960. The excise tax imposed under Section 4960(a) shall be reported and paid by the common parent of the controlled group if the parent is an ATEO. If the common parent of the controlled group is not an ATEO, then any excise tax imposed under Section 4960(a) shall be reported and paid by the ATEO that paid the single largest share of applicable remuneration to covered employees in the taxable year."

For reference, Treas. Reg. § 1.414(c)-5(b) states that

> In the case of an organization that is exempt from tax under section 501(a) (an exempt organization) whose employees participate in a plan, the employer with respect to that plan includes the exempt organization whose employees participate in the plan and any other organization that is under common control with that exempt organization. For this purpose, common control exists between an exempt organization and another organization if at least 80 percent of the directors or trustees of one organization are either representatives of, or directly or indirectly controlled by, the other organization. A trustee or director is treated as a representative of another exempt organization if he or she also is a trustee, director, agent, or employee of the other exempt organization. A trustee or director is controlled by another organization if the other organization has the general power to remove such trustee or director and designate a new trustee or director. Whether

a person has the power to remove or designate a trustee or director is based on facts and circumstances.

IX. Clarifying the Availability for Public Inspection

A. Description of current law

The instructions for the Form 4720 do not address whether the form needs to be made available for public inspection by an exempt organization other than a private foundation. Whether the Form 4720 will be made subject to public inspection affects how detailed the disclosures and reporting are required to be on the new Form 4720 Schedule N and Schedule O.

B. Reasons for proposed change

The proposed change is designed to provide guidance to help organizations evaluate the level of detail the implications of the information required to be reported on the form.

C. Description of proposed change

The instructions for the Form 4720 should clarify that the Form 4720 only needs to be made available for public inspection by private foundations and that it is confidential for all other tax-exempt organizations, taxable entities, and individuals.

X. Reconciling Schedule N of the Form 4720 with the Form W-2 or 1099

A. Description of current law

Schedule N of the Form 4720 must be completed if an organization is required to pay the tax on excess executive compensation under Section 4960 or on an excess parachute payment. Notice 2019-9 describes the intent for proposed guidance but requires a reader to understand several Internal Revenue Code sections to determine the amount of compensation for purposes of this excise tax.

B. Reasons for proposed change

The proposed change is designed to ensure accuracy and consistency regarding reporting under Schedule N of the Form 4720 between taxpayers and to help taxpayers better understand what is required for this disclosure.

C. Description of proposed change

It would be helpful to include a chart in the Form 4720 Schedule N instructions. Similar to what is done for Form 990 part VII and Form 990 Schedule J purposes, the chart should provide the starting point (W-2 box 1) for the calculation of compensation for 4960 purposes and items that adjust or do not adjust. This could potentially be incorporated into the 990 Part VII chart or a separate chart in the Form 4720. Further, such instructions should clearly indicate that prior remuneration should not be included in the current year calculation.

The instructions should also be clear that compensation for purposes of determining whether a person is a covered person should also follow this same methodology (if that is the intent).

XI. Updating the Instructions for Form 1065, Schedule K-1

A. Description of current law

Prior to the TCJA, information reported on Schedule K-1 received by exempt organization partners rarely contained the information necessary for exempt partners to complete their tax returns especially reporting UBTI. Now, tax-exempt organizations will need even more information to properly report UBTI due to the new requirements enacted by the TCJA. For example, with the Section 199A Proposed Regulations it is clear that a partnership must provide the information on the Schedule K-1, Box 20 using codes AA – AD separately by each Qualified Trade or Business. It is not as clear with current guidance that partnerships will find it necessary to report in Box 20 Code V by each trade or business. Exempt organizations find it difficult to get partnerships to provide the information needed to calculate UBTI accurately under the old rules, and many partnership preparers are just not aware of the rules, or perhaps ignore them. Without explicitly telling the partnership in the Schedule K-1 instructions that it must provide the information for an exempt organization to compute its UBTI with respect to each separately identified trade or business it is unlikely that many partnerships will provide the information on Box 20 Code V in enough detail for an exempt organization to accurately report under the new Section 512(a)(6) rules.

Further, lower tier partnerships do not always know whether there is a tax-exempt organization further "up the chain" of ownership, and, therefore, do not provide necessary information to a pass-through entity partner.

Lastly, for state UBTI purposes, entities often do not receive UBTI information separate from the allocation of the whole partnership in order to identify state UBTI. From a foreign tax credit perspective, an exempt entity often does not receive information required to determine how much of the foreign source income or taxes are attributable to unrelated business income.

B. Reasons for proposed changes

The proposed change is designed to provide greater clarity for exempt organizations that need to report UBTI arising from partnership interests.

C. Description of proposed changes

To meet the new requirement to separately track each unrelated trade or business under Section 512(a)(6), the following sentence should be added to the Form 1065 Instructions and/or the Partner's Instruction for Schedule K-1, Line 20, Code V: ***"Information provided to an exempt partner for unrelated business taxable income shall be provided separately with respect to each trade or business identified as required under section 512(a)(6). Further, any information required to be provided to a tax-exempt partner must also be provided to any pass-through partner of the filing organization, unless it is definitively known that there are no tax-exempt partners of the filing organization or any of its partners that are themselves pass-through entities."*** This is similar to what is being required relating to the new 199A reporting in 20AA –

AD which requires the partnership to provide detailed reporting by each separate Qualified Trade or Business.

In addition, the codes in Box 18, Tax Exempt Income and Nondeductible Expenses should be expanded to disclose the different types of nondeductible expenses or require a statement with this detail. For example, the partnership should be required to disclose the partner's share of nondeductible qualified transportation fringes that is not attributable to a separately reported trade or business activity under a separate code in Box 18 (i.e. Code D). This would give the exempt partner information that might be needed to report unrelated business taxable income under Section 512(a)(7).

Please note that similar clarification of required disclosure should be made with respect to foreign transactions reported on the K-1.

XII. Updating the Form 990-PF, Balance Sheet Reporting

A. Description of current law

The instructions for Part II of the Form 990-PF indicate that all attached schedules for the balance sheet must show the end-of-year value for each asset listed in column B and C of the balance sheet. It is unclear whether this means "fair market value" ("FMV") for all assets included in the attached schedules, as reported in column C of the balance sheet. The instructions for Lines 11 and 14 of Part II (reporting of investment and non-investment fixed assets), for example, indicate that the attachments only should include cost basis, accumulated depreciation, and ending book value. They do not require FMV.

The challenge associated with providing FMV is that fixed assets often consist of real estate and the breakout between land, building, improvements, etc. is not easily ascertainable. The FMV determined by a foundation is generally for the real estate property as a whole. It is burdensome to a private foundation to separately break out the FMV for each type of land, building and equipment asset included on the attachment.

We note that fixed assets should not be reported at FMV if they are used in the exempt activities for the foundation as opposed to for investment purposes. When used for exempt purposes, the full purchase price is deducted as a qualifying distribution. Nevertheless, the question remains as to whether private foundations must include the FMV of the fixed assets on the balance sheet.

B. Reasons for proposed change

The proposed change is designed to provide greater clarity for private foundations filing the Form 990-PF and reduce the burden associated with assigning a reasonable FMV to each under lying asset included in the fixed asset attachment.

C. Description of proposed change

The instructions to the Form 990-PF should clarify that the attachment requirements are only those stated in the instructions for lines 11 and 14 (which do not require FMV). Alternatively, clarification could be provided by an IRS notice to Form 990-PF preparers.

XIII. Addressing Form 990-PF & Section 4945(h) Compliance

A. Description of current law

Section 4945(h) requires private foundations to exercise "expenditure responsibility" ("ER") when making grants to certain non-public charities. Section 53.4945-5(d)(1) of the Treasury Regulations provides that one of the ER requirements is for the private foundation to make full and detailed reports to the IRS regarding ER grants so long as there are any amounts or reports outstanding related to the grant. This reporting is to be accomplished by attachment of such report to the Form 990-PF for the relevant year in which ER was required. From a practical standpoint, most grants that require ER are typically not fully expended in the same year that the grant is made. As a result, the required ER Form 990-PF reporting often spans multiple years.

ER requires compliance with a number of steps, including a pre-grant inquiry, written grant agreement, annual reports, and reports to the IRS. Grantors that routinely make ER grants typically have a good handle on the process and reliably perform most of the ER steps. Many grantors, whether experienced with ER grants or not, often make a foot fault in the final step, however, by failing to attach the required report to the Form 990-PF for years in which the grant is still open.

This error typically is made unintentionally and for a variety of reasons: the foundation's return is self-prepared or prepared by a volunteer or other practitioner that is unaware of this rule; or a foundation is e-filing its return and the software leads them to believe that that an additional ER report is not required (for example, in order to e-file an ER report via ProSystems one must mark Part VII-B, line 5a(4) "yes" to indicate a grant was made during the reporting year to a non-501(c)(3) organization thus failing to catch those foundations with open ER grants in the reporting year that were made in a prior year.

It appears that if the ER report is missing and the foundation wishes to correct the issue (by amending the Form 990-PF and filing a Form 4720 to self-assess the excise tax liability while requesting abatement) the organization typically finds itself subject to an IRS audit which requires it to demonstrate that all other steps of ER were satisfied with respect to the subject ER grant, and to prove there was reasonable cause for failing to include the ER report on the Form 990-PF. This process takes a lot of time for both the IRS and the taxpayer, which is burdensome to the taxpayer. In addition, the foundation almost always is able to have the excise tax abated.

B. Reasons for proposed change

The proposed change is designed to increase efficiencies associated with correcting the Form 990-PF with respect to ER reporting.

C. Description of proposed change

We recommend that the IRS and Treasury develop a streamlined process for private foundations to make a "late ER" report that can be availed of when the only 'missed' ER procedural step is complying with its reporting obligations to the IRS. This could be similar to the process by which filers now request the IRS to give advance approval of grant-making procedures for certain grants to individuals (i.e., in that situation, when a foundation has been making certain grants to individuals (as defined in Section 4945(g)(1) or (2)) and learns that it needed to obtain "advance

approval" from the IRS to do so, the foundation can stop making such grants, file the Form 8940 to explain their existing grantmaking procedures, and then wait 45 days before resuming the grantmaking to individuals). Applying that process to the ER arena here would allow a filer, as long as the original procedures for ER grantmaking had been done properly, to have excise taxes abated for the foot-fault taxable expenditures related to ER grant reporting that occurred prior to the IRS's approval of the program.

XIV. Reporting Related Organizations on Schedule R of the Form 990

A. Description of current law

When reporting a "related organization," on Schedule R of the Form 990, a tax-exempt organization must disclose whether the entity is a "controlled organization" within the meaning of Section 512(b)(13). There is inconsistent reporting of those in such circumstances amongst preparers.

For example, under attribution rules under Section 512(b)(13), does this make all brother-sister organizations of the filing organization "controlled organizations"? When "related organization" status exists as a 'parent' pursuant to application of the "control" definitions in the 990 Glossary, can such 'parent' be a 512(b)(13) "controlled org" of its subsidiaries?

"Control" (a Glossary term and thus shown in bold, as are other Glossary terms in this paragraph) is the predicate for finding ***"related organization"*** status between a filing organization and one or more other entities. With "control" in place on one or more days in a filer's relevant tax period, related organization status vests upon a 'parent' (a party in **control of** the filer), a 'subsidiary' (a party **controlled by** the filer), or a 'brother-sister' (a **commonly controlled** party). Of course, it is also the case that control may exist indirectly.

Schedule R's instructions provide an example of indirect control over a nonprofit organization that is useful in illustrating what the sector commonly refers to as control through "*de facto* majority board position," regardless of whether such position is by design or coincidence.[2] However, the final conclusion stated in this example we believe is incorrect, and its presence has become commonly cited for the facile, and incorrect, proposition that a filer's subsidiary organizations from 'separate lines' (in the example, one line has parent, A, being "in control" of B directly and through B's parenting of next generation, C, being "in control" *indirectly* of C; and in a second

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[2] The condition is that within the final sentence of the following Glossary definition –

Control of a not-for-profit organization (or other organization without owners or persons having beneficial interests, whether the organization is taxable or tax-exempt):

One or more persons (whether individuals or organizations) control a not-for-profit organization if they have the power to remove and replace (or to appoint or elect, if such power includes a continuing power to appoint or elect periodically or in the event of vacancies) a majority of the not-for-profit organization's directors or trustees, or a majority of members who elect a majority of the not-for-profit organization's directors or trustees. Such power can be exercised directly by a (parent) organization through one or more of the (parent) organization's officers, directors, trustees, or agents, acting in their capacity as officers, directors, trustees, or agents of the (parent) organization. Also, a (parent) organization controls a (subsidiary) not-for-profit organization if a majority of the subsidiary's directors or trustees are trustees, directors, officers, employees, or agents of the parent.

Underlining of the third sentence has been added for emphasis

line, parent, A, is "in control" of D directly) are automatically "under common control" and thus are related organizations to each other assuming they are exempt entities.

Please see Exhibit A (Examples for Schedule R) for specific examples of how these nuances arise.

B. Reasons for proposed change

The proposed change is designed to provide greater clarity for Form 990 reporting purposes.

C. Description of proposed change

We recommend that the IRS clarify the points raised above and in Exhibit A on Schedule R of the Form 990.

XV. Developing a Central Repository for K-1s

A. Current law

Taxpayers that have significant partnership investments struggle with getting their K-1 information efficiently and completely. Each partnership has its own website to pull down a taxpayer's K-1, as well as different formats on each site.

B. Reason for proposed change

The proposed change is designed to reduce the administrative burden associated with K-1 reporting.

C. Description of proposed change

We recommend that the IRS and Treasury create a central repository for all K-1s to which partnerships post that could be accessed by the partner using an EIN and unique password. In this way, considerable hours can be saved by taxpayers that have numerous K-1s to obtain.

XVI. Introducing New K-1 Fields to Obtain More Complete Information Current law:

A. Current law

Optical reader technology could provide for greater efficiency and accuracy in aggregating K-1 information but is of limited value when much of the necessary information is unstructured and inconsistently reported. Currently, many K-1s do not have all the required information in the K-1 form itself, but instead bury much of the information in the footnotes to the K-1. In many cases, the Box 20 code V amounts are not reported on the face of the K-1 but instead is reported in the footnotes. With the new UBI silo rules, we would expect even more K-1s to include UBI information in the footnotes instead of on the form itself.

B. Reason for proposed change

The following change is designed to improve the accuracy of K-1 reporting and allow for greater efficiency in aggregating K-1 information.

C. Description of proposed change

We recommend that the IRS and Treasury update the K-1 to reflect a greater number of fields to capture a broader range of information. Specifically, (1) the IRS and Treasury could consider whether to create two boxes for exempt organizations on K-1s – one for an exempt organization corporation and one for an exempt organization trust, and (2) create a second page of the K-1 to capture all the information needed by tax-exempt partners

XVII. Updating the K-1 Instructions

A. Current law

Even though the K-1 instructions indicate that the partnership is required to provide all the information necessary for a partner to file a tax return, many partnerships do not provide sufficient information. In part, this is due to the fact that many partnerships consist of funds of funds where lower-tier funds do not know that there is an upper-tier partner that is tax-exempt, or choose to assume that there is not. Making the instructions clear by listing what is required would help ease this problem.

B. Reason for proposed change

The following change is designed to improve the accuracy of K-1 reporting

C. Description of proposed change

We recommend that the K-1 Instructions require partnerships to provide a list of all of the information a tax-exempt organization would need to file its tax return, even if the partnership itself does not include any tax-exempt organization partners, unless all of the partners are individuals or the partnership knows that there are no tax-exempt partners up the chain. An initial list could include:

- Foreign source items specific to UBTI—not just in total for the return—for the purpose of determining foreign tax credits;
- Unrelated business income and related factors/adjustment items by state and local jurisdiction, as well as income in total by state;
- Miscellaneous itemized deductions (for UBTI vs. in total) and, separately, items that are ultimately determined to be deductible by a tax-exempt trust, or potential adjustments coded for a trust for limitations of deductions such as state tax deductions that may be included in a different line item;
- Identification of credits in Line 15 that are related to unrelated business activities;

- Amount of trade or business interest expense treated as UBI and any new breakout for UBTI for Section 163(j) applicability;
- Required bifurcation of income by income categories rather than listing as only 20V (especially applicable for trusts that have different rates and rules for passive activities);
- UBI amounts for the new Section 199A deduction;
- Listing of UBI amounts for depletion information for 17D, E, T and 20T, and
- Use of numerical values instead of percentages when calculating UBTI.

XVIII. Updating Reporting on Highest Compensated Independent Contractors on Form 990, Part VII, Section B

A. Current law

Form 990 Part VII Section B requires filing organizations to disclose their five highest compensated independent contractors that received more than $100,000 of compensation from the organization.

The term "independent contractors" is defined in the glossary to the Form 990 as an individual or organization that receives compensation for providing services to the organization but who isn't treated as an employee. The instructions for Part VII of the Form 990 further provide that the disclosure is of independent contractors that received more than $100,000 in compensation for services, whether professional or other services, from the organization.

Independent contractors include professional fundraisers, law firms, accounting firms, publishing companies, management companies and investment management companies. A management company is defined in the glossary as an organization that performs management duties for another organization customarily performed by or under the direct supervision of the other organization's officers, directors, trustees, or key employees. These management duties include, but aren't limited to, hiring, firing, and supervising personnel; planning or executing budgets or financial operations; and supervising exempt organizations or unrelated trades or businesses. The instructions further clarify that the amount the organization paid, whether reported on Form 1099-MISC, or paid under the parties' agreement or applicable state law is the amount to be reported.

In multi-entity systems, it is not uncommon for one organization to possess the purchasing and payables function for the entire system. As an example, a hospital system may include a parent which includes executive leadership and back-office services such as purchasing, supply chain, accounting, legal etc. for the various subsidiaries of the parent. That parent organization would be paying the various vendors, and will file any applicable Forms 1099. The parent organization would charge the various subsidiaries their share of the costs paid by the parent on the subsidiary's behalf through an intercompany account which is periodically settled. It is unclear whether the parent or subsidiary would report the highest paid independent contractors on the Form 990. Given the parent is not "independent" of the subsidiary, would the parent be included or excluded from reporting on the subsidiary's Form 990 Part VII section B? On the subsidiary's Form 990, Part IX

Statement of Functional Expenses, would the payment to the parent in this case be reported on line 11a or line 24 since it is not independent? Or would the subsidiary break out the various vendor costs charged through the intercompany arrangement on the various lines on line 11 (something that might be administratively more challenging to capture)? Is the fact of reimbursement to that payor susceptible of reporting on Schedule R Part V if that payor is a related organization of the filer?

B. Reason for proposed change

The proposed change is designed to provide greater clarity with respect to Form 990 reporting.

C. Description of proposed change

We recommend that the filing organization that directly paid and performed the necessary Form 1099 reporting also report the payments to the independent contractor on the Form 990, and that the subsidiary report the payment to the parent on Line 11a of Part IX of the Form 990.

Further, it would be helpful for the instructions to the Form 990 to provide an example.

Alternatively, the instructions could simply state that the independent contractor reporting on Part VII section B is provided only by the organization that directly pays the vendor and that any reimbursements by the filing organization would be reported on line 24 or any other appropriate line, depending on the facts and circumstances.

Further, payments to related organizations for services are not reported on 990 Part VII Section B as related organizations are not independent.

EXHIBIT A

Example of Schedule R Reporting Issues

The following example[3] uses numbered sentences for ease of reference:

Example 4.

1. Organizations A, B, C, and D are not-for-profit organizations.

2. Organization A appoints the board of Organization B, which appoints the board of Organization C.

3. A majority of the board members of Organization D are also board members of Organization A.

4. Under these circumstances, Organizations B and D are directly controlled by Organization A, and Organization C is indirectly controlled by Organization A.

5. Therefore, Organizations B, C, and D are subsidiaries of Organization A; Organization C is also a subsidiary of Organization B; and Organizations B and C have a brother or sister relationship with Organization D.

The facts within this example fail to support the sentence **[5]'s** result asserting that C and D "have a brother or sister" relationship (that is, are under common control). Such result appears to be reached due to the fact that A's Board members also compose a majority of D's Board members (the basis of A having "direct control" of D) while A is at the same time in "indirect control" over C. However, C and D are not, by such construct, "commonly controlled" by A as such a finding would need be predicated on whether A was in a position to actually exercise control over C and no facts were given in the example to such end.

The following exploration of Example 4 provides additional context for the issue:

The facts as given in sentence **[2]** are: A appoints the board of Organization B, which appoints the board of Organization C. Next fact (via sentence **[3]**) provided: a majority of the board members of Organization D are also board members of Organization A.

Two conclusions are next presented from these facts via sentence **[4]**, which provides: first, that B and D are directly controlled by A; and second, that C is *indirectly* controlled by A (this as A appoints a majority of the Board of B, and that B's Board has the right to appoint the majority of C's Board).

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[3] This example can be found in Eve Rose Borenstein and Jane M. Searin, Form 990: Exploring the Form's Complex Schedules at 2-8 (AICPA, 2017).

Thereafter, sentence **[5]** provides three conclusions:

- first that B, C, and D are subsidiaries of A;
- second that C is a subsidiary of B; and
- third that B and C have a brother or sister relationship with D.

There is no issue with the first two conclusions or the third's conclusion with respect to B and D. As to the conclusion that C and D are "commonly controlled," we disagree for the following reasons:

- While D is a direct "subsidiary" of A under the Glossary's definition of control of a not-for-profit (see the third sentence of that definition, reprinted in fn. 1), C has subsidiary (with respect to A) status only indirectly (through A's direct control of B, and B's in turn, direct control of C).
- Via this indirect subsidiary connection, A *has the means, but only indirectly,* to influence and control C. Through A's right to appoint B's Board it *could influence* B's appointment of C's Board. Equating that means of influence with a scenario of wieldable and effected control of C by A, however, is a huge overreach. No Form 990 instruction speaks to the use of *indirect control* as a surrogate to find one-half of the two-halves necessary for common control. If "common control" is going to vest from *indirect control* scenarios, brother or sister related organization status will be ascribed to "offspring two generations down" (i.e., to cousins!).
- The deficit in this example is its failure to note that no determination can be made as to whether C and D were commonly controlled *by A* during the relevant tax period(s). Such a determination would require additional facts absent from the example (e.g., had a majority of the individuals serving on C's Board been composed of A's Board members, officers, employees or agents, the same as the case between A and D), in which case the conclusion cited in the example would be correct.[4] Alternatively, had C and D been commonly controlled by the same individuals, regardless of their organizational affiliations, serving on both groups' board in majority positions, the entities would also be related.[5]

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[4] See the second of Schedule R's two examples addressing common control through multiple parties:

> **Example 2.** Organization E has 1,000 individual members who elect its board members. The membership of Organization E is also the membership of Organization F, and elects the board members of Organization F. Organizations E and F are brother/sister related organizations with respect to each other.

5 See the first of Schedule R's two examples addressing common control through multiple parties:

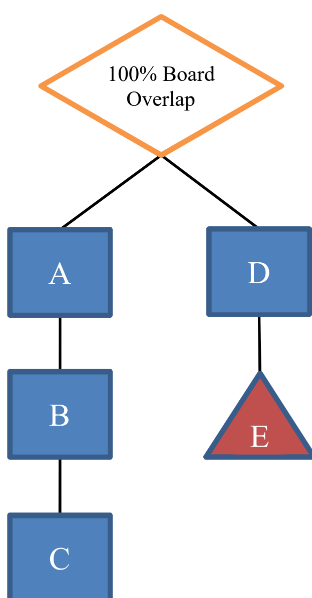
> **Example 1.** Organizations A and B each appoint one-third of the board members of Organizations C and D, and are not otherwise related to Organizations C and D. Although neither Organization A nor Organization B is a parent of Organization C or Organization D, Organizations C and D are controlled by the same persons, and therefore are brother/sister related organizations with respect to each other.

1. Clarification Needed – Are There Differences in How "Control" (as a Predicate to Finding Parent/Subsidiary/Brother-or-Sister Status as a "Related Organization" for Form 990 Purposes) is Applied in the Case of a Nonprofit Corporation versus an Entity in Trust Form?

In the first scenario below, we believe the results are clear with one nuance we believe should be confirmed:[6]

Scenario 1: Organizations A, B, C, and D are each nonprofit *corporations* characterized as "a not-for-profit organization (or other organization without owners or persons having beneficial interests, whether the organization is taxable or tax-exempt)" for purposes of the Schedule R instructions' Example 4."[7]

Organization A appoints the board of Organization B, which appoints the board of Organization C. A majority of the board members of Organization D are also board members of Organization A.



The instructions to Schedule R, at Example 4, on the same facts conclude that:

1. B and D are controlled by A. Therefore, B, C, and D are subsidiaries of A (for purposes of A's Form 990);

2. C is also a subsidiary of B (for purposes of B's Form 990); and

3. C and D have a brother/sister relationship with B (for purposes of B, C, and D's returns; however, as noted in Issue 1, preceding, we agree we not agree this is necessarily true of C).

With respect to B's Form 990, since it is a subsidiary of A, as is D, D is a commonly controlled organization (brother/sister).

With respect to C's Form 990, C reports it is "controlled by" B and thus C reports B as its parent (the IRC 318 attribution rules attribute ownership of C up to A, Schedule R's instructions only require reporting of a "parent" (here, B), not a "grandparent" organization (here, A) and thus A need not be reported as a related organization of C on C's 990 regardless of whether A "indirectly controls" C in the reverse direction).

Scenario 2: Facts are changed so that now both Organizations A and D are charitable trusts. A and D have 100% commonly controlled board of trustees. Neither Charitable Trust A nor Trust D has a single beneficiary with a beneficial interest of 50% or more in either trust. There is no overlap in the beneficiaries of trusts A and D. A new fact is Trust D has a controlled subsidiary E.

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[6] See last paragraph of text in Scenario 1.

[7] The cited instruction is reprinted in footnote 2.

Questions abound from this scenario:

- First, are A and D related for purposes of Schedule R reporting? If so, how? (see a, below)
- If A and D are related, are entities owned by the trusts themselves related (i.e., would B be related to E)?
    - The extent to which a 990 filer has a "parent" entity pursuant to application of the 990 instructions Glossary's definition of control DIFFER based on "type of entity."[8] Are we to apply the nonprofit organization control standard to E, a charitable trust, or the "control of a trust with beneficial interests" standard?
    - To what extent do the Income Tax Regulations' attribution rules augment the Form 990 instructions in the case of a 990 filer who has a related organization via a brother or sister relationship (that is, due to both entities being "commonly controlled" in line with the 990 instructions including the Glossary definition of "control")?

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[8] See the following two pertinent definitions from the Schedule R instructions:

Control of a not-for-profit organization (or other organization without owners or persons having beneficial interests, whether the organization is taxable or tax-exempt). One or more persons (whether individuals or organizations) control a not-for-profit organization if they have the power to remove and replace (or to appoint or elect, if such power includes a continuing power to appoint or elect periodically or in the event of vacancies) a majority of the not-for-profit organization's directors or trustees, or a majority of members who elect a majority of the not-for-profit organization's directors or trustees. Such power can be exercised directly by a (parent) organization through one or more of the (parent) organization's officers, directors, trustees, or agents, acting in their capacity as officers, directors, trustees, or agents of the (parent) organization. Also, a (parent) organization controls a (subsidiary) not-for-profit organization if a majority of the subsidiary's directors or trustees are trustees, directors, officers, employees, or agents of the parent.

Control of a trust with beneficial interests. One or more persons control a trust if they own more than 50% of the beneficial interests in the trust. A person's beneficial interest in a trust shall be determined in proportion to that person's actuarial interest in the trust as of the end of the tax year. See Regulations sections 301.7701-2, 3, and 4 for more information on classification of corporations, partnerships, disregarded entities, and trusts.