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Mr. Stephen Lagarde, Attorney Advisor
Ms. Elinor Ramey, Attorney Advisor
Office of Tax Policy
US Department of Treasury
1500 Pennsylvania Avenue, N.W.
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Ms. Victoria Judson, Associate Chief Counsel, TEGE
Ms. Janine Cook, Deputy Associate Chief Counsel, TEGE
Mr. Stephen Tackney, Deputy Associate Chief Counsel, TEGE
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Request for Guidance on Questions Raised by New Tax Law

Dear Elinor, Rob, Stephen, Vicki, Janine and Stephen:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our clinician partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, the American Hospital Association (AHA) writes in response to requests that attorneys in the Office of Tax Policy and the Office of Chief Counsel have made publicly to share issues arising under various provisions of Public Law 115-97, informally known as the Tax Cuts and Jobs Act of 2017, that need to be addressed as your offices develop implementation guidance.

Thank you for inviting input from taxpayers affected by the law. Our members have been working to identify what actions they must take and what records they must keep in order to comply with the new law and have identified a number of questions on which guidance is needed. The Department of the Treasury and the Internal Revenue Service (IRS) have included guidance under section 512(a)(6), which requires separation of trades and businesses when computing unrelated business tax liability, and section 4960, which imposes a 21 percent excise tax on compensation of the most highly paid employees of tax-exempt organizations, as priorities on the updated Priority Guidance Plan that was issued on February 7 of this year. Guidance under these provisions, and also other provisions that have not been made priorities at this time, is important to ensure that organizations can meet their compliance obligations. It also will provide taxpayers with confidence that application of these taxes will be consistent across the organizations to which it applies. The AHA asks that Treasury and IRS issue proposed guidance, with an opportunity for stakeholders to comment, to answer the following questions.

UBIT: Tax-exempt organizations' unrelated business taxable income calculated separately for each trade or business (IRC sec. 512(a)(6))

New section 512(a)(6) of the Code requires an organization that is otherwise subject to the unrelated business income tax under section 511 of the Code, to determine whether it is conducting "more than 1 unrelated trade or business" and, if so, compute unrelated business income separately for each such trade or business. Furthermore, losses from one unrelated trade or business may not offset gains from another.

- How is one unrelated trade or business to be distinguished from another? There are no precedents for making this distinction with respect to unrelated trades or businesses.

- To the extent passive investing is a trade or business, is it a single unrelated trade or business? If not, must the exempt organization look through any investment held in the form of a pass-through entity, such as a partnership or LLC, to the underlying business activity that is generating the unrelated business in order to determine whether it is a separate trade or business from others that may be generating unrelated business income?

- How is debt-financed income includible in unrelated business income under section 512(b)(4), income from a controlled subsidiary includible in unrelated business income under section 512(b)(13), and insurance income attributable to a controlled foreign subsidiary includible in unrelated business income under section 512(b)(17) treated for purposes of section 512(a)(7)? These types of income are treated as unrelated business income by operation of specific inclusions in the statute, not because they have a nexus to an unrelated trade or business.

- How is the income deemed to result from payments for qualified transportation fringe benefits under new section 512(a)(7) to be treated for purposes of applying the rules requiring separation among unrelated trades or businesses? The amounts so deemed are not income at all. They are payments, not revenue generated by any kind of trade or business, let alone an unrelated trade or business.
- Will enforcement of section 512(a)(6) be delayed, in essence delaying the effective date, until final regulations are in place? Computation of liability for unrelated business income tax requires precision, and different potential interpretations of this provision could produce very different results. Without regulations, it is impossible for tax-exempt

organizations to be confident of the amount of any tax liability under the new law. If enforcement is not delayed, will tax-exempt organizations be offered relief from any estimated tax penalties that may apply for periods prior to the effective date for final regulations providing guidance? Tax-exempt entities organized as corporations that accrue liability for unrelated business income tax may be required to make estimated tax payments during the course of the taxable year and may be subject to penalties under section 6655 if they fail to make timely adequate payments. In the absence of guidance, it is impossible for organizations to project their liability and determine whether they are required to make estimated tax payments, let alone the amount of estimated tax they must pay. We ask that relief be provided from penalties with respect to any estimated tax penalties that may be owed as a result of the application of section 512(a)(6) for periods prior to the effective date for final regulations providing guidance in response to the questions we and other taxpayers have raised about the application of section 512(a)(6).

UBIT: Tax-exempt organizations' unrelated business taxable income increased by disallowed fringe benefit expenses (IRC sec. 512(a)(7))

New section 512(a)(7) of the Code deems amounts paid or incurred by a tax-exempt organization for non-deductible qualified transportation fringes to be unrelated business taxable income.

- If a tax-exempt organization allows its employees to park in parking lots and garages it owns or operates where parking is available free to visitors and members of the public, is the organization deemed to have any additional unrelated business taxable income as a result of offering this free parking? We presume the answer to this question is consistent with the guidance in Notice 94-3, 1994-1 C.B. 327, Question 10, which addresses the valuation of employer-provided parking and includes an example that concludes that the fair market value of employer-provided parking is $0 “because an individual other than an employee ordinarily would not pay to park there.”

Excise Tax on Compensation of Certain Employees of Tax-Exempt Organizations (IRC sec 4960)

New section 4960 of the Code imposes a 21 percent excise tax on: (a) remuneration (other than any excess parachute payments) paid by a tax-exempt organization to covered employees in excess of $1 million for the taxable year, and (b) any excess parachute payments paid by a tax-exempt organization to covered employees. Covered employees include the five “highest compensated employees” for the taxable year for any taxable year beginning on or after December 31, 2016, and anyone who has been a covered employee in a prior taxable year.

- In determining remuneration paid for the taxable year and the five highest compensated employees for the taxable year, does an organization use the calendar year compensation reported on the W-2 and Form 990, or, if the taxable year is different, must it allocate compensation between taxable years? As you know, employee wages must be reported on a calendar year basis on Form W-2, not on a taxable year basis. Holding aside the separate question of whether there are distinctions among the terms compensation, remuneration and wages, Form 990 requires reporting of compensation information for a taxable year, and it requires reporting of compensation paid to directors, officers and other key executives in both Part VII and Schedule J of the return. Form 990 bridges the difference between compensation for the calendar year and the taxable year covered by the return by asking organizations to report compensation paid to officers, directors, trustees and key employees using the compensation reported in certain boxes on Form W-2 for the year ending with or within the taxable year covered by the Form 990. Furthermore, churches and governmental affiliates do not file Form 990, but are required to file Forms W-2 for their employees. The burden that would be placed on organizations to allocate compensation would be substantial if they were not allowed at least the option of using compensation reported on Form W-2 for the calendar year.

- If a covered employee is employed by a tax-exempt organization that undergoes a merger with another tax-exempt organization, does that covered status carry over to the merged entity?

- What are medical services? The tax applies to remuneration in excess of $1 million. Section 4960(c)(3)(B) provides that remuneration does not include amounts paid to a licensed medical professional for the performance of medical services. No definition is provided of medical services. Licensed medical professionals perform a wide variety of services for hospitals that depend upon their medical expertise, including services that extend beyond direct patient care such as supervision of the delivery of medical care, on-the-job training of junior medical professionals, teaching and proctoring medical students and residents, peer review and quality assurance activities, medical necessity determinations, developing care pathways and protocols, clinical research, professional medical consultations, medical expert testimony, and oversight of the quality of health care services. Since remuneration does not include remuneration to a licensed medical professional for medical services, we presume that this remuneration for medical services is not taken into account in determining whether a covered employee has remuneration in excess of $1 million and anticipate that guidance will confirm this understanding of the plain language of the statute.

- If an individual is employed by two related organizations, A and B, does A determine whether the individual is a covered employee based solely on the remuneration that A pays to the individual or does it determine that status based on the remuneration paid by both A and B? Section 4960(c)(2) defines a covered employee as one of the five highest "compensated" employees of the organization for the taxable year (or someone who was a covered employee in a previous tax year beginning after December 31, 2016). However, nowhere does section 4960 define compensation. Rather it defines remuneration. Section 4960(c)(3) defines remuneration by reference to section 3401(a), which defines wages for purposes of income tax withholding. (Note this definition correlates to Box 1 of Form W-2, but not to Box 5, Medicare wages, which is used for purposes of reporting compensation in some instances on Form 990 and may be different from the amount in Box 1.) Section 4960(c)(4) defines remuneration as amounts paid with respect to employment by the applicable tax-exempt organization and related organizations. The tax is applied under section 4960(a)(1) to remuneration in excess of $1 million. Is remuneration, which serves as the base for the tax, distinct from the compensation used to determine who are the five most highly compensated employees, i.e., covered employees of the applicable tax-exempt organization? Is remuneration paid to a licensed professional for medical services taken into account when determining who are the five highest compensated employees?

- When and how must the section 4960 tax be paid? Will organizations report liability on Form 4720, which tax-exempt organizations currently use to pay other excise taxes under chapter 42 of the Code?

- How will the statute of limitations apply given that Form 990 calls for reporting of compensation for the calendar year ending with or within the taxable year covered by the return? Under section 6501(l)(1) of the Code, the statute of limitations for taxes imposed by chapter 42 begins to run with the filing of the return for the year in which the act giving rise to liability for such tax occurred. Under Treas. Reg. § 301.6501(n)-1(a)(1), the relevant return is "the return of all persons required to file a return with respect to any such tax arising from such act, notwithstanding that all such persons have not signed the return." The Form 990 will be filed for the organization's taxable year. Since compensation is currently reported on a calendar year basis for purposes of Form , which allows use of compensation information on the Form W-2 for the year ending with or within the taxable year, guidance is needed to clarify for purposes of applying section 6051(l)(1), whether the year in which the compensation was paid giving rise to the liability for the act will be the calendar year ending with or within the taxable year with respect to which the Form 990 is filed.

INTERNATIONAL TAX (IRC SECS. 951A AND 965)

New section 951A of the Code requires a United States shareholder of a controlled foreign subsidiary to include the shareholder's "global intangible low-tax income" (GILTI) in gross income for the taxable year. New section 965 of the Code requires that the Subpart F income of a controlled foreign corporation or certain other foreign corporations be increased for the last year beginning before January 1, 2018 by accumulated post-1986 deferred foreign income. Some tax-exempt hospitals own interests in foreign subsidiaries that may cause these provisions to apply. The hospitals are generally exempt from income tax but remain subject to unrelated business income tax. The IRS has repeatedly issued rulings to tax-exempt organizations confirming that Subpart F income is the equivalent of dividend income and, therefore, not subject to unrelated business income tax. See, e.g., PLR 201430017 (May 2, 2014).

- Will GILTI be considered Subpart F income and characterized as a dividend for unrelated business income tax purposes, meaning that it would be excluded from unrelated business income under section 512(b)(1)?

- If a tax-exempt organization owns an interest in a foreign corporation that must include accumulated post-1986 deferred foreign income in its Subpart F income, will the earnings be treated like other Subpart F income and be characterized as a dividend for unrelated business income tax purposes, meaning that it would be excluded from unrelated business income under section 512(b)(1)?

The AHA asks for guidance on each of these questions. With the exception of questions about relief from estimated tax penalties, we believe that any guidance must be in proposed form and provide an opportunity for notice and comment.

Sincerely,

/s/

Thomas P. Nickels
Executive Vice President