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nonprofit alert

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Lessons from the IRS Nonprofit College and University Compliance Project: Final Report Offers a Wealth of Information for All Tax-Exempt Organizations

In October 2008, the Internal Revenue Service ("IRS") began work on the nonprofit Colleges and Universities Compliance Project (the "Project"), distributing an initial compliance questionnaire to over 400 tax-exempt colleges and universities. Based on the information obtained from the compliance questionnaires, the IRS then selected 34 colleges and universities for further examination.

The schools selected for examination included both public and private colleges and universities, with about two-thirds of those examined considered large schools (i.e., over 15,000 students). The IRS has now completed 90% of those examinations, and, on April 25, 2013, the IRS released its final report on the Project (the "Final Report").[1] The Final Report summarizes the findings from the completed examinations and represents the culmination of almost five years of research and analysis of the tax-exempt higher education community.

Although the Project focused on colleges and universities only, the Final Report nevertheless contains critical information that can be used by all tax-exempt organizations. Specifically, the Report can help organizations identify and understand issues that will be the likely focus of future examinations, such as unrelated business income and executive compensation. The IRS is likely to remain particularly vigilant in reviewing and overseeing compliance with the rules applicable to these two areas in future examinations of all organizations recognized as exempt under Internal Revenue Code Section 501(c)(3).

The role and nature of IRS compliance projects

The use of compliance check projects is an emerging trend at the IRS, and all exempt organizations should be aware of the steps and processes involved in such initiatives. Over the last decade, the IRS has conducted three detailed compliance projects, including reviews of tax-exempt hospitals and tax-exempt credit counseling organizations. It is currently engaged in two more: one project is focused on the exempt housing counseling and foreclosure prevention industry and the other on organizations that use the self-certification process. In the past, the IRS relied primarily on individual examinations to identify areas of misreporting or noncompliance. Now, the development of compliance check projects allows the IRS to gain information about a broader portion of an industry and develop more focused examinations accordingly.

In a compliance project, the IRS broadly reviews an entire industry at one time, comparing organizations within the industry to gain an understanding of common practices, such as reporting of income and classification of common activities. By taking a snapshot of an entire industry, the IRS can identify anomalies that may indicate broader trends within the industry. These compliance projects then help the IRS identify common areas of potential abuse and noncompliance on which agents can focus in future examinations.

Each compliance project typically follows the same order of events, beginning with the creation and distribution of a compliance check questionnaire and ultimately leading to on-site examinations by IRS agents. There are several phases to each project. After identifying an industry, the IRS prepares and sends out a compliance check questionnaire to a significant portion of that chosen industry. The compliance check questionnaire is the phase that touches the broadest segment of the identified industry. The colleges and universities that received the Project's initial questionnaire represent about 16% of the entire tax-exempt higher education field.

The questionnaires are typically designed to collect a substantial amount of information about the practices of organizations in the sector. In the Project, the questionnaire developed by the IRS was over 30 pages long and asked for substantial information about the institution's income, compensation of various employees including athletic coaches and faculty, related exempt organizations, the types of unrelated business activities in which the institution engaged, accounting methods, endowment funds, and governance policies, among other categories.[2]

The IRS uses the responses to the questionnaires, coupled with data from the Forms 990 and 990-T filed by the organizations that received the questionnaire, to learn about the operations of these institutions. The initial analysis of the Project data identified unrelated business income and executive compensation as areas of common noncompliance. The IRS then selected 34 schools for examination based specifically on those two categories of potential noncompliance.

The next phase, on-site examinations, affects a much smaller segment of an industry but is the most burdensome, time-consuming, and potentially problematic for an organization. Unlike the review of a compliance check questionnaire, an examination can result in the assessment of additional tax or even revocation of an organization's tax-exempt status. The number of examinations the IRS typically opens during a compliance project depends on the information that the IRS obtains from its review of the questionnaires. In the Project, about 8.5% of the total number of colleges and universities that originally received the questionnaire were ultimately selected for examination. By way of comparison, during the hospital compliance project that began in 2006, the IRS opened up examinations at 20 tax-exempt hospitals. During the credit counseling compliance project that took place between 2004 and 2012, the IRS conducted examinations of more than 80% of the industry, as measured by revenue.

Final Report findings

As noted above, in the Final Report, the IRS identified certain trends and potential areas of widespread noncompliance with respect to reporting unrelated business taxable income and the payment of compensation, both to officers and to other highly compensated employees.

Unrelated business income

Tax-exempt organizations generally are not required to pay federal income taxes on income derived from activities that are substantially related to their exempt purposes. A tax-exempt organization may, however, be subject to the federal corporate income tax on income derived from unrelated trade or business activities. This tax is known as the unrelated business income tax ("UBIT").

Unrelated business income ("UBI") arises when a tax-exempt organization regularly carries on a trade or business that is not substantially related to the tax-exempt purposes of the organization. The Code imposes UBIT at the regular corporate rates on an organization's UBI, reduced by the organization's related losses and deductions. The regulations explain the rationale for the UBIT regime with the following background: "The primary objective of adoption of the unrelated business income tax was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete."[3]

An "unrelated trade or business" is any activity that meets each of the following three conditions:

- The activity must be a trade or business.

- The trade or business must be regularly carried on.
- The trade or business must not be substantially related to the purposes for which the organization was recognized as exempt from income tax.[4]

To be a "trade or business" the activity must be carried on for the production of income from the sale of goods or the performance of services.[5] It is important to recognize that activities do not lose their identity as a trade or business simply because they might be conducted as part of similar activities related to the organization's exempt purpose. For example, in the colleges and universities context, operating a golf course that is used to provide educational benefits to students does not mean that income from the use of the golf course by non-student members of the general public for recreation also does not constitute a trade or business.

In determining whether an activity is "regularly carried on," the IRS will look at whether the activity is conducted often and continuously and how it is pursued. The IRS will compare the activity with the same or similar activities conducted by non-exempt organizations. Finally, for the activity to be "substantially related" to an organization's exempt purposes, it must contribute significantly to the accomplishment of one or more of the organization's exempt purposes. Merely generating money for use in pursuit of an organization's exempt purposes, however, is not itself enough to characterize an activity as "substantially related."[6]

Misunderstanding UBI and unrelated business activities can have severe consequences for an organization. Outside of paying tax on income generated from the activity, a tax-exempt organization can jeopardize its exempt status if an unrelated business activity is substantial in relation to an organization's total exempt functions. This is why organizations that engage in one or more unrelated business activities in a more than insubstantial manner often create taxable for-profit subsidiaries to house and carry out such activities.

Among the colleges and universities examined, the IRS found that adjustments to UBIT liability often arose in connection with certain activities that were regularly carried on and were not substantially related to the exempt purposes of the institutions. These activities included advertising, arena use, facility rentals, and the operation of fitness and recreation centers, sports camps, and golf courses. Nearly half of the colleges and universities examined incurred changes to their UBIT liability in connection with their advertising and facility rentals. Similarly, the operation of fitness, recreation, sports, and golf programs resulted in UBIT adjustments for approximately one-third of the organizations examined.[7]

The Final Report also contains important findings about reporting of UBI. When an organization generates at least $1,000 of gross UBI, it must file a Form 990-T, "Exempt Organization Business Income Tax Return," to report the income and pay any taxes due on that income. The Form 990-T must be filed in conjunction with the organization's annual Form 990. When computing and reporting UBI, an organization can take a number of tax deductions. The Code permits deductions for net operating losses (NOLs),[8] and organizations may also take deductions for expenses that are "directly connected" with the carrying on of the unrelated trade or business.[9] Thus, for an organization to utilize losses to reduce its UBIT liability, those losses must relate to the activity or activities giving rise to UBI. Conversely, if the losses do not arise from the conduct of an unrelated trade or business, they may not be used to offset UBI.

The Final Report notes that 90% of the schools examined had misreported UBI on their Forms 990 and 990-T during the years under examination. The scope of these reporting discrepancies includes over $170 million in disallowed claims of losses and NOLs against the UBIT liability of these institutions. The resulting changes in the reporting of losses and NOLs could result in over $60 million in assessed taxes. On 60% of the Forms 990-T that it examined, the IRS determined that losses used to offset UBI were not sufficiently connected to unrelated business activities. The Final Report also notes that the IRS disallowed more than $150 million in NOLs during the course of its Project-related examinations, because the examining agents found that the institutions failed to demonstrate the requisite connection between the trades or business and the activities generating losses.[10]

In particular, if an activity consistently resulted in losses over the course of several years, the IRS concluded that such activities lacked the necessary "profit motive" that characterizes a trade or business.[11] As such, the IRS did not allow those losses to reduce an organization's UBIT exposure. The IRS identified numerous instances in which examined colleges and universities had reported net losses on activities "for which expenses had consistently exceeded UBI for many years." The IRS determined that these activities were not carried on with a profit motive and, as such, disallowed the NOLs that flowed from those activities.[12]

Other common findings among the examined colleges and universities included errors in computation of NOLs and the substantiation of such amounts and misclassification of activities as related to the institution's tax-exempt purposes. About 40% of the institutions examined had misclassified activities as exempt and not reportable, leading to the reclassification of nearly $4 million as UBI, subject to tax. In conducting the examinations, the IRS found that activities classified as exempt were not in fact substantially related to the organization's exempt purposes.[13]

The IRS found that only 20% of the institutions examined sought outside advice about potentially unrelated business activities and UBI reporting.[14] With the complexity of UBI and reporting issues, outside advice is critically important. In the event of an examination, the IRS may not ultimately agree with decisions about characterization of an activity or how income was reported, as was the case in several of the Project-related examinations, but obtaining legal and accounting advice and documenting the organization's decisions can help the organization defend its position during an IRS examination.

Executive compensation

Organizations exempt under Section 501(c)(3) must be organized and operated for the benefit of the public, rather than for private interests.[15] To the extent an organization confers a substantial benefit on any private individual or entity, the IRS can find that the organization is not operating exclusively for exempt purposes. However, "[o]ccasional economic benefits flowing to persons as an incidental consequence of an organization pursuing exempt charitable purposes will not generally constitute prohibited private benefits."[16] Thus, the IRS and courts have recognized that private persons will necessarily benefit, under some circumstances, when an exempt organization carries out its mission.

Determining whether such benefits constitute impermissible private benefits to individuals focuses on whether the benefits are incidental, qualitatively and quantitatively, to the public benefits the organization furnishes. For the qualitative aspect of the test, the IRS focuses on whether the benefit to the public of the organization's activities cannot be achieved without a benefit to certain private individuals, and ensuring that the private benefit is no larger than necessary to carry out the public benefit.[17] On the quantitative side, a benefit will be considered quantitatively insignificant if it is insubstantial when compared with the public benefit the organization confers. The amount of private benefit, therefore, varies with the public benefit in this comparative test.[18]

As part of this prohibition on private benefit, charitable organizations are also prohibited from allowing any part of their net earnings to inure to the benefit of any private individual or shareholder. A "private individual or shareholder" refers to a person having a personal and private interest in the activities of the organization.[19] This concept, known as "private inurement," is commonly viewed as a part of the private benefit analysis. Private inurement is more limited, however, in that the prohibition focuses on the beneficiaries' relationship to the organization and the types of benefits being received. As such, "all inurement is private benefit, but not all private benefit is inurement."[20] The private inurement doctrine applies only to transactions between a tax-exempt organization and an "insider" (i.e., someone with a close relationship with or ability to exert influence over the organization). It is important to note that this doctrine does not prohibit dealings between a charity and its insiders; it requires that dealings between a charitable organization and its insiders be reasonable, at arm's length, and in good faith. For example, paying reasonable compensation to a founder for services rendered is not considered private inurement.[21]

In lieu of, or in addition to, the possibility of revocation of exempt status if an organization's net earnings inure to the benefit of an insider, Internal Revenue Code Section 4958 allows the IRS to impose excise taxes on "disqualified persons" who receive "excess benefits" from a transaction with an exempt organization. Taxes assessed on excess benefit transactions under Section 4958 are known as "intermediate sanctions." These penalty taxes apply only if an organization pays an amount in excess of what would reasonably be paid by a similarly situated organization for comparable services. If a Section 501(c)(3) organization pays reasonable compensation to its officers, directors, trustees, and key employees (“ODTKEs”), no excess benefit transaction occurs.

Through the intermediate sanctions provisions of the Code, the IRS may require an individual who is deemed to have received unreasonable compensation to return the excessive portion of the compensation to the organization. It may also impose an excise tax of up to 200% (of the excess benefit amount) on the individual who received the excessive benefit. Additionally, the IRS may impose an excise tax of 10% on every ODTKE that approved the transaction. Finally, as conferring an excess benefit will likely cause an organization's assets to inure to the benefit of an insider, the IRS may revoke an organization's exempt status if it finds the organization is no longer operating as a charitable organization due to excessive private inurement.[22]

Section 4958 and the accompanying regulations provide a "safe harbor" that results in a rebuttable presumption that amounts paid by the organization to its ODTKEs are reasonable. To establish the rebuttable presumption of reasonable compensation:

- The organization must appoint an "independent body" to review and determine the amount of compensation.
- The independent body must rely on appropriate comparability data to set the compensation amount.
- The independent body must contemporaneously document its decisions in setting compensation.

To overcome this presumption, if established, the IRS must develop sufficient contrary evidence to rebut the value of the comparability data on which the organization relied.[23]

Colleges and universities exempt under Section 501(c)(3) are subject to these rules on private benefit and private inurement. In the Final Report, the IRS found that the compensation for 94% of ODTKEs at the colleges and universities examined was set following procedures intended to satisfy the requirements for the rebuttable presumption. However, the IRS concluded that 20% of the institutions examined did not satisfy the standards established by the regulations. One significant shortcoming was the use of comparability data that derived, at least in part, from organizations that were not "similarly situated" to the institution in question. The Report states that factors such as location, endowment size, revenues, total net assets, number of students, selectivity in admissions, and age of the institution led agents to conclude that schools included in the comparability data were not in fact similar institutions. In addition, several colleges and universities relied on compensation studies that (1) did not adequately document how and/or why certain data was used or (2) did not specify whether the amounts reported included salary only or also reflected other types of taxable and non-taxable compensation.[24]

Organizations commonly rely on compensation consultants to provide this comparability data and to assist in setting compensation. Indeed, the IRS found that 50% of the schools examined used outside compensation consultants.[25] Use of a consultant did not necessarily result in the use of accurate comparability data, however. As discussed, 20% of the schools examined would not have successfully met the rebuttable presumption of reasonable executive compensation. Thus, reliance on a compensation consultant-and the comparability data provided by that consultant-is not enough by itself to fully protect an organization from the possibility of intermediate sanctions under the private inurement rules.

While the Final Report reaches certain conclusions about the scale of compensation paid by colleges and universities to various ODTKEs, it does not specify the number of institutions under examination actually found to have engaged in an excess benefit transaction subject to tax. Still, the Report's focus on executive compensation is consistent with other recent examinations of organizations outside the field of higher education. Revenue agents have imposed intermediate sanctions based on unreasonable compensation far more often in recent years than in the past. In informal discussions, IRS officials have indicated that compensation is a focus at all levels within the IRS, from the Examinations Division to the Office of Chief Counsel, and all tax-exempt organizations should therefore take heed of the executive compensation pitfalls identified in the Report.

Non-ODTKE compensation and employment tax issues

The Final Report also contains the findings of the IRS examinations with respect to compensation of non-ODTKEs at colleges and universities. The highest paid non-ODTKEs at these institutions were typically investment managers and sports coaches. In addition, the IRS found that department heads, faculty, and administrative and managerial employees were among other highly compensated non-ODTKEs at the schools examined.[26] Non-ODTKEs generally do not fall within the categories of individuals that are per se treated as "disqualified persons" for purposes of the intermediate sanctions rules in Section 4958, and as such, they may not rise to the level of insider who would be subject to the private inurement and excess benefit rules. Whether other employees can be considered insiders depends on the circumstances surrounding their employment. The regulations list various "facts and circumstances" that may indicate an individual's exercising substantial influence over the affairs of an organization. Depending on the interplay of such facts and circumstances, an individual may ultimately be deemed a "disqualified person" for purposes of Section 4958 and thus subject to intermediate sanctions.[27]

In addition, employees who are not ODTKEs still may be determined to have received a prohibited private benefit. As discussed, Section 501(c)(3) tax-exempt organizations are still subject to the broader prohibition on private benefit, which prohibits payment of excessive compensation for services rendered by an employee. As such, the IRS may determine that an organization is conferring a private benefit on an employee based on the amount and structure of an individual's compensation package. Thus, the payment of excessive compensation to non-ODTKEs can still jeopardize an organization's tax-exempt status.

The inclusion of this additional data by the IRS in the Final Report provides important and useful information for colleges and universities when considering the appropriate salary structures for all highly compensated employees. Beyond the higher education industry, other exempt organizations should also take note of the Service's interest in non-ODTKE compensation. While not all organizations employ individuals like sports coaches, many organizations employ investment managers or other highly compensated non-officers that possess varying levels of control within the organization.

As part of the Project, the IRS also opened employment tax examinations at 11 of the 34 colleges and universities and retirement plan examinations at eight schools. Each of these examinations resulted in upward adjustments to wages and the assessment of additional taxes in excess of $7 million, with more than $160,000 in associated penalties. The reasons for these wage adjustments included common problems for all exempt organizations, such as failure to properly account for the value of personal use of automobiles, housing, and travel in the wage calculation, as well as failure to properly classify individuals as employees or independent contractors.[28]

Since the Final Report

On May 8, 2013, the U.S. House of Representatives Ways and Means Subcommittee on Oversight held a hearing to discuss the findings set forth in the Final Report. At that hearing, Rep. Charles Boustany (R-LA) called the information in the Final Report "troubling" and indicative of "almost universal noncompliance" with the Code's provisions on UBI and executive compensation by colleges and universities. He noted that the House Ways and Means Committee is considering revisions to the Code that may affect these provisions.

In her testimony before the Committee, then-Director of the IRS Exempt Organizations Division, Lois Lerner, assured members of the Committee that the IRS has already begun a second UBIT compliance project, focusing on exempt organizations that report UBI on their Forms 990 but do not then file Form 990-T. She stated that the IRS is currently planning a more expansive project, to begin next year, which will investigate whether issues identified in the Final Report are present across a greater portion of the tax-exempt sector. Ms. Lerner explained that the IRS views its projects and publications like the Final Report as a critical way to educate the exempt organizations community and thereby to increase and improve compliance.

Conclusion

The Final Report contains valuable lessons for colleges and universities as well as many other types of tax-exempt organizations. It is a guide for organizations subject to future compliance projects, a highlight reel of issues of interest in current IRS examinations, and a preview of issues on which the IRS will focus in future examinations. The Final Report and the entire Project are part of a broader pattern in IRS enforcement that has emerged over the last ten years. From the hospital and credit counseling compliance projects to the ongoing projects on foreclosure and mortgage services organizations and self-certified organizations, the IRS has consistently been using the compliance project format to conduct examinations and identify what it sees as likely widespread issues for all tax-exempt organizations. The Final Report for the Project thus provides a critically important blueprint to what the IRS will consider to be optimal compliance when conducting an examination.

Some of the lessons that all tax-exempt organizations should take from the Project include:

- If an organization receives a compliance check questionnaire as part of an IRS initiative, the organization should complete it and file it with the IRS. In the Project, 13 colleges and universities received, but did not complete, the questionnaire. The IRS opened examinations of all 13 schools. While the IRS states that completing a questionnaire is voluntary, it appears as though the failure to do so will automatically result in additional IRS scrutiny.
- When completing Forms 990 and 990-T and in determining an organization's UBIT liability, organizations should allow adequate time to consult with their tax counsel, to ensure that expenses are accurately allocated and that losses and NOLs bear the requisite relationship to the activity giving rise to UBI. If an organization takes the position that an activity is substantially related to its tax-exempt purposes, it should document the basis for its determination.

- An organization should consider using for-profit subsidiaries to house and conduct unrelated business activities that may be substantial. If a tax-exempt organization is contemplating substantial engagement in an unrelated business activity, a taxable, wholly owned subsidiary may be a helpful option to house the activity and protect the organization's tax-exempt status. Importantly, a taxable, for-profit subsidiary can pay some or all of its after-tax profits to the parent exempt organization in the form of dividends, all of which are tax-free to the parent. Additionally, if properly maintained, a for-profit subsidiary can isolate liabilities that may arise from the conduct of an activity, protecting the parent from legal risks associated with the activity. A variety of options exist for capturing unrelated business activities in new taxable entities, and these are options exempt organizations should review when considering a new endeavor that may be unrelated to the organization's exempt purposes.
- Organizations exempt under Section 501(c)(3) or (c)(4) should closely review their methods for setting executive compensation and their use of comparability data. The payment of unreasonable executive compensation can lead to the imposition of intermediate sanctions involving significant penalty taxes or even the revocation of exempt status. Executives at all tax-exempt organizations should be aware of the compensation approval process.
- Organizations should adopt and follow formal compensation policies to set executive compensation. The Final Report states that nearly two-thirds of the schools examined used compensation policies that applied to at least one of their ODTKEs during the tax years included in the exams. Having a formal compensation policy can assist an organization in establishing the rebuttable presumption of reasonable compensation.
- Organizations should seek outside advice and engage with the consultants, accountants, and lawyers that the organization hires. Even though the IRS may not agree with the conclusions reached by outside advisors with respect to UBI or compensation, going to the process of obtaining, analyzing, and utilizing outside opinions indicates a level of care and diligence exercised by the organization in deciding how to handle particular matters. When using an outside consultant for compensation data, organizations should ask questions about the origins of the data and ascertain whether the data reflects the practices of organizations that are truly similarly situated.
- Organizations that do not use compensation consultants should review their own procedures for selecting comparability data to ensure that such data reflects the practices of similarly situated entities. In its examinations, the IRS found that schools that did not use compensation consultants commonly relied on current surveys as their primary form of comparability data. If an organization does not use a compensation consultant, it should carefully examine the types of surveys used in setting compensation and consider the types of organizations reflected in those surveys.
- Smaller organizations that may not be able to hire outside experts to assist with UBI and executive compensation issues can still take steps to ensure compliance. Smaller institutions can receive substantial benefits from membership in a trade association of similar entities that can pool their resources and, collectively, hire appropriate experts to provide general information and develop guidelines for compensation and annual tax reporting.

Expect UBI and executive compensation issues to continue to garner attention from the IRS in the coming years. During the course of the Project, the IRS went to great lengths to educate its revenue agents about these issues and their consequences. Top IRS officials have already indicated that the agency will be conducting a more wide-ranging compliance project focusing on these areas in the future. Therefore, regardless of whether an examination is commenced through a compliance project or not, these are issues that will be at the forefront of an agent's focus during all future examinations.

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[1] "Colleges and Universities Compliance Project Final Report," available at www.irs.gov/pub/irs-tege/CUCP_FinalRpt_042513.pdf.

[2] The original questionnaire may be viewed at: www.irs.gov/pub/irstege/sample_cucp_questionnaire.pdf.

[3] Reg. 1.513-1(b).

[4] Section 512(a)(1) (defining unrelated business taxable income to mean "the gross income derived by any organization from any unrelated trade or business ... regularly carried on by it.").

[5] Reg. 1.513-1(b).

[6] Regs. 1.513-1(c)(1), (d).

[7] Final Report, *supra* note 1 at 11-12 (2013).

[8] NOLs are losses that are reported in one year and used to offset gains in past or future years. Colleges and universities, as well as other exempt organizations, often report NOLs resulting from unrelated business activities and use such amounts to mitigate their overall UBIT liability.

[9] IRM 7.27.6.2(1), IRM 7.27.6.2(2).

[10] Final Report, supra note 1 at 11-14.

[11] See, e.g., Rev. Ruling 81-69, 1981-1 CB 351 (where a service is offered at a price insufficient to recover costs, the activity is not conducted with a profit motive, and losses from the activity may not be used to offset gains from other, profitable unrelated business activities).

[12] Final Report, *supra* note 1 at 3.

[13] *Id.* at 13.

[14] *Id.* at 14.

[15] Reg. 1.503(c)(3)-1(d)(1)(ii).

[16] American Campaign Academy, 92 TC 1053, 1066 (1989).

[17] Ltr. Rul. 9615030.

[18] *See* Rev. Rul. 70-186, 1970-1 CB 128.

[19] Reg. 1.501(a)-1(c).

[20] IRM 7.76.3.11.1(1).

[21] IRM 4.76.3.11.2(3).

[22] H. Rep't No. 104-506, 104th Cong., 2d Sess. 56, fn. 15 (1996).

[23] Regs. 53.4958-6(a), (b).

[24] Final Report, *supra* note 1 at 4, 22-23.

[25] *Id.* at 22.

[26] *Id.* at 17-18.

[27] Reg. 53.4958-3(e)(2). These facts and circumstances include, but are not limited to, whether the person (1) founded the organization; (2) is a substantial contributor to the organization; (3) is compensated based primarily on revenues derived from activities of the organization, or of a particular department or function of the organization that the person controls; (4) has or shares authority to control or determine a substantial portion of the organization's capital expenditures, operating budget, or compensation for employees; (5) manages a discrete segment or activity of the organization that represents a substantial portion of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole; (6) owns a controlling interest (measured by either vote or value) in a corporation, partnership, or trust that is a disqualified person; or (7) is a non-stock organization controlled, directly or indirectly, by one or more disqualified persons.

[28] Final Report, *supra* note 1 at 19-21.