Nonprofit Executive Compensation:

Why You Should Be Concerned about Private Inurement and Excess Benefit Transactions and What You Can Do to Avoid the Tax Pitfalls

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June 29, 2011

Association TRENDS

What are intermediate sanctions?

- **Internal Revenue Code ("Code") section 4958 allows the Internal Revenue Service (the "Service") to impose penalties on "disqualified persons" who participate in or approve "excess benefit transactions" with tax-exempt organizations exempt under Code sections 501(c)(3) or 501(c)(4)**
- **These penalties are commonly referred to as "intermediate sanctions"**
- **Similar to "private inurement" concept, which is applicable to Code section 501(c)(6) organizations as well section 501(c)(3) and 501(c)(4) entities; private inurement can result in the revocation of tax-exempt status**
- **The same advice given to avoid intermediate sanctions will help minimize private inurement risk as well**

Who may be subject to intermediate sanctions?

- **Code section 4958 penalties may only be imposed on "disqualified persons" of section 501(c)(3) and 501(c)(4) organizations**

- **Code Section 4958(f) generally defines the term "disqualified person" to include:**
  - **Any person who was, at any time during the 5-year period ending on the date of such transaction, in a position to exercise substantial influence over the affairs of the organization**
  - **Family members of individuals who are in a position to exercise substantial influence**
  - **A 35-percent controlled entity**
  - **Any person who is described above with respect to a supporting organization of the applicable tax-exempt organization**
  - **Certain donors and donor advisors with respect to donor-advised funds**

Who may be subject to intermediate sanctions?

- **IRS regulations list specific persons who are in a position to exercise substantial influence, including:**
  - Voting members of the organization’s governing body
  - President, CEO, COO
  - Treasurer and CFO

What type of transactions can give rise to intermediate sanctions and private inurement?

- **Common situations that may result in excess benefit transactions and private inurement include:**
  - **Compensation**
  - **Payments for services provided to the organization (*e.g.,* back-office service providers)**
  - **Purchase of property by the organization or the sale of property to a disqualified person**
  - **Provision of certain fringe benefits (which may constitute "automatic" excess benefits)**

Why you should be concerned?

- **Penalty for receipt of an excessive benefit:**
  - Return the value of the excessive benefit to the organization; and
  - An excise tax of either:
    - 25% of the value of the excessive benefit if the benefit is returned to the organization prior to the issuance of a notice of deficiency by the Service, or
    - 200% of the value of the excessive benefit if the benefit is returned after the Service issues the notice of deficiency

Why you should be concerned?

- **Penalty on organization managers for approval of an excessive benefit transaction:**
  - Section 4958(a)(2) imposes a 10% tax on any organization manager that knowingly approves an excess benefit transaction
  - This can include boards of directors, executive committees, and compensation committees, among others

Why you should be concerned NOW?

- **We have seen the Service assess intermediate sanctions more in the last 18 months than in the previous 6 years combined; this also corresponds with an enhanced focus on executive compensation in examinations of section 501(c)(6) organizations**

- **Executive compensation (including from a private inurement perspective) and intermediate sanctions were included on the FY2011 IRS Tax-Exempt/Governmental Entities Workplan**

- **During a recent conversation with an attorney from IRS Office of Chief Counsel, we were told that the Service is developing cases for intermediate sanctions and that the Service will pursue these cases aggressively in court**

What can you do to avoid intermediate sanctions and private inurement?

- **Use caution when entering into transactions with disqualified persons**
- **Develop and follow a conflict of interest policy and an executive compensation policy that prevent officers, directors and executives from participating in decisions that impact them financially**
- **Require independent board, executive committee, or compensation committee approval and documentation of transactions – with documented reliance on sufficient, defensible comparability data – before payments are made**

What can you do to avoid intermediate sanctions and private inurement?

- **Under IRS regulations, if the 501(c)(3) or 501(c)(4) organization takes certain precautions in approving a transaction, there is a "rebuttable presumption" that the transaction is at fair market value**
- **To establish the rebuttable presumption of reasonableness:**
  1. **The transaction must be approved in advance by disinterested members of the organization's governing body (or a committee of the governing body);**
  2. **The governing body must obtain and rely on valid comparability data in approving the transaction; and**
  3. **The governing body must contemporaneously document its decision and the reason for its decision**

Questions?

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