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# Tax-Exempt Organization Update: Some Headaches Cured, While Others Linger

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As part of the Tax Cuts and Jobs Act of 2017 ("[2017 Tax Act](#)"), Congress created several headaches for tax-exempt organizations. With the passage of the Further Consolidated Appropriations Act of 2020 ("[2020 Tax Act](#)"), Congress cured one of those headaches. The 2020 Tax Act also retired a headache – this one not caused by the 2017 Tax Act – that has been around for decades. Congress, unfortunately, let another 2017 Tax Act headache linger.

## Headache Cured

Part of the 2017 Tax Act imposed the widely reviled "parking tax." This was a tax imposed under Section 512(a)(7) requiring tax-exempt organizations to include in their unrelated business income ("[UBIT](#)") amounts paid or incurred for qualified transportation fringe benefits or a parking facility. As part of the 2020 Tax Act, Congress retroactively repealed the 512(a)(7) "parking tax" from the date of enactment. The [IRS has published guidance here](#) about how to claim a refund or credit for UBIT paid as a result of the "parking tax."

## Headache Retired

The 2020 Tax Act retired a headache for private foundations. Section 4940 imposes an excise tax on the net investment income of most private foundations. (The Section 4940 net investment income tax has been around in some form since 1969.) Until the passage of the 2020 Tax Act, the Section 4940 tax was a two-tier tax of either 1% or 2%. To qualify for the 1% rate, a private foundation had to examine its prior five years of charitable distributions, among other calculations. The 2020 Tax Act fulfills the long-standing request of the private foundation community that the two-tier structure (and corresponding calculations) be replaced with a flat tax rate. For tax years beginning after December 20, 2019, Section 4940's new tax rate is 1.39%. Why 1.39%? This is a rate that is

intended to be revenue-neutral for the government.

## Headache Linger

Another headache caused by the 2017 Tax Act is the Section 4960 Tax on Excess Executive Compensation. Section 4960 imposes a tax at the corporate rate (currently 21%) on compensation of over \$1,000,000 paid to any of the top five employees of tax-exempt organizations and certain governmental entities. (Section 4960 also imposes a tax on “excess parachute payments” to these executives as part of their separation from employment.) Compensation can also include amounts paid by a related organization, including a related for-profit. The tax is imposed on the exempt organization or related organization paying the compensation – not the executive. Determining the executives covered by the Section 4960 tax and the amount of taxable “excess” compensation can be a challenge. Unfortunately, the 2020 Tax Act provided no relief for this headache.

In early 2019, the IRS issued [Notice 2019-9](#) to provide interim guidance regarding Section 4960. To make matters worse, this guidance opened new questions about the reach of Section 4960. For example, Notice 2019-9 raises the possibility that the Section 4960 tax applies to compensation paid by a for-profit corporation to a corporate executive who voluntarily serves as a director or officer of the corporation’s related foundation. IRS officials have said they would address concerns about the broad scope of Notice 2019-9, but no new guidance has been published.

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