

Helping Non-Profits Navigate Tax and Labor Issues

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Amanda Nussbaum, a partner in the Tax Department and a member of the Not-for-Profit Group at Proskauer, chairs a comprehensive seminar each fall for non-profits to discuss current developments and topics of interest related to tax, labor, governance and benefits.

This year marked the Firm's 22nd conference.

Our Firm represents many of the world's most prominent exempt organizations across industries and geographies, including collegiate and professional sports leagues, not-for-profit hospitals and health systems, international health care initiatives, museums and performing arts organizations, institutions of higher education, and a wide variety of public charities and private foundations. We are proud to represent a large number of non-profit organizations on a pro bono basis.

Amanda briefly addressed the impact of tax reform on tax exempt organizations, and then turned it over to the presenters who covered the following key topics:

- New rules for tax-exempt bond compliance
- The excess benefit transaction rules
- Hot topics in employee benefits and executive compensation for tax-exempt organizations
- Partnership audit rules: considerations for tax-exempt investors

Important takeaways from each presentation:

New rules for tax-exempt bond compliance

Senior counsel Elizabeth Mills addressed new IRS guidance for charities and governmental entities that have facilities financed with tax-exempt bonds. The new Revenue Procedure 2017-13 replaced the Revenue Procedure 97-13 safe harbors for service contracts for bond-financed facilities. The new safe harbors provide more flexibility for compensation arrangements and contract terms but require very specific contract language on certain points. Organizations using tax-exempt bonds need to revise their template contracts to include these provisions.

The excess benefit transaction rules

Partner David Miller discussed the excess benefit rules, which impose punitive excise taxes on “insiders” that engage in non-arm’s length transactions (including the receipt of excess compensation) with section 501(c)(3) and section 501(c)(4) organizations, and on the officers and directors who approve those transactions. Although the burden of proving that a transaction between an insider and a tax-exempt organization was conducted at an arm’s length basis is on the insider and the managers, the presumption can be reversed by following certain “rebuttable presumption” procedures. These procedures require that an independent find comparable transactions for the proposed transaction and approve the proposed transaction based on the comparable transactions.

Hot topics in employee benefits and executive compensation for tax-exempt organizations

Associate Steven Einhorn explained the new IRS program for issuing opinion and advisory letters for code section 403(b) pre-approved plans. Tax exempt employers who adopt one of these pre-approved plans will generally be able to rely on an opinion or advisory letter from the IRS that gives assurance that the form of the plan document satisfies the requirements of code section 403(b) and its final regulations. He then explained that in connection with this new program, the IRS announced a “remedial amendment period” that sponsors of code section 403(b) plans can take advantage of, regardless of whether they choose to adopt a pre-approved plan document. Generally, what this means is that if the form of a code section 403(b) plan does not satisfy the requirements of the code and the final regulations, but it is properly amended by March 31, 2020, it may be possible to amend the plan retroactively back to January 1, 2010 (or, if later, the effective date of the plan). He suggested that this is an excellent opportunity for all sponsors of code section 403(b) plans to carefully examine their plans. Steven then gave an overview of the tax rules applicable to tax-exempt employers with respect to deferred compensation by highlighting some of the key concepts under code section 457(f) and the Proposed Treasury Regulations under code section 457(f). He concluded his presentation by addressing a few key failures that are frequently found in the administration of employee benefit plans that the IRS and DOL frequently catch on audit.

Partnership audit rules: considerations for tax-exempt investors

Associate Janicelynn Park discussed considerations for tax-exempt investors in connection with the new partnership tax audit rules. She provided a brief overview of these rules, which go into effect for tax years beginning in 2018. She also addressed ways in which partnership agreements were addressing provisions in these rules, as well as points that have been open to negotiation. Finally, Janicelynn identified areas in which tax-exempt investors can negotiate to limit any tax liability derived from a partnership’s audit risk, and protect themselves in the audit and settlement process.

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