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Author

Aprill, Ellen P

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Section 4960's Failure to Tax Governmental Entities

Professor Ellen P. Aprill

Part I

Congress Fumbles the Ball on Section 4960

The tax legislation signed into law by President Trump on December 22 takes aim at tax-exempt organizations that pay presidents, college football coaches, and other employees more than \$1 million a year. But as with so many aspects of the hastily drafted bill, Republican lawmakers fumbled on this provision too. While the drafters evidently intended to impose a 21% excise tax on both public and tax-exempt private institution that have employees with compensation over \$1 million, they appear to have inadvertently left public universities off the hook.

As a result, the new excise tax quite likely won't apply to public universities with highly paid employees, such as Nick Saban (who makes more than \$11.1 million a year) Clemson coach Dabo Swinney (\$8.5 million), or Michigan coach Jim Harbaugh (\$7.0 million). It will, however, apply to private universities with their own highly compensated employees, such as Stanford coach David Shaw (\$5.7 million), Texas Christian's Gary Patterson (\$5.1 million), and Northwestern's Pat Fitzgerald (\$3.3 million). That's good news for state-school sports fans, whose teams will now have an advantage in the scramble for top coaching talent. But it may come as a surprise to Republican lawmakers who -- according to the explanation accompanying the House-Senate conference report -- thought that the new excise tax would apply to state and local government employers whose income is excluded from federal income tax.

In the eyes of the public, the excise tax does apply to public institutions. One newspaper report states that the section 4960 excise tax will hit "every major college with a coach or athletic director who earns seven figures" -- that is, both those at private and those at public institutions. Another media commentator welcomed the provision for its "smack down on high salaries," listing presidents and coaches of public as well as private institutions.

Exempt organization practitioners have, of course, been studying the language and implications of new section 4960. In a recent issue of the on-line publication EO Tax Journal, its editor, Paul Streckfus, reported such a discussion with Marcus Owens, a well-known exempt organization practitioner and former director of the IRS exempt organizations division. They took particular note of the fact, that, although University of Alabama pays its football coach many millions of dollars a year, it does not seem to be caught by the provision because it is a state institution. They wondered, however, whether the language in new section 4960 stating that an applicable tax exempt organization for purposes of the provision includes any organization with income "excluded from tax under section 115(1)" could subject public universities to the excise tax.

If subjecting public institutions to this excise tax was the drafters' intent, they did not succeed. Section 115(1) states that gross income "does not include income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof." The drafters of section 4960 seem to believe that public colleges and

universities rely on section 115(1) in order to avoid income taxation. That is a common and understandable reading of the language of section 115(1). It is, however, a misreading. This mistake is a serious one with far-ranging consequences. Public universities employ a large percentage of the most highly compensated coaches of power conference teams.

The IRS has long taken the view that states and political subdivisions avoid income tax not under section 115(1), but under a doctrine of implied statutory immunity. Unless otherwise specified in the Internal Revenue Code, states and their political subdivisions are not taxpayers under the Code, and their income is not gross income within the meaning of section 61. That is, under current law, it is constitutional for Congress to tax the states and their political subdivisions. The doctrine of intergovernmental immunity does not bar the federal government from taxing the income of states and political subdivisions. Respect for our federalist system, however, requires Congress to be explicit in overriding the implied immunity. As Revenue Ruling 87-2 explained, "Income earned by a state, a political subdivision of a state, or an integral part of a state or political subdivision of a state is generally not taxable in the absence of specific statutory authorization for taxing such income." See generally Ellen P. Aprill, *The Integral, the Essential and the Instrumental: Federal Income Tax Treatment of Government Affiliates*, 23 J. OF CORP. LAW 803 (1998).

Section 511(a)(2)(B) is an example of a specific statutory authorization. It includes among the entities subject to unrelated business income tax not only organizations exempt from tax under section 501(c) and pension plans exempt under section 401(a), but also any public college or university that is "an agency or instrumentality of any government or any political subdivision thereof, or which is owned or operated by a government or any political subdivision thereof, or by any agency or instrumentality of one or more governments or political subdivisions." According to legislative history, Congress included this language in order to place public institutions on a parity with private colleges and universities exempt under section 501(c)(3). New section 4960 does not include similar statutory language, but only the reference to section 115(1).

Public universities and colleges, however, rarely base their tax-free status on section 115(1). As dozens of private letter rulings attest, they escape federal income taxation because they are either an integral part of a state or political subdivision or possess themselves sufficient powers, such as police power, to qualify as a political subdivision. Private Letter Ruling 7904006, for example, determined that a state university system was a political subdivision of a state because of the public purposes of the state university system, the control and financing of the system by the state and the existence of the regulatory powers and power of eminent domain accorded to the system by the state. It explained that a particular university in the system was an integral part of the state university system and thus an integral part of a political subdivision of the state. The ruling specifically stated in its conclusions that section 115 did not apply to the university. Similarly, Private Letter Ruling 9143048 stated that section 115 does not apply to a public community college because it was an integral part of a state's political subdivision.

Under the long-standing view of the IRS, section 115(1) organizations are not and cannot be political subdivisions or integral parts of political subdivisions. To qualify under section 115(1), an entity must be separately organized from a state or political subdivisions, save or makes

money for the state or political subdivisions, ensure that its assets revert to the state or political subdivisions upon dissolution, and avoid conferring substantial private benefit. See Rev. Rul. 90-74. I have called these entities “governmental affiliates;” a recent article dubbed them quasi-governmental entities.

Many section 115(1) entities are hospitals. These section 115(1) entities will escape the new excise tax for any too highly compensated physicians because of the exception for medical services in section 4960. However, the activities of entities with income excluded under section 115(1) are many and varied. They include investment funds, pooled liability funds, health plans, land banks, and economic development corporations, all of which are now subject to the section 4960 excise tax.

Perhaps in subjecting section 115(1) organizations to the section 4960 excise tax, Congress concluded that some of these entities are paying compensation over \$1 million dollars. If, however, Congress thought that, by including section 115(1) entities among the organizations subject to section 4960, the provision will require public universities to pay the excise tax on excessive compensation of football and basketball coaches or university presidents, the lawmakers failed to achieve their goal. To achieve this goal, section 4960 needs technical correction that revises it to include a provision similar to the one subjecting public colleges and universities to the unrelated business tax. This possible error is but another of the problems inherent in drafting tax legislation too quickly.

PART II

Response to Professor Kahn: Tax Status of Public Universities

by Ellen P. Aprill



Ellen P. Aprill is a professor of law and the John E. Anderson Chair in Tax Law at Loyola Law School Los Angeles. She thanks Marc Owens, Paul Streckfus, Brian Galle, Alex Reid, Sanford Holo, and especially Philip Hackney for comments on earlier drafts.

In this article, Aprill responds to professor Douglas Kahn regarding public universities and the new section 4960 excise tax.

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I thank professor Douglas Kahn for his thoughts on an important issue and for offering me the opportunity to respond.¹ My earlier article argued that section 115(1) cannot serve as the basis for subjecting all public universities and colleges to the new section 4960 excise tax.² At least one law firm memorandum describing the new legislation identified section 115(1) as the basis for applying that new excise tax to public universities, and I felt the need to counter that position. However, the interplay of state universities, section 501(c)(3), and the excise tax also requires consideration, as Kahn has undertaken. I welcome the opportunity to examine this aspect of section 4960.

In my view, Kahn's arguments do not fully resolve whether public universities and colleges are

subject to excise tax on "excessive compensation" under section 4960. The inclusion of any organization that is "exempt from taxation under section 501(a)" as an applicable organization under section 4960 does not subject the universe of public universities and colleges that pay "excessive compensation" to the new excise tax. Some public universities are exempt from tax under section 501(c)(3) and thus under section 501(a).³ Others rely instead solely on the long-standing doctrine of implied statutory immunity from tax for states and their political subdivisions.⁴

Under current law section 508 specifies that to qualify for exemption under section 501(c)(3) a public university or college must apply for and receive a determination letter confirming exempt status under section 501(c)(3).⁵ Kahn does not discuss this notice and determination requirement. Unless the state university or college receives such a determination, it will not be exempt from taxation under section 501(a) for purposes of section 4960. That is, being a public university or college does not automatically confer section 501(c)(3) status.

The application and determination requirement of section 508 applies by its terms only to "an organization organized after October 9, 1969."⁶ However, as Philip Hackney has written, "Practically, even before the change in statutory

³ Section 501(a) explains that an organization described in subsection (c) or (d) or section 401(a) is exempt from tax. Thus, organizations exempt under section 501(c)(3) are subject to the excise tax of section 4960.

⁴ See GCM 14,407 (Jan. 28, 1935) (explaining that the Revenue Act of 1934 taxed the income of "individuals" and "corporations" but not the income of a state). See also Rev. Rul. 71-131, 1971-1 C.B. 28 (income derived from state-owned liquor store not subject to federal income tax); Rev. Rul. 71-132, 1971-1 C.B. 29 (same). See generally Aprill, "Excluding the Income of State and Local Governments: The Need for Congressional Action," 26 Ga. L. Rev. 421 (1992).

⁵ See section 508.

⁶ *Id.*

¹ Douglas A. Kahn, "Does Excise Tax on Excessive Comp Apply to State Universities?" *Tax Notes*, Jan. 15, 2018 p. 297.

² Ellen P. Aprill, "Congress Fumbles the Ball on Section 4960 (Guest Post by Ellen Aprill)," *The Medium* (Dec. 26, 2017).

requirements to file, many charitable organizations filed notices with the Service in order to be listed in Treasury Publication 78," a list assuring donors that their contributions to the organizations listed will be deemed charitable contributions deductible under section 170.⁷ Also, before enactment of section 508, the IRS set out requirements for organizations to prove their eligibility for exempt status under section 501(c)(3).⁸

Some state universities and colleges have applied for and received determination of section 501(c)(3) status. As I wrote 25 years ago⁹:

Governmental units may qualify for exempt status under section 501(c)(3). Tension between the IRS position regarding taxation of governmental entities and the exempt organization rules . . . surfaces in the rules regarding such status. A wholly owned state or municipal instrumentality that is a separate entity may qualify for exemption as a charitable entity under section 501(c)(3) if it is a clear counterpart of a charitable, educational, religious, or like organization. An entity is not a clear counterpart, however, if it is clothed with powers other than those described in section 501(c)(3). Thus, political subdivisions, which by definition possess sovereign powers, should not be able to achieve exempt status. But . . . the IRS is inconsistent. For purposes of section 501(c)(3) status, the IRS adopts a definition of sovereign powers different from the section 103. . . . In Revenue Ruling 67-290,

for example, a hospital with the power of eminent domain was permitted to qualify for section 501(c)(3) status on the grounds that only enforcement or regulatory powers prevented clear counterpart status. That is, the IRS appears to apply a narrower definition of "political subdivision" for purposes of section 501(c)(3) than for other purposes. Entities that seem clearly to qualify as political subdivisions are nonetheless granted status as section 501(c)(3) charitable organizations.

Several public universities have sought and received recognition as exempt organizations under section 501(c)(3). As one lawyer who advises public universities has shared with me, the key reason for obtaining the exemption relates to fundraising. With a determination from the IRS, the university can show potential donors, including private foundations considering large grants to the public university, the familiar IRS letter declaring the organization's tax-exempt status under section 501(c)(3) and point to the university's inclusion on the IRS list of organizations eligible to receive tax-deductible contributions.¹⁰

As Kahn points out, TAM 790406 involved a public institution that had received tax-exempt status. My discussion failed to address the dual status of the college in that memorandum as both an exempt organization and a governmental unit. I relied on TAM 790406 to show that university systems can be considered political subdivisions and that individual universities can be integral parts of that political subdivision. My earlier article did not address the fact that new section 4960 includes among applicable organizations "any organization exempt from taxation under section 501(a)." I acknowledge that it would have been helpful for me to discuss the implications of the college's dual status as an integral part of a political subdivision and as an organization exempt under section 501(c)(3). The key issue in the memorandum involved the special provision subjecting public universities and colleges along

⁷ Hackney, "Should the IRS Never 'Target' Taxpayers? An Examination of the IRS Tea Party Affair," 49 *Valparaiso U. L. Rev.* 453, 462 (2015).

⁸ Professor Hackney explains, "Dating back to the income tax of the Civil War, the Service has required nonprofit applicants to prove their charitable status to claim exempt status. With the enactment of the 1913 Income Tax, the Service enacted regulations to require nonprofit organizations to prove entitlement to exempt status." *Id.* at 460 (footnotes omitted). In the teens and '20s of the 1900s applicable regulations allowed the organization seeking exempt status to file affidavits. *Id.* "The Service appears to have changed its affidavit system into a private letter ruling system in the 1940's." *Id.* at 461. The enactment of section 508 introduced the current notice and determination system. See also Lloyd Hitoshi Mayer, "The Better Part of Valour Is Discretion": Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations," 7 *Col. J. Tax L.* 80, 82-83 (2016). As discussed *infra*, there are university systems that have received IRS determinations of their exemption under section 501(c)(3) as early as 1939.

⁹ Aprill, "Excluding the Income," *supra* note 4, at 445-446.

¹⁰ For other benefits afforded section 501(c)(3) organizations, see Basil Facchina et al., "Privileges & Exemptions Enjoyed by Nonprofit Organizations," 28 *U.S.F.L. Rev.* 85 (1993).

with tax-exempt private universities and colleges to the unrelated business income tax.¹¹

Kahn quotes the following sentence from TAM 790406: "Furthermore, we believe that income would be excludable from gross income under section 115(1)." That sentence referred only to a hypothetical proposed in the memorandum: "Consider a college or university within the scope of section 511(a)(2)(B) [the provision subjecting public universities and colleges to the UBIT] that derives income from an essential governmental function." It is this income that the memorandum stated would be excludable under section 115(1). It concluded that, in the set of facts under consideration, section 115(1) did not exclude income from either the college's hotel services or its utility services. According to TAM 790406, hotel services "would not come within the scope of 115(1) under any interpretation." A few paragraphs later, it stated, "If we are to give any effect to section 511(a)(2)(B), we must necessarily decide that section 115 does *not* apply to the income derived from providing utility services in the circumstances of the present case" (emphasis added). That is, after dismissing application of section 115, the memorandum then proceeded to apply the UBIT rules to the hotel and utility income. Under the UBIT rules, income derived from providing those services to the public are subject to income tax, while those provided to members, students, and patients are free from UBIT under section 513(a)(2), the so-called convenience exception.

In retrospect, it would have been a better choice for me to have discussed a different private ruling, one of many that have relied on an entity's exemption from taxation based solely on status as a political subdivision or an integral part of a political subdivision,¹² rather than a public college exempt under section 501(c)(3) and subject to

UBIT. Kahn is right to call me to task for an incomplete discussion of this memorandum.

Those universities and colleges that have applied for and received a determination letter that they qualify under section 501(c)(3) would appear to be subject to the section 4960 excise tax under the provision as enacted.¹³ I have been able to identify some of them. Neither dual political subdivision/501(c)(3) universities nor section 115(1)/501(c)(3) organizations need to file the annual Form 990¹⁴; thus, they are not found on Guidestar, a source commonly consulted to identify exempt organizations. Using the IRS Exempt Organizations Select Check¹⁵ and the Exempt Organizations Business Master File Extract,¹⁶ however, I found listed as public charities the following universities known to pay coaches excessive compensation within the meaning of section 4960:¹⁷ Regents of the University of California at Los Angeles (ruling year 1939), Regents of the University of Colorado (ruling year 1939), University of Alabama (ruling year 1945), Regents of the University of Michigan (ruling year 1961), University of Nebraska Board of Regents (ruling year 1973), The Ohio State University (ruling year 2013), Florida State University (ruling year 1973), University of Florida (ruling year 2014), and the Board of Regents of the University of Wisconsin System

¹³ However, the IRS and Treasury have sometimes treated governmental entities and affiliates that are also exempt under section 501(c)(3) differently from other organizations exempt under that subsection. For example, if a governmental entity or affiliate acquires section 501(c)(3) status, its employees and managers who are "disqualified persons" under section 4958 do not become subject to that provision's excise tax on excess benefit transactions, unlike employees and managers of other section 501(c)(3) organizations. See reg. section 53.4958-2(a)(2)(ii). The preamble to the final regulations under section 4958 specifically notes that, in light of comments, the proposed regulations had been amended to make clear that section 115(1) organizations as well as governmental entities are not applicable organizations for purposes of section 4958. See T.D. 8978, 67 F.R. 3076, 3077 (Jan. 23, 2002). How section 4960 interacts with section 4958 is also an important issue, but one for another day.

¹⁴ See Rev. Proc. 95-48, 1995-2 C.B. 418; Rev. Rul. 78-316, 1978-2 C.B. 304.

¹⁵ See IRS, "Exempt Organizations Select Check." This online resource is the successor to Publication 78.

¹⁶ See IRS, "Exempt Organizations Business Master File Extract (EO BMF)."

¹⁷ I searched for some but not all NCAA public universities listed as paying coaches compensation exceeding \$1 million in the *USA Today* table of top NCAA coach pay, "NCAA Salaries." Searching the EO BMF by state university name is time-intensive and discloses many kinds of related organizations. I have learned, for example, that state universities have alumni associations in many, many cities.

¹¹ See section 511(a)(2)(B). This provision includes among the entities subject to UBIT not only organizations exempt from tax under section 501(c) and pension plans exempt under section 401(a), but also any public college or university that is "an agency or instrumentality of any government or any political subdivision thereof, or which is owned or operated by a government or any political subdivision thereof, or by any agency or instrumentality of one or more governments or political subdivisions." I discuss some of the complexities introduced by the special provision applying UBIT to public universities and colleges but not other governmental entities in Aprill, *supra* note 4, at 446-448.

¹² As Kahn acknowledges, I discussed one such ruling in my earlier article and do so further in this article.

(ruling year 2014). These entities are indeed organizations “exempt from tax under section 501(a)” under section 4960(c)(1)(A).¹⁸

Faced with these new excise taxes, public universities that have dual status as both political subdivisions (or integral parts of states or their political subdivisions) and section 501(c)(3) organizations may choose to pay the tax. Alternatively, they could voluntarily terminate their section 501(c)(3) status. Newly issued Rev. Proc. 2018-5, 2018-1 IRB 233, section 3.01(12) describes the procedure for them to do so.¹⁹ As another option, they might argue that, as in the case of the excise tax on excess benefit transactions under section 4958, comity calls for exempting them from the new section 4960 tax.

Not all public universities and colleges, however, have applied for and received an IRS determination recognizing them as exempt charities under section 501(c)(3). If they had, the provision subjecting them to UBIT along with but separately from organizations described in section 501(c) would be unnecessary.²⁰ I was, for example, unable to find Clemson, Arizona, Arizona State, or Texas on the Exempt Organization Business Master File.²¹

A public university may rely on a private letter ruling to demonstrate its status as a political subdivision or integral part of a political subdivision, which establishes the implied statutory immunity from tax. Such status also confers on the organization the ability to receive tax-deductible contributions. Many have received such rulings, as I noted in my earlier article. LTR

9122068, for example, concluded that a university system was a political subdivision and that individual educational institutions were integral parts of the university system. It determined that the university system was described in section 170(b)(1)(A)(v) and (c)(1) as a governmental unit. Nowhere did the private letter ruling refer to the provisions of section 170 as applicable to organizations exempt under section 501(c)(3).²²

Receiving a determination letter, it seems to me, would be especially important, even crucial, for governmental entities, including university systems desiring section 501(c)(3) status, to ensure that their status as a political subdivision or an integral part of a political subdivision did not prevent such exemption. TAM 200126032 is especially instructive. It quoted Rev. Rul. 60-384, 1960-2 C.B. 172: “For example, where a public school, college, university or hospital is an integral part of a local government, it could not meet the requirements for exemption under section 501(c)(3) of the Code.” The memorandum involved a university system. It described the power of eminent domain granted the university system in its own name as well as the extent of its police and regulatory powers. TAM 200126032 determined that the federal tax exemption granted to the university system in 1961 under section 501(c)(3) was issued in error because the university system was an integral part of the state.²³

Instead of a private letter ruling as to their status as political subdivisions or integral parts of a

¹⁸ Thus, I was wrong in my earlier article to say that these universities escape the excise tax of section 4960. I note that among them is the University of Michigan, my undergraduate alma mater and Kahn’s long-time employer. Allow me to add, “Go Blue!”

¹⁹ This revenue procedure regarding various procedures for exempt organizations is reissued annually early in the calendar year.

²⁰ According to legislative history, Congress included this language to place public institutions on a parity with private colleges and universities exempt under section 501(c)(3) in imposing the UBIT. See S. Rep. No. 781, 82d Cong., 1st Sess., pt. 2 (1951), 1951-2 C.B. 458, 534-585. That is, Congress concluded a special legislative provision was needed to achieve parity.

²¹ It is possible that I did not use the correct search terms, although I tried several variations.

²² Like LTR 9143048, which I discussed in my earlier article, LTR 9122068 also explains: “Section 115 applies to agencies and instrumentalities that are separate entities, that is, organizations that are not integral parts of the government of a state or a political subdivision. However, section 115 does not apply to activities conducted directly by states or their political subdivisions, such as counties, cities, or towns.” For additional examples of private letter rulings that conclude that a college or university is a political subdivision or an integral part of a political subdivision, see, e.g., LTR 8132073 (junior college qualified as political subdivision eligible to receive deductible contributions under section 170(c) as contribution to governmental unit); LTR 8608039 (state university and community college system integral part of state government so that contributions to it are deductible under section 170(c) as contribution to governmental unit); and LTR 7830159 (recognizing university as political subdivision with ability to issue tax-exempt bonds). An IRS web page reminds us: “In order for a government entity to receive a determination of its status as a political subdivision, instrumentality of government, or whether its revenue is exempt under Internal Revenue Code section 115, it must obtain a letter ruling by following the procedures specified in Revenue Procedure 2017-1 or its successor. There is a fee associated with obtaining a letter ruling.” IRS web page, “Governmental Information Letter.” (The content of a governmental information letter from the IRS is explained *infra*.)

state or political subdivision, public universities and colleges could also rely on a free "governmental information letter."²⁴ As the IRS explains, "This letter describes government entity exemption from Federal income tax and cites applicable Internal Revenue Code section pertaining to deductible contributions and income exclusion. Most organizations and individuals will accept the governmental information letter as the substantiation they need."²⁵

The key point is that a public university or college that has not been granted exempt status under section 501(c)(3) is not within the category subject to the section 4960 excise tax as an organization "exempt from tax under section 501(a)." Thus, under section 4960 as enacted, public universities and colleges face several dilemmas. Those that have obtained section 501(c)(3) status are likely subject to the section 4960 excise tax, but could relinquish section 501(c)(3) status. Regardless of whether public universities are currently qualified as exempt under section 501(c)(3), these institutions could decide to wait and see if Congress clarifies the application of the excise tax to them. As yet another option, they may decide to see whether the IRS, rather than Congress, issues guidance

that, perhaps, reinterprets section 115(1) to apply generally to political subdivisions and their integral parts.²⁶ If the tax is assessed against them, some public universities might decide to challenge its application as a matter of comity.

However tax professionals view the policy underlying the section 4960 excise tax, most, I think, would agree that the tax was intended to apply in the same way to public and private universities. The question is what the statute must say to reach that result. The bar for statutory drafting is set high in our federalist system when Congress decides to tax state entities: "Income earned by a state, a political subdivision of a state, or an integral part of a state or political subdivision of a state is generally not taxable in the absence of specific statutory authorization for taxing such income."²⁷ A reference to organizations exempt under section 501(a), a category that does not include all public institutions, falls short of section 4960's presumed goal of taxing public as well as private universities. In my opinion, public universities that rely solely on the implied statutory immunity from tax afforded states and their political subdivisions are not within any of the categories of applicable organizations subject to the section 4960 excise tax.

In conclusion, I again thank Kahn for spurring me to examine further section 4960. ■

²³ I note that university systems have been recognized by the IRS as exempt under section 501(c)(3) after the date of this memorandum. University systems vary in their relationships to state governments and their political subdivisions as well as the extent to which they possess the police powers required for status as a political subdivision. I also note that this memorandum stated, "Section 115 of the Code is the specific statutory authority dealing with the exclusion for items of income accruing to a State or a political subdivision thereof," but did not further discuss the provision or rely on it for its conclusion. Private letter rulings are not completely consistent in their treatment of section 115(1), as the contrast between this statement and the quotation from LTR 9122068 indicates. Occasionally state universities and colleges are neither political subdivisions nor integral parts of a state or political subdivision and, as a result, are characterized as section 115(1) entities. See LTR 8935012. Section 115(1) entities sometimes, but not always, also seek and receive exemption under section 501(c)(3). See April, *supra* note 4. See also April, "The Integral, the Essential, and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates," *Exempt Org. Tax Rev.* 263 (Feb. 1999). The inconsistency in section 115(1) private letter rulings makes any reliance on section 115(1) in section 4960 particularly precarious. Of course, private letter rulings are not precedential. Section 115(a) revenue rulings do not show the same kind of variance. See Rev. Rul. 90-74, 1990-2 C.B. 34, Rev. Rul. 90-70, 1990-2 C.B. 3, Rev. Rul. 77-261, 1977-2 C.B. 45.

²⁴ IRS, "Governmental Information Letter," *supra* note 22. The governmental information letter distinguishes governmental units, such as states and their political subdivisions, from section 115(1) entities. That is, they are described in the letter as separate categories.

²⁵ *Id.* The IRS offers the Governmental Information Letter free of charge as "a special service to government entities" in lieu of the more expensive and more specific private letter ruling. *Id.*

²⁶ I thank professor Brian Galle for this suggestion. Any such new interpretation would overturn more than eight decades of the dominant IRS interpretation of section 115(1) that it does not apply to political subdivisions and their integral parts. See GCM 14,407. Although the IRS has not been completely consistent in its treatment of section 115, given this long-standing and most common interpretation of section 115(1), I think any challenge to guidance short of notice-and-comment rulemaking is doomed to fail. Notice-and-comment rulemaking with *Chevron* deference might succeed. The language of section 115(1) is certainly ambiguous. Further, *Chevron* itself involved a change to established policy. In section 115(1), however, notions of federalism and comity might well persuade a court to reject so major a change even if made by a regulation promulgated with notice-and-comment rather than by Congress. See April, *supra* note 4, for a detailed description of the legislative and interpretive history of section 115(1). I see similar but greater problems with any attempt to interpret section 501(c)(3) as automatically applying to public universities and colleges. Major changes inevitably bring unforeseen consequences.

²⁷ Rev. Rul. 87-2, 1987-1 C.B. 18.