PRIVATE INUREMENT AND THE FOR-PROFIT SERVICE PROVIDER

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I. INTRODUCTION

Tax-exempt organizations are increasing the number of relationships they form with for-profit entities. Services rendered by for-profit enterprises in these relationships range from fundraising and administrative support to professional services and services related to the tax-exempt organization's exempt purpose. The Internal Revenue Code (IRC) contains several provisions that may apply to the relationships between tax-exempt organizations and their for-profit service providers. This paper will examine the concept of inurement as it relates to the relationships between for-profit enterprises and public charities and social welfare organizations.

II. TAX EXEMPT ORGANIZATIONS

Internal Revenue Code Section 501(a) grants an exemption from taxation to organizations described in Sections 401(a), 501(c) and (d). Section 401(a) deals with pension plans, profit sharing plans, and stock bonus plans. Section 501(d) deals with religious and apostolic organizations, while Section 501(c) deals with many enumerated types of organizations including charitable organizations and social welfare organizations.[1]

Internal Revenue Code Section 501(c) lists 27 different categories of exempt organizations. There are different rules for each type of organization. Various code sections provide for fines, penalties, and excise taxes for violations of the income tax portions of the code. In the exempt organization area, there historically have been few statutory penalty and anti-abuse provisions. At least in theory, the Internal Revenue Service (IRS) could punish rules violations only by revoking an organization's tax-exempt status.

Section 501(c)(3) has three major parts. The first part deals with the organization and operation of a qualifying entity. The second part contains a list of qualifying organizations. The third part of the section lists prohibited activities.

A Section 501(c)(3) organization may be organized as a corporation, fund, foundation or community chest. It must be organized and operated exclusively for one or more exempt purposes.

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1 I.R.C. § 501(c)(3) (2000); Treas. Reg. § 1.501(c)(3)-1(a)(1) (2000).

IRC Section 501(c)(3) provides that qualifying organizations must engage in one or more of the following activities: "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals . . ."

The final section of IRC Section 501(c)(3) lists a restricted activity and two types of activities in which a 501(c)(3) organization may not engage. First, no part of the net earnings of the organization may inure to the benefit of a shareholder or private individual. Second, the organization's participation in lobbying activities is limited. Third, the organization may not participate in any political campaign.[2]

Organizations that qualify for tax-exempt status under IRC Section 501(c)(3) are further divided into public charities and private foundations. Section 501(c)(3) organizations are treated as private foundations unless they meet one of the exemptions in Section 509. Public charities are granted more favorable treatment than private foundations under the IRC.

There are two types of organizations that qualify under IRC Section 501(c)(4). The first type includes civic leagues or other not-for-profit organizations operated for social welfare. The second type includes local associations of employees that devote their net earnings to charitable, educational or recreational purposes.[3] Historically, the inurement rules of IRC Section 501(c)(3) did not apply to organizations exempt from taxation under Section 501(c)(4). The Taxpayer Bill of Rights 2[4] changed the law, and now the inurement rules apply to 501(c)(4) organizations.[5]

II. INUREMENT

The inurement rules require a tax-exempt organization to use its net earnings in its efforts to accomplish its exempt purpose or purposes.[6] The net earnings of the organization must not benefit individuals outside the class of intended beneficiaries. The term "private shareholder or individual" in IRC Section 501(c)(3) refers to individuals who have a private interest in the exempt organization's activities.[7] There are several situations in which relationships between a tax-exempt organization and its for-profit service providers may cause inurement of the net earnings of the exempt organization to the for-profit enterprise. The first situation involves the tax-exempt organization's relationships with its officers, directors, founder or founders, and major donors. These groups of people are popularly referred to as insiders. Transactions between insiders and the tax-exempt entity that are not at arm's-length may cause inurement. These

2 I.R.C. § 501(c)(3).

3 *Id*. § 501(c)(4)(A).

4 The Taxpayer Bill of Rights 2, Pub. Law 104-168, 110 Stat. 1452 (1996).

5 I.R.C. § 501(c)(4)(B).

6 Treas. Reg. § 1.501(c)(3)-1(d).

7 *Id*. § 1.501(a)-1(c).

transactions may include excess compensation, excessive fringe benefits, bargain sales of assets, below market loans, and similar events.[8]

The second situation that may cause inurement involves transactions between tax-exempt organizations and for-profit entities controlled by insiders. These transactions may violate the inurement provisions if they are not at arm's-length.

At times a tax-exempt entity and its insiders may be economically indistinguishable. The insiders may have the ability to make unsecured, interest-free loans to themselves or their family members or otherwise use the entity's assets for their own benefit. This type of relationship may violate the inurement provisions, but is beyond the scope of this article

The final type of transaction that is the subject of this article involves activities commonly known as revenue sharing arrangements. The IRC does not use the term, but discusses "any transaction in which the amount of any economic benefit provided . . . is determined in whole or in part by the revenues of 1 or more activities of the organization . . ."[9] An example of a revenue sharing arrangement is a contract between a tax-exempt organization and a professional fundraiser if the fundraiser's income under the contract is based on the gross revenues generated from fundraising. A more current example involves the situation in which a service provider agrees to host a web site for a tax-exempt entity in exchange for a share of the advertising generated from banner ads placed on the site.

As stated previously, there are relatively few statutory provisions dealing with violations of the tax laws governing tax-exempt organizations. Until 1996, the only possible sanction for violation of the prohibition against private inurement was revocation of the entity's tax-exempt status. In 1996 IRC Section 4958 was enacted to cover excess benefit transactions. The rules it contains are popularly known as intermediate sanctions.

IRC Section 4958 was clearly designed to apply to certain types of private inurement and does not purport to cover all conceivable transactions. Transactions outside the definition of excess benefit transaction under IRC Section 4958 may continue to be tested under the common law theories of inurement that have been developed by the courts. It is also possible that the definitions contained in IRC Section 4958 and the regulations thereunder will become the basis for all future inurement cases, and transactions will be tested as a private benefit violating the operating requirement of IRC Section 501(c)(3).

IV. IRC SECTION 4958

The intermediate sanctions of IRC Section 4958 apply to transactions between disqualified persons and applicable tax-exempt organizations. The sanctions take the form of a two-tiered tax system. The first level tax, known as the initial tax, has two

8 *See generally,* Mabee Petroleum Corp. v. United States, 203 F.2d 872 (5th Cir., 1953) (unreasonable compensation to an employee); Church of Scientology v. Comm'r, 823 F.2d 1310 (9th Cir. 1987) (excessive compensation to an insider).

9 I.R.C. § 4958(c)(2).

parts. A tax equal to twenty-five percent of the excess benefit transaction is imposed on the disqualified person and a tax equal to ten percent of the excess benefit, up to $10,000, is imposed on any organization manager who participated in the transaction.[10] The second tier tax is an additional tax of 200 percent of the excess benefit that will be imposed on the disqualified person if the transaction that gave rise to the first tier tax is not corrected within a certain amount of time, known as the taxable period.[11]

IRC Section 4958 defines an excess benefit transaction as "any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person if the value of the economic benefit provided exceeds the value of the consideration . . . received for providing such benefit."[12] Further, the Secretary of the Treasury was given the authority to expand the definition of excess benefit transaction in the regulations to include other transactions in which the benefit to the disqualified person is based on revenues from one or more activities of the organization.[13] The House Committee Report indicated that the second part of the test is intended to apply to "financial arrangements (to the extent provided in Treasury regulations) under which a disqualified person receives payment based on the organization's income in a transaction that violates the present-law private inurement prohibition."[14]

The term applicable tax-exempt organizations is defined to include those organizations exempt from tax under IRC Section 501(a) and described in IRC Sections 501(c)(3) and (4).[15] The intermediate sanctions of IRC Section 4958 do not apply to transactions involving private foundations because such transactions are subject to special penalty excise taxes under IRC Section 4941 for self-dealing and IRC Section 4945 if the transaction does not accomplish a charitable purpose.[16] The definition of an applicable organization includes all organizations that met this test at any time during the five-year period preceding the date of the transaction.[17]

A disqualified person is defined under IRC Section 4958 as a person who was in a position to exercise substantial influence over the affairs of the entity at any time during the five-year period preceding the date of a transaction, a member of the family of such a person, or a 35 percent controlled entity.[18] A 35 percent controlled entity is a corporation if a disqualified person owns more than 35 percent of the voting power, a partnership if a disqualified person owns more than 35 percent of the profits interests, or an trust or estate if a disqualified person owns more than 35 percent of the beneficial interests.[19]

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10 *Id*. § 4958(a).

11 *Id*. § 4958(b).

12 *Id*. § 4958(c)(1)(A).

13 *Id*. § 4958(c)(1)(B).

14 H.R. REP. on Sections 1311-1314 of the Taxpayer Bill of Rights 2, supra note 4, H.R. Rep. 104-56 (1996).

15 I.R.C. § 4958(e)(1).

16 H.R. REP., *supra* note 14.

17 I.R.C. § 4958(e)(2).

18 *Id*. § 4958(f)(1).

19 *Id*. § 4958(f)(3).

V. 1998 PROPOSED REGULATIONS UNDER IRC SECTION 4958

The 1998 proposed regulations contained several definitions that helped clarify the provisions of IRC Section 4958. They also contained some controversial provisions.

Inurement is not specifically defined in the statutes or the regulations. The proposed regulations had two definitions of "excess benefit transaction." The first definition was "Except as provided in Section 53.4958-5 with respect to certain revenue-sharing transactions, an excess benefit is the value of the economic benefit provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person that exceeds the value of the consideration (including the performance of services) received by the organization for providing such benefit."[20] The value to be used was defined later in the proposed regulations as generally being fair market value.[21] As noted above, it is possible that all future inurement cases will be tested using the IRC Section 4958 rules. Should this happen, excess benefit will become synonymous with private inurement. The significance of this concept is that inurement would then be based on a fair market value standard.

The second definition of excess benefit transaction contained in the proposed regulations covered revenue sharing transactions. The definition did not require that the amount of the benefit to the disqualified person exceed the fair market value of goods and services provided to the tax-exempt organization by the disqualified person. Instead, it provided that, under the relevant facts and circumstances, a transaction would be an excess benefit transaction "if, at any point, it permits a disqualified person to receive additional compensation without providing proportional benefits that contribute to the organization's accomplishment of its exempt purpose."[22] The proposed regulations provided that the entire amount of such an excess benefit transaction was subject to the penalty taxes under IRC Section 4958, not just the amount in excess of fair market value.[23]

The proposed regulations included two examples of the application of IRC Section 4958 to revenue sharing arrangements. In the first example, the tax-exempt entity employed an investment manager. The investment manager's compensation was based, in part, on the year-to-year increase in the value of the assets under his management. In this case, the disqualified person could not increase his own compensation without also benefiting the tax-exempt organization. Thus, there was no excess benefit transaction.[24] In the second example, the tax-exempt entity engaged an organization to manage bingo games on its behalf. The tax-exempt entity provided the building the games were held in, and the for-profit service provider agreed to cover all other expenses. The tax-exempt organization was to receive a stated percentage of the net profits from the bingo operation. Net profits were to be calculated after the payment of wages to the employees of the management company, and the management company was to receive rents for the

20 Prop. Treas. Reg. § 53.4958-1(b).

21 *Id*. § 53.4958-4(b).

22 *Id*. § 53.4958-5(a).

23 *Id*. § 53.4958-1(b).

24 *Id*. § 53.4958-(5)(d) (example 1).

use of its equipment. Because the bingo management company controlled the amount of wages paid to employees and owned the equipment that was used in the games, it controlled the amount of expenses charged against gross revenues. Thus, it could manipulate its own revenues without increasing the revenues of the charity. In this case, the IRS concluded that there was an excess benefit transaction.[25]

The sections of the proposed regulations dealing with revenue sharing were the subject of numerous comments to the Treasury. Some commentators objected to the lack of a fair market value standard, while others suggested that standards similar to those in prior unpublished rulings should apply.[26] IRC Section 4958 provides that the Treasury may expand the definition of excess benefit transaction in the regulations to cover revenue sharing arrangements only if such arrangements result in inurement.[27] At the time the regulations were released, the Treasury had recently won a victory in the Tax Court dealing with inurement under the pre-Section 4958 law in the *United Cancer Council, Inc.* case.[28]

Under IRC Section 4958, the second tier tax is to be paid unless the transaction that generated the first tier tax is corrected.[29] To correct a transaction under the proposed regulations, the disqualified person was required to have repaid the tax-exempt organization the amount of the excess benefit plus interest. If the disqualified person received property other than cash, the tax-exempt organization could accept an offer to return the property plus interest.[30] The correction must have taken place in the time frame from the date the transaction occurred to the earliest of the date the first tier tax was assessed or the date a deficiency notice with respect to the first tier tax was mailed.[31]

Not all organizations exempt from federal income tax under IRC Section 501(c)(4) are required to file an application for recognition of exemption. The proposed regulations recognized this, and provided that an IRC Section 501(c)(4) organization that has filed an application for recognition under Section 501(c)(4) as well as an organization that has identified itself as being exempt from tax under IRC Section 501(c)(4) on a Form 990 will be treated as an applicable tax-exempt entity under IRC Section 4958.[32]

The proposed regulations provided guidance for determining who was a disqualified person. These provisions took the form of a list of persons deemed to have substantial influence over the tax-exempt organization,[33] a list of persons not deemed to have substantial influence over the tax-exempt organization,[34] and a facts and circumstances approach for any person not on either list.[35] For organizations not involved in providing medical services the list of persons deemed to have substantial influence included: voting members of the board of directors, the president (or other chief executive officer), and the

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25 *Id* (example 2).

26 *See* Supplemental Information accompanying temporary regulations issued Jan. 10, 2001.

27 .I.R.C. § 4958(c)(2).

28 United Cancer Council, Inc. v. Comm'r, 109 T.C. 326, 109 T.C. No. 17 (1997).

29 I.R.C. § 4958(b).

30 Prop. Treas. Reg. § 53.4958-1(c)(2)(ii).

31 *Id*. § 53.4958-1(c)(2)(iii).

32 *Id*. § 53.4958-2(c).

33 *Id*. § 53.4958-3(c).

34 *Id*. § 53.4958-3(d).

35 *Id*. § 53.4958-3(e).

treasurer.[36] Persons deemed not to have substantial influence included: other IRC Section 501(c)(3) applicable organizations, employees whose total compensation was less than the IRC Section 414(q)(1)(B)(i) limit for determining highly compensated employees, and employees who were not board members, disqualified officers, or substantial contributors.[37]

Because of the facts and circumstances test, it was possible under the proposed regulations for someone who would not be considered an insider to be a disqualified person. The proposed regulations contained a list of facts and circumstances that indicated substantial influence as well as a list of facts and circumstances that show no influence over the organization.[38] One of the factors arguing for substantial influence applied if the person's compensation was based on revenues from one of the organization's activities that was within the person's control.[39] In the proposed regulations, the example of the bingo management company mentioned above, the management company was deemed to be a disqualified person because its compensation came from an activity of the tax-exempt organization that was under its control. Note that this, too, was an issue in the *United Cancer Council, Inc.* case.

The proposed regulations also contained a provision that created a rebuttable presumption that a transaction was not an excess benefit transaction. To create the presumption, the entity must have taken three steps. First, a group that was entirely without a conflict of interest with respect to the proposed transaction must have approved the transaction. This group could be the entity's board, a committee of the board, or a committee that included non-board members as long as such a committee followed procedures that satisfy the regulations. Second, the board or committee must have relied on appropriate data as to comparability prior to making its determination. Third, the board or committee must have documented the basis for its decision at the time the decision is made.[40] The comparability requirement was designed to document fair market value for the services contracted. The proposed regulations further provided that a small organization could meet this test in reviewing compensation arrangements by reviewing the "compensation paid by five comparable organizations in the same or similar communities for similar services."[41] A small entity was defined as having an average annual gross receipts of less than $1,000,000 for the prior three tax years.[42]

This particular provision of the proposed regulations was of interest to the directors of many public charities and social welfare organizations. The proposed regulation provided a safe harbor that would be useful if the tax-exempt organization engaged in business relationships with its officers, directors, or entities controlled by either group. Further, since the proposed regulations took the position that service providers who were not insiders could be disqualified persons, reasonable directors could conclude that they

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36 *Id*. § 53.4958-3(d).

37 *Id*. § 53.4958-3(e).

38 *Id*. § 53.4958-3(e)(2).

39 *Id*. § 53.4958-3(e)(2)(iii).

40 *Id*. § 53.4958-6.

41 *Id*. § 53.4958-6(d)(2)(ii).

42 *Id*. § 53.4958-6(d)(2)(iii).

should comply with the independence requirement, the comparability requirement and the documentation requirement for many if not all of the exempt organization's contracts.

VI. UNITED CANCER COUNCIL, INC. V. COMMISSIONER

Although the proposed regulations described above related to the intermediate sanctions of IRC Section 4958, the IRS had made arguments based on similar concepts in previous inurement litigation.

The United Cancer Council, Inc. was a tax-exempt organization that promoted cancer prevention and ameliorative approaches to cancer care, rather than the search for a cure approach of the American Cancer Society. The organization was facing a fiscal crisis when it negotiated a five-year exclusive fundraising contract with Watson and Hughey Company, a professional fundraising firm. The contract was a success for the charity, although it only received $2.3 million out of total revenues of $28.8 million. The balance of the total revenues was applied to actual costs of the fundraising programs and the fundraiser's profits. The United Cancer Council, Inc. did not renew the contract at the expiration of the initial term, but engaged a different firm. The second fundraising firm's approach was less successful, and the United Cancer Council, Inc. eventually filed for bankruptcy.[43]

At the trial in the Tax Court, the IRS argued that "(1) the petitioner was not operated exclusively for exempt purposes because its 'activities served private commercial purposes;' (2) petitioner 'operated in large part for the private benefit of W&H;' and (3) petitioner's net earnings inured to the benefit of private shareholders or individuals."[44] The Tax Court discussed whether the inurement principals could apply to the fundraiser. It stated that the law did not support the petitioner's contention that entering into an arm's-length contract could not cause one to become an insider.[45] The Tax Court held the fundraiser to be an insider.[46] The Tax Court went on to find, after considering testimony from experts on both sides, that the fundraising contract exceeded reasonable compensation.[47] The Tax Court did not reach a finding on the IRS's other two points.

On appeal, the Seventh Circuit could not find support for the IRS's concept that the fundraiser somehow took control of the enterprise, became an insider, and triggered the inurement provisions.[48] The court stated "(t)here was no diversion of charitable revenues to an insider here, nothing that smacks of self-dealing, disloyalty, breach of fiduciary obligation or other misconduct of the type aimed at by a provision of law that forbids a charity to divert its earnings to members of the board or other insiders."[49] Since the Tax Court had not ruled on the IRS's alternate theory that the relationship with the

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43 United Cancer Council v. Comm'r, 165 F. 3d 1173, 1175-76 (7th Cir. 1999).

44 United Cancer Council, Inc. v. Comm'r, 109 T.C. 326, 383 (1997).

45 *Id.* at 388.

46 *Id.* at 389.

47 *Id.* at 397.

48 United Cancer Council v. Comm'r, 165 F. 3d at 1178.

49 *Id.*

professional fundraiser provided a private benefit to the fundraiser that violated the operational test of IRC Section 501(c)(3), the Seventh Circuit could not consider the argument. The case was remanded to the Tax Court to consider this issue,[50] but was eventually settled out of court.[51]

VII. 2001 TEMPORARY REGULATIONS

On January 10, 2001 the Treasury Department issued temporary regulations. The temporary regulations maintained the general framework of the proposed regulations, but differed from the proposed regulations in several areas. There are four changes apply to issues discussed previously in this article.

First, with respect to the concept of correction of an excess benefit transaction, the temporary regulations explain that the decision to take back property previously transferred to a disqualified person lies with the exempt organization. Further, if the property has declined in value while held by the disqualified person any correction must include additional payments in the amount of the decline in the property's value.[52] The temporary regulations give guidance with respect to correction when the applicable organization has ceased to exist or changed its status. If the applicable organization was an organization exempt from tax under IRC Section 501(c)(3), then the disqualified person must make the corrective payment to another IRC Section 501(c)(3) organization. If the applicable organization was exempt from tax under IRC Section 501(c)(4), then the corrective payment may go to a successor if qualified under IRC Section 501(c)(3) or (4) or any other such organization.[53]

Second, in defining treasurer, the proposed regulations indicated that the treasurer had or shared the authority to sign checks or authorize electronic transfers. This provision was deleted from the temporary regulations.

Third, the rebuttable presumption in the regulations requires a small organization to gather information from three similar organizations rather than five.[54]

Fourth and most importantly, the temporary regulations do not contain any special rules related to revenue sharing transactions. These transactions will be tested for the time being under the general rules applicable to other excess benefit transactions. However, the Treasury has reserved the section governing revenue sharing transactions. The Treasury notes that any future regulations on revenue sharing transactions will first be issued in proposed form.[55]

There are some new rules contained in the temporary regulations. The most significant of these is the initial contract exception. Under this rule, IRC Section 4958 does not

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50 *Id*.

51 *What's Hot in Washington*, KPMG Internet Newsletter, May/June 2000, *at* http://www.independentsector.org/programs/gr/May_2000_newsletter.htm.

52 Temp. Treas. Reg. § 53.4958-7T(b)(4)(ii) (2001)

53 *Id*. § 53.4958-4T(e).

54 *Id*. § 53.4958-6T(c)(2).

55 See *Supplemental Information to Temporary Regulations under IRC Section 4958*.

apply to any fixed payment made to a person pursuant to an initial contract. The person must not have been a disqualified person prior to the creation of the contract. The contract must be a binding, written contract.[56] In the supplementary information that introduces the temporary regulations, the Treasury indicated that the rules were written to address the issue raised in *United Cancer Council, Inc*.

VIII. CONCLUSION

All charities and social welfare organizations must realize that the original sanction of revocation of tax-exempt status is still available for cases of extreme inurement. These organizations should continue to structure their affairs to avoid private inurement.

The application of the excess benefit intermediate sanctions requires two things. First, there must be a disqualified person. Second, there must be a transaction in which the tax-exempt organization pays more than fair market value for services.

Insiders can test their relationship with the organization under the proposed regulations. Many will be disqualified persons. Insiders who are disqualified persons and who also provide goods or services to the tax-exempt entity know that one of the elements of the intermediate sanctions is already in place. They should take steps to avoid entering into any transaction for other than fair market value. If possible, they should structure their contracts with the exempt organization so that they meet the rebuttable presumption that the transactions are not excess benefit transactions. This will force some additional costs to the exempt organization while the tax risk is on the insider. However, directors are often immunized against financial loss for their actions as directors. It is possible that the directors' exiting duty of care may now or in the future require them to take the steps necessary to establish the rebuttable presumption described in the regulations in some or all contract negotiations.

The temporary regulations under IRC Section 4958 still contain language that will allow the IRS to classify a service provider who is not an officer, a director, or any other traditional insider as a disqualified person. This is a facts and circumstances test, and neither the board nor the third-party, for-profit service provider will not know for certain whether the third-party is a disqualified person at the time the contract is negotiated. This issue will only be resolved upon audit by the IRS. Because of this uncertainty, organizations should attempt to meet the rebuttable presumption for their contracts with third parties.

The initial contract exception will protect service providers for the duration of the initial contract, but will not protect them from exposure to the intermediate sanctions after the expiration of the initial term. Further, there are exceptions to the exception if the contract is renegotiated or materially changed, and contracts that allow one party to terminate the contract at will are not covered by the exception.[57] Third-party service providers negotiating an initial contract should make sure that the terms comply with the

56 Temp. Treas. Reg. § 53.4958-4T(a)(3).

57 *Id*. § 53.4958-4T(a)(3)(v).

temporary regulations so that the contract is viewed as an initial contract at all times during it period.

Negotiation between the tax-exempt organization and the for-profit service provider will not be sufficient to prove fair market value of the services rendered. The board is charged with gathering the comparability data necessary to establish the rebuttable presumption and recording it concurrently with the transaction. A third party service provider will receive the benefit of the presumption, but may not see the merit of encouraging a potential customer to gather information about the value of the services it will provide. It may be difficult for a third-party service provider to convince an unwilling board to incur the additional costs the presumption will require.

Taking the steps necessary to document that goods and services were provided for fair market value could be significant with respect to the private benefit issue as well. Today the concepts of inurement and private benefit overlap. However, the private benefit rules do not require a finding that the person receiving the benefit is an insider under the traditional inurement rules or a disqualified person under IRC Section 4958.[58] It is possible that the fair market value rationale applied to inurement under IRC Section 4958 will also provide a defense to an argument that the transaction provides a private benefit.

Finally, service-providers who may engage in revenue sharing transactions should be aware of the proposed regulations. The Treasury has reserved this section in the regulations and may issue another version of the 1998 proposed regulations. In the supplemental information that accompanies the temporary regulations the Treasury indicated that regulations on revenue sharing could still consider the entire amount of the transaction to be an excess benefit, but note that final regulations will not be retroactive. In the meantime, revenue sharing will be tested under the general rules, and the excess benefit will only be the amount by which the compensation exceeds fair market value.

58 *See* American Campaign Academy v. Comm'r, 92 T.C. 1053, 1069 (1989).