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CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
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The Honorable Herb Kohl  
United States Senator  
14 West Mifflin Street  
Suite 207  
Madison, WI 53703-2576

Attention:

Dear Senator Kohl:

I am responding to your March 31, 2009, letter on behalf of your constituents, \_\_\_\_\_ and his wife \_\_\_\_\_ is a \_\_\_\_\_ graduate of the University of Minnesota medical residency program. \_\_\_\_\_ asked why the IRS continues to pursue the issue of whether stipends received by medical residents for their services are subject to taxes under the Federal Insurance Contributions Act (FICA).

Services students perform are excepted from FICA taxes [section 3121(b)(10) of the Internal Revenue Code]. The Code defines a student for this purpose as an individual employed by a school, college, or university at which he or she is enrolled and regularly attends classes. The student FICA exception applies only to services performed in the employ of an organization that has the status of a school, college, or university (SCU); and only if the student who performs the services is enrolled and regularly attends classes at that school, college, or university.

Our longstanding position is that medical residents are not students within the meaning of section 3121(b)(10); they are full-time employees. Therefore, they are ineligible for the student FICA exception. However, in *State of Minnesota v. Apfel*, 151 F. 3d 742 (8<sup>th</sup> Cir. 1998) the Eighth Circuit held that medical residents the University of Minnesota employed in its residency programs were students as defined by the Social Security Act. Therefore, they did not need to pay FICA taxes on their wages.

In 2004, the IRS issued regulations to clarify the student FICA exception. The regulations provide more detailed standards for determining what is a SCU and who is a

student within the meaning of section 3121(b)(10) of the Code. These regulations make it clear that a medical resident by virtue of being a full-time employee is ineligible for the student FICA exception. This regulation applies to services performed on or after April 1, 2005.

These regulations provide that any stipends received for services provided as a medical resident on or after April 1, 2005 are subject to FICA tax. However, in *Regents of the University of Minnesota v. United States*, 2008 WL 906799 (D.Minn.2008), the district court for Minnesota held that the part of the regulation stating that a full-time employee is ineligible for the student FICA exception is invalid. The United States appealed this decision because the IRS and the Department of Justice believe the regulations are valid, and accordingly stipends the University of Minnesota pays to its medical residents for services performed on or after April 1, 2005 are subject to FICA tax. The Court system has not yet resolved this issue; therefore issuing any refunds of tax is premature.

I hope this information is helpful. If you have any questions, please contact me at  
or at .

Sincerely,

Nancy J. Marks  
Division Counsel/Associate Chief Counsel  
(Tax Exempt & Government Entities)