



Section of Taxation

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Re: Recommendations for 2016-2017 Priority Guidance Plan

Dear Messrs. Koskinen, Wilkins, and Mazur:

The American Bar Association Section of Taxation welcomes the opportunity to provide recommendations for inclusion in the 2016-2017 Priority Guidance Plan. These recommendations represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association. The enclosed list contains recommendations made by the members of the following committees within the Section of Taxation.

Corporate Tax
Employee Benefits
Estate and Gift Taxes
Exempt Organizations
Financial Transactions
Investment Management
Partnerships and LLCs
Real Estate

Sales, Exchanges and Basis
Standards of Tax Practice
State and Local Taxes
Tax Accounting
Tax-Exempt Financing
Transfer Pricing
U.S. Activities of Foreigners and Tax Treaties

We would be happy to discuss the recommendations with you or your staff, if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

CCs: William M. Paul, Deputy Chief Counsel (Technical), Internal Revenue Service
Scott W. Dinwiddie, Associate Chief Counsel (Income Tax & Accounting),
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**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**Recommendations for the 2016-2017
Department of the Treasury Office of Tax Policy and Internal Revenue Service
Priority Guidance Plan**

As requested in Notice 2016-26,¹ the Section of Taxation of the American Bar Association has identified the following tax issues that we recommend be addressed through regulations, rulings, or other published guidance in 2016-2017. In each case, the name and contact information for a representative of the committee making the suggestion are provided.

CORPORATE TAX

Audrey N. Charling, Corporate Tax Committee, (203) 373-3380,
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1. Guidance under sections 1502² and 1504 regarding consolidated group continuation.
2. Guidance narrowing the scope of “fast pay stock” for purposes of tax shelter reporting obligations, including material advisor reporting.
3. Identification of legal issues under section 355 relating to device and business purpose for which private letter rulings will ordinarily be entertained.

EMPLOYEE BENEFITS

Susan A. Wetzel, Employee Benefits Committee, (214) 651-5389,
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1. Additional guidance under section 401(k)(12) and (13) regarding certain mid-year changes and certain business transactions, specifically focusing on the ability to merge two safe harbor plans in connection with a business transaction.
2. Guidance permitting more extensive incorporation of statutory and regulatory requirements by reference and the exclusion from plan documents of provisions that are not relevant to the plan sponsor and plan participants.
3. Guidance regarding the application of measurement methods under section 4980H³ and reporting requirements under sections 6055 and 6056 in the corporate transaction context.

¹ 2016-14 I.R.B. 533.

² References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”) or the Treasury regulations issued thereunder, unless otherwise indicated.

³ See Notice 2014-49, 2014-41 I.R.B. 665.

4. Guidance clarifying how the regulations under section 414(c) apply to limited liability companies (“LLCs”) and their owners (for example, is control based on ownership of stock having a least 80% of the voting power or value (like corporations), or on ownership of 80% of the profits interests or capital interests (like partnerships, although these concepts have no clear analogs for LLCs)).
5. Guidance regarding whether the definition of “trade or business” and the concept of a “partnership-in-fact” that were applied under ERISA by the First Circuit and district court in *Sun Capital* will apply under section 414(b), (c) and (m).
6. Guidance under section 336 of the PATH Act.
7. Guidance regarding the retroactive effective date for Medicare Part A coverage for individuals who enroll after age 65 and the restrictions on HSA contributions for individuals with Medicare coverage under section 223.

ESTATE AND GIFT TAXES

Laura Hundley, Estate and Gift Taxes Committee, (303) 473-2732,
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1. Guidance on “decanting” taking into consideration the recommendations submitted by the Section as well as other professionals in accordance with Notice 2011-101.⁴

EXEMPT ORGANIZATIONS

David A. Shevlin, Exempt Organizations Committee, (212) 455-3682,
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1. Proposed regulations pursuant to sections 4958, 4966 and 4967 regarding donor advised funds.
2. Update Rev. Proc. 92-94,⁵ including to (i) confirm that support from a non-U.S. governmental entity counts as public support in the same manner as support from a federal, state, or local governmental entity counts for purposes of the public support calculation under section 509(a), (ii) revise the definition of “currently qualified” in light of the current five-year calculation period for public support

⁴ 2011-52 I.R.B. 932. Specifically, immediate guidance is sought regarding Item #12 from Notice 2011-101, which requested comments on decanting when the Distributing Trust is exempt from the generation-skipping transfer (“GST”) tax under Regulation section 26.2601-1, has an inclusion ratio of zero under section 2632, or is exempt from GST tax under section 2663. Under the current regulations, guidance is provided for decanting a trust that is “grandfathered” from the GST tax (see Reg. §26.2601-1(b)(4)); similar guidance is requested for trusts that are exempt as a result of the allocation of a taxpayer’s GST exemption and not such “grandfathering.”

⁵ 1992-2 C.B. 507.

- and to provide that an affidavit is currently qualified if a foreign organization in the first five years of its existence reasonably can be expected to qualify as publicly supported, (iii) clarify that grantors need not evaluate foreign hospitals for compliance with section 501(r), (iv) clarify that foreign schools must attest that they do not discriminate on the basis of race, color or national and ethnic origin, but are exempt from the specific requirements of Rev. Proc. 75-50 and (v) clarify that sponsoring organizations of donor-advised funds may make equivalency determinations pursuant to Rev. Proc. 92-94 when making grants to foreign organizations.
3. Finalize the following regulations:
 - a. Regulations under section 6104(c).
 - b. Regulations under section 7611 relating to church tax inquiries and examinations.
 4. Proposed regulations under section 501(c) relating to political campaign intervention. Section 127 of the Department of the Treasury Appropriations Act, 2016 (Title I of Division E of the Consolidated Appropriations Act, 2016), which prohibits the Treasury Department from finalizing any regulation or other guidance relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4), applies only to fiscal year 2016.
 5. Revenue ruling under section 4944 regarding the qualification of an equity investment in a limited liability company as a program-related investment.
 6. Guidance under section 4941 regarding a private foundation's investment in a partnership in which disqualified persons are also partners.
 7. Guidance based on the principles of Private Letter Ruling 201446025 (Nov. 14, 2014) regarding the circumstances under which redomestication does not require submission of a new application for recognition of tax-exempt status.
 8. Proposed regulations under section 509 clarifying that, in certain circumstances, Type I and Type II supporting organizations that designate their supported organizations by name, rather than by class, are permitted to make distributions to publicly supported organizations other than those specifically designated by name.

FINANCIAL TRANSACTIONS

Eileen Marshall, Financial Transactions Committee, (202) 973-8884,
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1. Guidance on treatment of distressed debt, including regulations relating to accruals of interest and discount, application of payment ordering rules when debt is not paid in full, and further mitigating character mismatches with respect to accrued interest and discount that is never paid.

2. Regulations under section 446 on notional principal contracts (NPC) relating to the inclusion in income or deduction of a contingent nonperiodic payment, and guidance relating to the character of payments made pursuant to an NPC.
3. Guidance under Regulation section 1.1001-3 regarding circumstances where there is a change in either the corporate legal obligor or the tax obligor (*e.g.*, check-the-box elections, F reorganizations), including the application of Regulation section 1.1001-3(f)(7)(ii), relating to deterioration in financial condition of the obligor.
4. Guidance on the characterization, particularly for withholding tax purposes, of (i) consent fees for debt modifications and waivers; (ii) standby letter of credit fees and commitment fees; and (iii) positive rebates, borrow fees, negative repo rate payments and negative rebates on cross-border securities loans and repos.
5. Revised regulations under section 249 addressing the manner of demonstrating that an amount is attributable to the cost of borrowing and not to a conversion feature.
6. Guidance under section 871(m) on the substantial equivalence test, the qualified derivatives dealer exception and in response to other comments provided by industry.
7. Revise proposed regulations under section 385 so that a failure to comply with the requirements of Proposed Regulation section 1.385-2(b) creates a presumption that the instrument is stock, rather than a *per se* rule. Reconsider the application of the funding rule of Proposed Regulation section 1.385-3 to financial institutions, cash pools and treasury centers.

INVESTMENT MANAGEMENT

Amy B. Snyder, Investment Management Committee, (610)-503-7705,
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1. Guidance addressing investment in commodities and commodity-linked derivatives by regulated investment companies (“RICs”) through controlled foreign corporations and commodity-linked notes.
2. Guidance regarding the tax treatment of exchange-traded notes.
3. Regulations regarding the taxation of notional principal contracts (“NPCs”), including the character of payments made under a NPC, the inclusion in income or deduction of a contingent nonperiodic payment, and the definition of a “payment” made pursuant to a NPC.

4. Guidance confirming that RICs can generally “look through” their interests in a partnership to the partnership’s underlying assets for purposes of the asset diversification test under section 851(b)(3). To date, the IRS’s published guidance has been limited to specific factual situations.⁶
5. Regulations or other guidance expanding and clarifying existing tax hedging and straddle rules in the context of hedging transactions that reduce or manage risks on an entire portfolio of stocks or bonds held by a taxpayer (i.e., hedging transactions effected at the portfolio level, and not on a security-by-security basis).
6. Regulations or other additional guidance addressing circumstances under which the holder of a variable contract (as defined in section 817(d)) will be treated as the owner of assets held by a segregated asset account under the “investor control” doctrine,⁷ specifically in the context of insurance-dedicated RICs that are “funds of funds.”
7. Guidance on the application of the “cure” provisions in sections 851(d)(2) and (i), added by the RIC Modernization Act of 2010, including the schedules referred to in sections 851(d)(2)(A)(i) and (i)(1)(A) and the meaning of “due to reasonable cause and not due to willful neglect” in sections 851(d)(2)(A)(ii) and i)(1)(B). We refer the Service to Regulation section 1.856-7, which provides guidance to real estate investment trusts (“REITs”) concerning a REIT’s failure to meet its gross income requirements.

PARTNERSHIPS AND LLCs

Thomas E. Yearout, Partnerships and LLCs Committee, (314) 862-1040,
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1. Regulations concerning the new partnership audit rules under section 411 of the PATH Act of 2015.
2. Final Regulations under section 751(b).
3. Final Regulations regarding series LLCs.
4. Regulations concerning the fractions rule under section 514(c)(9).

⁶ *E.g.*, those described in Revenue Procedure 2001-57, 2001-2 CB 577, Revenue Procedure 2005-20, 2005-1 CB 90, and Revenue Procedure 2009-42, 2009-40 IRB 459.

⁷ *See* T.D. 8101, “Income Tax; Diversification Requirements for Variable Annuity Endowment and Life Insurance Contracts,” (Sept. 15, 1986) (indicating that guidance on “investor control” will be provided in regulations or revenue rulings under Section 817(d) relating to the definition of “variable contract.”); *see also* T.D. 9185, “Treatment of Variable Contracts—Diversification Requirements,” (Feb. 28, 2005).

5. Guidance on the proper treatment of contingent liabilities under sections 743(b) and 755.
6. Guidance on section 704(c) layers relating to partnership mergers.
7. Regulations establishing a new *de minimis* rule under section 704(b).
8. Guidance on the definition of a limited partner for SECA purposes.
9. Guidance on who can sign a partnership return.

REAL ESTATE

Robert D. Schachat, Real Estate Committee, (202) 327-8010, robert.schachat@ey.com

1. Final Regulations under section 460 relating to the home construction contracts exemption and its application to land development contracts and condominium developers and contractors.
2. Guidance regarding the treatment of cancellation of indebtedness income as “unrelated business taxable income” under section 512.
3. Guidance regarding simplification of section 514(c)(9)(E) and the “fractions rule.”
4. Guidance under section 562(e)(2) for non-publicly offered REITs.
5. Guidance under the new rules for qualified foreign pension trusts (“QFPFs”) under section 897(l):
 - a. Confirm that a qualified foreign pension fund (“QFPF”) can be formed at a local level, e.g., a province or municipality.
 - b. Clarify extent of government regulation and scope of annual information reporting about their beneficiaries required for QFPFs under section 897(l)(2)(D).
 - c. Confirm that a foreign government pension fund that is eligible for relief under both section 892 and section 897(l) can claim the benefits of both sections.
 - d. Confirm that, under section 897(l)(1)(B), subsidiaries held directly or indirectly by the QFPF can claim the benefits.
 - e. Guidance regarding the ability of an entity owned by multiple QFPFs to claim benefits.

SALES, EXCHANGES AND BASIS

Mary B. Foster, Sales, Exchanges and Basis Committee, (425) 646-4020,
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Guidance clarifying that none of (i) a non-recognition distribution-from-partnership transaction under section 731 immediately before an exchange of like kind property, (ii) a non-recognition contribution-to-partnership transaction under section 721 immediately after an exchange of like kind property, or (iii) a non-recognition contribution-to-partnership transaction under section 721 immediately before an exchange of like kind property, will disqualify the exchange itself as a like kind exchange under section 1031, so long as title to the like kind property passes through the exchangor pursuant to the like kind exchange.

STANDARDS OF TAX PRACTICE

Michael J. Desmond, Stands of Tax Practice Committee, (805) 618-1862,
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1. Guidance on Circular 230 References to Registered Tax Return Preparers (RTRPs). Circular 230 should be updated to reflect the D.C. Circuit's decision in *Loving* and remove references to RTRPs. The IRS Form 2848 was updated in December 2015 to remove references to RTRPs. At that time, special rules and requirements were added with respect to the limited practice rights of unenrolled return preparers, including a requirement that they participate in the IRS's Annual Filing Season Program, Rev. Proc. 2014-42.
2. Guidance on contingent fees. Circular 230 section 10.27 has not been updated to reflect the District Court's decision in *Ridgely*.

STATE AND LOCAL TAXES

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1. Final Regulations regarding state and local tax implications of series LLCs.

TAX ACCOUNTING

Colleen O'Connor, Tax Accounting Committee, (202) 533-8049,
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1. Guidance under section 446 addressing changes in methods of accounting relating to the new FASB/IASB revenue recognition standards.
2. Revenue Procedure under section 263(a) regarding the capitalization of natural gas transmission and distribution property.
3. Guidance regarding the treatment of deferred revenue in taxable asset sales and acquisitions.

4. Regulations under section 199 relating to computer software.
5. Final regulations under section 41 on the exception from the definition of “qualified research” for internal use software under section 41(d)(4)(E).
6. Regulations under section 174 regarding procedures for adopting or changing methods of accounting for research and experimental expenditures.
7. Final regulations under section 199 including amendments by the Tax Extenders and Alternative Minimum Relief Act of 2008.
8. Final regulations under section 263A regarding the inclusion of negative amounts in additional section 263A costs.
9. Guidance under section 263A to update, clarify and modify the existing rules to reflect current business practices.
10. Regulations under section 451 regarding advance payments received for goods and services, including amounts received in exchange for the sale or issuance of gift cards, trading stamps, and loyalty points that can be redeemed for goods or services.
11. Regulations under section 453A regarding contingent payment sales.
12. Regulations under section 460 addressing the application of the look-back interest rules to certain pass-through entities with tax-exempt owners.
13. Regulations under section 460 regarding home construction contracts and rules for certain changes in method of accounting for long term contracts.

TAX-EXEMPT FINANCING

Stefano Taverna, Tax-Exempt Financing Committee, (214) 754-9200,
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1. Revise and finalize proposed issue price regulations.⁸
2. Re-propose in revised form proposed political subdivision regulations.⁹
3. Finalize proposed arbitrage regulations addressing issues other than issue price released in September 2013.
4. Finalize public approval regulations under section 147(f) released in September 2008.

⁸ 80 Fed. Reg. 36,301 (2015).

⁹ 81 Fed. Reg. 03790 (2016).

5. Update, simplify and coordinate application of multipurpose issue regulations under sections 141 and 148.
6. Provide updated revenue procedure or other guidance addressing management and service contracts set forth in Revenue Procedure 97-13 and Notice 2014-67. Expand scope of safe harbors. Provide guidance on arrangements that are not treated as management or service contracts raising potential private business use.
7. Update guidance addressing reissuance considerations relating to tax-advantaged bonds.

TRANSFER PRICING

Tracy A. Gomes, Transfer Pricing Committee, (972) 232-3064, tgomes@mwe.com

1. Guidance on financial guarantees. Reported decisions from other jurisdictions (for example, the Chevron decision in Australia) show the potential complexity of this issue. In our view, guidance concerning basic principles applicable to intercompany guarantees and other forms of credit support would be valuable. Such guidance need not address the full range of technical issues associated with valuation of guarantees.
2. Guidance on financial transactions in general (non-global dealing context). IRS Exam appears to be devoting increased attention to transfer pricing issues with respect to financial transactions (including intercompany loans, etc. by non-financial entities). At present, the regulatory guidance in this area consists of the arm's length interest rate guidance in Regulation section 1.482-2(a) and –by analogy only -- the transfer pricing methods applicable to tangible and intangible property.
3. Guidance on difficult to value intangibles (commensurate with income standard). In an attempt to apply the commensurate with income standard, IRS Exam sometimes applies non-traditional approaches (including applications of the income method). In some cases, these approaches do not align with established valuation concepts or with the current understanding of the commensurate with income standard.
4. Guidance on appropriate use of country-by-country reporting data by treaty partners. Such guidance could address situations in which a treaty partner relies primarily on country-by-country reporting data to make a transfer pricing adjustment. The final OECD report contemplated that such adjustments are improper and, if made, could be dealt with in a summary manner via the Mutual Agreement Procedure.

U.S. ACTIVITIES OF FOREIGNERS AND TAX TREATIES

Michael J. Miller, U.S. Activities of Foreigners and Tax Treaties Committee, (212) 903-8757, mmiller@rhtax.com

1. Guidance under sections 877A and 7701(a)(50) regarding the status of certain individuals who relinquished U.S. citizenship under the Immigration and Nationality Act on or prior to June 3, 2004.
2. Guidance under section 897 with respect to the definition of qualified foreign pension plans and other aspects of the changes to section 897 made by the PATH Act.
3. Guidance on the application of treaty provisions to hybrid entities for non-FDAP items, *e.g.*, effectively connected income not attributable to a permanent establishment and branch profits tax.
4. Guidance on the applicability, or not, of international information return requirements (*e.g.*, Forms 5471, 8865, 3520, 3520-A) to dual residents filing nonresident returns under a treaty tie-breaker provision.