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Acting Deputy Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
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Hon. Donald L. Korb
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
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Re: Recommendations for 2006-2007 Guidance Priority List

Dear Acting Deputy Assistant Secretary Solomon and Chief Counsel Korb:

The American Bar Association Section of Taxation welcomes the opportunity to provide recommendations of guidance projects for inclusion in the 2006-2007 Treasury-IRS Guidance Priority List. These recommendations represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the 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 various committees within the Section. I hope you find the suggestions helpful as you formulate the new Priority Guidance List. The recommendations include items in the following areas of practice:

- Banking and Savings Institutions
- Corporate Tax
- Energy and Environmental Taxes
- Estate and Gift Tax
- Exempt Organizations
- Partnerships and LLCs
- Real Estate
- Sales, Exchanges and Basis
- Tax Accounting

Sincerely,

Dennis B. Drapkin
Chair, Section of Taxation

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Enclosure

RECOMMENDATIONS FOR THE 2006-2007 TREASURY-IRS GUIDANCE PRIORITY LIST

As requested in Notice 2006-36, members of the Section of Taxation of the American Bar Association have identified the following tax issues that should be addressed through regulations, rulings or other published guidance in 2006-2007. In each case, the contact person's name and contact information are provided. We would be happy to discuss the issues with you, if you would find that helpful.

BANKING AND SAVINGS INSTITUTIONS

John Ensminger, Banking and Savings Institutions Committee, (718) 624-5730, jensminger@msn.com

1. Guidance under section 1272(a)(6) regarding pools of credit card receivables.
2. Guidance regarding the ability of banks to elect pass-through tax treatment (beyond S corporation status).
3. Guidance concerning the character of originated mortgage servicing rights (a project that might also be appropriate for the Industry Issue Resolution Program) as an important issue to the mortgage banking industry. It is not clear whether originated mortgage servicing rights, which have a zero basis in the hands of the originator, are still § 1231 assets or are treated as some other type of asset.

CORPORATE TAX

Karen Gilbreath, Corporate Tax Committee, (202) 327-7704, karen.gilbreath@ey.com

1. Guidance on treatment of distributions made prior to reorganizations.
2. Guidance on application of Section 368(a)(1)(D) to transactions in which the target and acquiring corporations do not have 100% common ownership and stock of the acquiring corporation is not issued.
3. Guidance on “substantially all” calculation issues; including the effect of debt repayment and the issuance of new debt, particularly in acquisitions of highly-leveraged target corporations.
4. Reorganizations involving contingent consideration, including guidance on (i) the treatment of restricted stock and compensatory stock options and their effect on the continuity of interest and solely for voting stock requirements; and (ii) reorganizations involving escrowed or contingent stock or other variable consideration, particularly the impact of such arrangements on continuity of interest.
5. Guidance on transactions that qualify under multiple provisions of the Code (“overlap” transactions), including whether Section 357(c) is applicable in the context of an acquisitive “D” reorganization that also constitutes a Section 351 exchange.

6. Guidance under Section 351(e) to reflect 1997 Act amendments, including guidance providing for the nonapplicability of Section 351(e) in a case in which all of the stock of the transferee corporation is owned by members of the same Section 1563(a)(1) controlled group and the transferee corporation is neither a REIT nor a RIC.

ENERGY AND ENVIRONMENTAL TAXES

Robert A. Swiech, Energy and Environmental Taxes Committee, (303) 444-2993, swiech@statetax-law.com

1. Update and coordinate Treas. Reg. §§ 1.613A-3(e), 1.704-1(b)(2)(iv)(k) and 1.704-3. concerning oil and gas depletion on properties owned by a partnership.

ESTATE AND GIFT TAX

John F. Bergner, Estate and Gift Taxes Committee, (214) 745-5289, Jbergner@Winstead.com

1. Revenue ruling holding that (i) to the extent the spouse first to die is granted a testamentary general power of appointment over the other spouse's assets, such assets will be included in the gross estate of the spouse dying first under Section 2041 and can be used to make use of the Estate Tax Exemption of that spouse, and (ii) a gift made by the surviving spouse to the spouse first to die by granting that spouse a general power of appointment over the surviving spouse's property qualifies for the marital deduction under Section 2523. The ruling should apply in the case of both a revocable trust funded solely by the surviving spouse and a "joint revocable trust" (*i.e.*, a trust created and funded with property of both spouses).

EXEMPT ORGANIZATIONS

LaVerne G. Woods, Exempt Organizations Committee, (206) 628-7792, lavernewoods@dwt.com

1. **Section 4965 and Tax Shelter Penalties.** Guidance regarding new Section 4965 of the Internal Revenue Code (enacted by Section 516 of the Tax Increase Prevention and Reconciliation Act signed by President Bush on May 17, 2006), which imposes new excise taxes with respect to any tax-exempt organization that becomes a party to a prohibited tax-shelter transaction.
2. **International Grant-Making and Activities.** Guidance regarding international grant-making and international activities of Section 501(c)(3) organizations taking into account the comments in response to Announcement 2003-29.
3. **Simplification of Public Support Test.** Revise the regulations under Sections 509(a)(1), 170(b)(1)(A)(vi), and 509(a)(2) to simplify, clarify, and achieve greater consistency in application of the alternative public support tests for organizations seeking classification as public charities.
4. **Section 4958 and Revocation Standards.** Finalize the regulations proposed on September 9, 2005, dealing with the relationship between revocation of Section 501(c)(3) status and Section 4958 excise taxes, taking into account comments received on the proposed regulations.

5. **Section 4958 and Independence of Directors.** Guidance regarding when a member of a tax-exempt organization's board of directors can be considered independent for purposes of the rebuttable presumption of Treas. Reg. § 53.4958-6 notwithstanding a financial relationship between the organization and the director or the director's employer, under a *de minimis* standard or otherwise.
6. **Section 509(a)(3) and Independence of Directors.** Guidance regarding when an organization will be considered controlled directly or indirectly by disqualified persons within the meaning of Section 509(a)(3)(C) by virtue of the disqualified persons' business or financial relationships with members of the organization's board of directors.
7. **Program-Related Investments.** Guidance regarding the definition and scope of program-related investments of private foundations.
8. **Section 501(m).** Guidance regarding the application of Section 501(m) and commercial-type insurance. Following the Supreme Court's decision in *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151 (June 20, 2002), the Service's withdrawal of its HMO audit guidelines in this area, and the expiration of the 18-month directive suspending the application of Section 501(m) to HMOs, there is no guidance concerning the Service's interpretation of Section 501(m).
9. **Political Activities and Section 501(c)(3) Organizations.** Convert the Fact Sheet released on February 24, 2006, dealing with political activities by Section 501(c)(3) organizations (FS-2006-17), into a Revenue Ruling.
10. **Political Activities and Primary Purpose Test.** Guidance regarding acceptable methods for determining whether an organization is conducting political activities (including both candidate campaign intervention and improper private benefit to partisan interests) as its primary activity (consistent with Section 527 exemption), or as a less-than-primary activity (consistent with non-charitable Section 501(c) exemption).
11. **Internet Activities of Tax-Exempt Organizations.** Guidance regarding the various tax exemption issues (e.g., lobbying and political activities) arising from internet activities of tax-exempt organizations.
12. **Low-Income Housing Partnerships.** Seek public comment on the Memorandum for Manager, EO Determinations, dated April 25, 2006, dealing with criteria for processing exemption applications by Section 501(c)(3) organizations participating in low-income housing tax credit partnerships, and convert it into a Revenue Ruling.
13. **Reporting of Income from Intellectual Property.** Guidance regarding the computation and reporting of "qualified donee income" from "qualified intellectual property" contributions described in Section 170(m), as added by the 2004 JOBS Act.
14. **Group Exemptions.** Updated guidance, such as a revenue procedure, concerning group exemptions.

PARTNERSHIPS AND LLCs

James E. Wregglesworth, Partnerships and LLCs Committee, (206) 628-7795, jimwregglesworth@dwt.com

1. Guidance is needed on whether the principles of Rev. Rul. 99-6 apply in situations beyond those described in the ruling. Specifically, guidance is needed on (i) the treatment under Sections 704(c)(1)(B) and 737 and (ii) addressing the consequences to the acquiring partner of the taxable or tax-free acquisition of partnership interests.
2. Regulations are needed under Section 704(c)(1)(C). The regulations should address the impact of a transfer or liquidation of a contributing partner's interest on the basis of the partnership's property with respect to any successor partner where a partner has contributed property with a built-in loss. Guidance is needed on the interaction of Section 704(c)(1)(C) with various other Code sections, most notably Section 734(b). Guidance is also needed on the treatment pursuant to Section 704(c)(1)(C) when the contributed loss property is subsequently contributed to lower tier partnerships or deemed transferred as part of a termination under Section 708(b)(1)(B), including whether a successor to the contributing partner (in a transaction where Section 381 does not apply to the successor) can avail itself of the losses.
3. Guidance is needed on the application of Section 743(b) and Section 734(b) to securities partnerships that aggregate under Treas. Reg. Section 1.704-3(e). This guidance should discuss the impact of the adjustment on individual partners' revaluation accounts.
4. Guidance is needed to clarify whether, when a partner sells a partnership interest and recognizes ordinary income under Section 751(a) attributable to Section 1248 amounts, the partner is entitled to claim foreign tax credits under Section 902. Guidance should include the interaction of Prop. Reg. Section 1.1248-8 with Section 751(a).
5. Guidance is needed on how to apply the "second-tier" nonrecourse debt allocations under Treas. Reg. Section 1.752-3(a)(2) when multiple partners share "reverse" Section 704(c) on a single property with a single debt.
1. Guidance on Section 752 recourse debt allocations (i) under Treas. Reg. Section 1.752-4(b)(2)(iii) in light of *IPO II, et al. v. Comm'r*, 122 T.C. No. 17, No. 14500-02 (April 23, 2004), and (ii) regarding how a partnership liability is allocated where more than one partner bears the economic risk of loss for that partnership liability. (The Temporary Regulations addressed this issue). T.D. 8237 (December 30, 1988) 53 FR 53140).

REAL ESTATE

James Lowy, Real Estate Committee, (415) 894-8602, james.lowy@ev.com

1. Guidance under Section 857(b)(6)(C)(iii). Section 857(b)(6)(C) creates a safe harbor from treatment of certain property sales by a REIT as "prohibited transactions." A requirement of the safe harbor is that either the REIT not make more than 7 property sales during the year, or that the aggregate adjusted bases of property sold by the REIT not exceed 10 percent of the aggregate bases of all REIT assets as of the beginning of the

year. Guidance should be issued to provide that property disposed of in a Section 1031 tax-deferred exchange is not treated as a sale of property for purposes of this requirement.

2. Guidance under Section 512. Revenue Ruling 2004-24 addresses the consequences arising from the provision of certain parking facilities by REITs. With respect to such services, the REIT rules cross-reference the rules that apply to tax exempt investors under Section 512. Although the ruling focuses on the treatment of REITs, it does make certain references to the treatment of tax exempt investors that have created uncertainty. Guidance should be issued specifically to address the treatment of parking facilities provided by tax exempt real estate investors directly and by partnerships in which such investors own interests.
3. Guidance under Section 514(c)(9). This subsection generally provides an exception for certain tax exempt investors to the debt-financed property rules of Section 514. Several requirements must be met to qualify for the exception, including, in the case of property held through a partnership, the so-called "fractions rule" contained in Section 514(c)(9)(E)(i)(I). Guidance should be considered to address several shortcomings in the rules that inhibit non abusive market-driven transaction structures including, among others, (i) rules that would enable partnerships to vary the allocation of management fee expenses among limited partners based on investment size or similar criteria, (ii) rules that would enable partnerships to allocate income property-by-property, and to allocate income based on source (operating income vs. income from sales), and (iii) rules that would allow for cumulative preferred returns where there is no current distribution, etc.

SALES, EXCHANGES AND BASIS

David Shechtman, Sales, Exchanges and Basis Committee, (215) 772-7314, dshechtman@mmwr.com

1. Revenue ruling on what determines like-kind status of identical properties that may be treated differently under state laws. For example, a pipeline crossing a state line may be treated as real property in one state and as personal property in the other state.
2. Revenue ruling on non-qualification for like-kind exchange treatment of an exchange involving property owned by the taxpayer that is used predominantly for personal purposes. Examples include a primary residence and vacation/second homes that are not rented or are not rented at market rates to others.

TAX ACCOUNTING

Jody Brewster, Tax Accounting Committee, (202) 371-7280, jbrewste@skadden.com

1. Guidance under Sections 162 and 263 regarding deduction and capitalization of expenditures for tangible property, including automatic procedures for changing methods of accounting thereunder.
2. Guidance under Section 199 regarding the new, narrower wage limitation enacted in the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA; P.L. 109-222).

3. Guidance under Section 199 providing more examples and illustrations of whether a taxpayer's production activities meet the "substantial in nature" facts and circumstances test.
4. Guidance implementing Notice 2004-18 regarding the treatment of capitalized transaction costs for intangibles.
5. Update and expand procedures for automatic accounting method changes.
6. Modify accounting method procedural guidance to: (a) allow taxpayers under examination more opportunity to file method changes; (b) provide guidance that Section 481(a) and audit protection apply to all accounting method changes for which a Form 3115 is required, unless expressly provided for otherwise in an official pronouncement (*e.g.*, change to discontinue the application of any of the methods under Section 460 where a taxpayer is not or no longer subject to Section 460; change to accrual method under Treas. Reg. § 1.448-1(h) for the first year a taxpayer is subject to Section 448); (c) allow taxpayers to obtain automatic consent to change the treatment of certain transactions as sales instead of as leases, or vice versa, and to implement the change with a Section 481(a) adjustment and audit protection in all cases, not only in "unusual and compelling" circumstances. (Such method changes could be granted with only "bare consent" where the IRS National Office does not rule as to the proper characterization of the transactions as sales or leases); (d) provide for a Section 481(a) adjustment for changes to discontinue the application of any methods under Section 460 where taxpayer is not subject to Section 460; (e) allow a change to the Inventory Price Index Computation (IPIC) method of Treas. Reg. § 1.472- 8(e)(3) to include an item definition change.
7. Reconsider Rev. Rul. 2005-42 regarding treatment of environmental remediation expenditures under Section 263A.
8. Reconsider Rev. Rul. 70-564 to allow the carryover of LIFO layers following Sections 351 and 721 transactions provided the new entity chooses to use a LIFO method.
9. Guidance under Section 263A regarding "negative" additional Section 263A adjustments.
10. Guidance on the tax treatment of vendor allowances under Section 471, including guidance permitting reasonable methods for allocating vendor allowances among items of inventory.
11. Guidance on the terms and conditions for method changes made pursuant to Section 381, including whether LIFO changes should be made on a cut-off basis.
12. Guidance is needed to address the application of Section 453A to contingent payment installment sales.

13. Reconsider Rev. Ruls. 71-234 and 77-480 to allow use of the rolling average cost of inventory to the extent it approximates actual cost.
14. Guidance is needed under the dollar-value last-in, first-out (LIFO) inventory method for taxpayers that define LIFO items based on components of cost.
15. Guidance is needed to clarify the scope of the IPIC pooling rules, including whether purchased for resale items may be contained in the same pool as manufactured items and whether a LIFO election must be expanded to include all items within an IPIC pool.
16. The proposed regulations relating to corporate estimated tax under Section 6655 should be finalized.