



Section of Taxation

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June 18, 2007

Hon. Eric Solomon  
Assistant Secretary (Tax Policy)  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Hon. Donald L. Korb  
Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Re: Recommendations for 2007-2008 Guidance Priority List

Dear Assistant Secretary Solomon and Chief Counsel Korb:

The American Bar Association Section of Taxation welcomes the opportunity to provide recommendations of guidance for inclusion in the 2007-2008 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 of Taxation. 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:

Affiliated and Related Corporations  
Capital Recovery and Leasing  
Corporate Tax  
Employee Benefits  
Energy and Environmental Taxes  
Exempt Organizations

Low Income Taxpayers  
Partnerships and LLCs  
S Corporations  
Standards of Tax Practice  
Tax Accounting

Sincerely,

Susan P. Serota  
Chair, Section of Taxation

Enclosure

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## **RECOMMENDATIONS FOR THE 2007-2008 TREASURY-IRS GUIDANCE PRIORITY LIST**

As requested in Notice 2007-41, 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 2007-2008. 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.

### **Affiliated and Related Corporations**

Victor Penico, Affiliated and Related Corporations Committee, (415) 783-6363, [vpenco@deloitte.com](mailto:vpenco@deloitte.com)

1. Regulations revising section 1.1502-13(g) regarding the treatment of intercompany obligations to make the rules more administrable and to clarify their operation in nonrecognition transactions.
2. Guidance under section 1.1502-76(b)(2)(B) (the "next day rule") regarding whether the payment for compensatory stock or options (or similar items) at closing is properly allocable to the portion of S's day after the event resulting in S becoming (or ceasing to be) a member of a consolidated group if the allocation is consistently applied by the affected parties.
3. Guidance under section 1502 establishing methods that members of consolidated groups that have cancellation of indebtedness income excluded from gross income before the effective date of section 1.1502-28 may use in applying section 108(b).
4. Guidance under section 1.1502-13(j)(2) clarifying that there is no successor person in a transaction in which substantially all of the assets of the transferor are transferred to members in a complete liquidation if there is no member that succeeds to the attributes of the transferor under section 381.
5. Guidance addressing the application of the section 1.1502-33(a)(2) anti-duplication principle to the interaction of section 304 and section 1.1502-33.

### **Capital Recovery and Leasing**

Kevin D. Anderson, Capital Recovery and Leasing Committee, (301) 634-0222, [kdanderson@bdo.com](mailto:kdanderson@bdo.com)

1. Definition of a "geothermal facility" for purposes of section 45. In order to qualify for the section 45 credit, a geothermal facility must be "originally" placed in service after October 22, 2004. An 80/20 test applies (i.e., more than 80% of the fair market value of the property must be "new" property) to be treated as newly placed in service. The question is what equipment is included in the definition of a geothermal facility (i.e., does it include the pipes in the ground?). The IRS provided similar authority for open-loop biomass facilities in 2006. (Notice 2006-88)

2. Guidance on the issues under Subchapter K for partnerships claiming the credit under section 45.
3. Guidance on making the election under section 179C.
4. Proposed regulations under section 263(a) regarding the treatment of capitalized transaction costs. (Carried over from 2006-2007 Priority Guidance Plan, but not expected to be completed prior to the end of the current plan year.)
5. Guidance under section 470 in areas other than those involving pass-through entities.

### **Corporate Tax**

Julie Divola , Corporate Tax Committee, (415) 983-7446, [julie.divola@pillsburylaw.com](mailto:julie.divola@pillsburylaw.com)

1. Guidance regarding the recovery of basis in redemptions of corporate stock governed by section 301. A notice was published in the Federal Register on April 19, 2006.
2. Guidance regarding the scope of the alter ego doctrine.
3. Regulations enabling elections for certain transactions under section 336(e).
4. Regulations revising section 1.355-3 regarding the active trade or business requirement. Interim guidance clarifying the effective date of proposed regulations was published on May 8, 2007.
5. Regulations regarding predecessors and successors under section 355(e). Proposed regulations were published on November 22, 2004.
6. Guidance under section 362(e) regarding the importation or duplication of losses. Proposed regulations were published October 23, 2006.
7. Regulations regarding transactions involving the transfer or receipt of no net equity value. Proposed regulations were published on March 10, 2005.
8. Guidance on the characterization of distributions made prior to or in connection with reorganizations.
9. Regulations revising section 1.368-2(k) regarding transfers of assets after reorganizations. Proposed regulations were published on August 18, 2004. Additional 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.
10. Guidance regarding the scope of section 368(a)(1)(D) and the relevance of the “deemed share” issued in connection with transactions that otherwise do not

involve stock consideration. Proposed and temporary regulations were published on December 19, 2006.

11. Regulations under section 368(a)(1)(F). Proposed regulations were published on August 12, 2004.
12. 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.
13. Guidance regarding the transfer of treasury stock to a corporation controlled by the transferor. See Rev. Rul. 2006-2, revoking Rev. Rul. 74-503.
14. 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.
15. Guidance on the effect of *Coltec Industries Inc. v. United States*, 454 F.3d 1340 (Fed. Cir. 2006) on routine business transactions that involve additional restructuring in order to obtain more favorable tax consequences.
16. Guidance under section 382(l)(3)(C) regarding the extent to which fluctuations in the relative fair market values of different classes of stock are not taken into account in determining whether there is an ownership change of a loss corporation for purposes of section 382.
17. Guidance under section 384 clarifying whether the approach used under Notice 2003-65 for purposes of section 382 must also be used for purposes of section 384 when both section 382 and section 384 apply as a result of the same transaction.
18. Guidance under section 382(h)(6) clarifying that cancellation of indebtedness (COD) income excluded from gross income under section 108(a) is taken into account in determining the amount of a loss corporation's net unrealized built-in gain (NUBIG) or loss (NUBIL) under Notice 2003-65.

### **Employee Benefits**

David A. Mustone, Employee Benefits Committee, (703) 714-7509, [dmustone@hunton.com](mailto:dmustone@hunton.com)

1. Guidance on the elimination of Schedule P from Form 5500 and impact on starting statute of limitations period.
2. Update the 402(f) Notice.

3. Guidance on 409A Taxes, Income Inclusion and Penalties
4. Guidance on cafeteria plan relationship of the use it or lose it principle with the new rollover to HSAs and guidance on implementing rollovers to HSAs
5. Guidance on discretionary v. remedial v. integral amendment issues under the Pension Protection Act of 2006. Specific clarification is needed to resolve when required versus discretionary amendments need to be adopted, particularly in light of PPA's apparent extension of deadlines for plan amendments. Relief may also be needed where record keepers implemented changes believing them to be required for plans when the plan sponsor believed such changes were discretionary and for which no amendment was made.
6. Guidance on the intersection of Minimum Distribution Regulations, Pension Protection Act and Nonspousal Beneficiaries and Trust beneficiaries. Specifically, clarification is needed on the interrelationship of qualified plans, individual retirement plans, Code section 401(a)(9)(B)(iii)(II) and the post death required minimum distribution rules in light of the new provision on non-spousal beneficiaries and for trust beneficiaries.
7. Guidance on cafeteria plan reimbursement of health insurance premiums other than the employer's health plan premiums. Guidance should also be issued addressing whether premiums for accident and health coverage that is not part of the employer's employee benefit plans can be reimbursed under Code section 125.
8. Guidance on COBRA premium calculation for DC health plans and COBRA benefits for non-FSA DC health plans. Specifically, clarification is needed on health reimbursement accounts ("HRAs") and operational guidance regarding the application of COBRA to health FSAs, HRAs, including premium calculations for HRAs, and details on how COBRA coverage operates where multiple qualified beneficiaries elect accounts.
9. Guidance on funding under the PPA.
10. Guidance on Cash Balance Plans after PPA.
11. Guidance on Qualified Automatic Contributions.
12. Guidance regarding stock rights on publicly traded partnerships under Code section 409A
13. Provision of a section 409A correction program

## **Energy and Environmental Taxes**

Robert A. Swiech, Energy and Environmental Taxes Committee, (281) 497-5703, [rswiech@aol.com](mailto:rswiech@aol.com)

1. Update and coordinate the oil and gas depletion regulations under sections 613A(c)(7)(D) and 704(b) & (c).
2. Publish guidance that geological works incurred solely to site a well remain deductible under Reg. section 1.612-4 (not amortized under section 167(h)).
3. Guidance on how to make an election under section 179C.

## **Exempt Organizations**

Michael A. Clark, Exempt Organizations Committee, (312) 853-2173, [mclark@sidley.com](mailto:mclark@sidley.com)

### *Pension Protection Act of 2006 Related Guidance*

1. Section 4966 and Donor Advised Fund Penalties. Guidance regarding new section 4966 of the Internal Revenue Code, including guidance as to the definition of a “donor advised fund” under section 4966(d)(2)(A) of the Code, the exceptions to donor advised fund status under section 4966(d)(2)(B) and (C) of the Code, and the scope of “taxable distributions” under section 4966(c) of the Code.
2. Definition of “Functionally Integrated Type III Supporting Organization.” Guidance regarding the requirements for qualification as a “functionally integrated type III supporting organization” under section 4943(f)(5) of the Code for purposes of the qualifying distribution rules under section 4942 of the Code and the excess business holding rules of Code section 4943.
3. Section 4958 Excess Benefit Transaction Taxes Applied to Supporting Organizations and Donor Advised Funds. Guidance regarding section 4958(c)(2) to (3) and (f) and its application to supporting organizations and donor advised funds, including defining “substantial contributors” and “disqualified persons” with respect to supporting organizations which support the charitable and educational programs of section 501(c)(4), (5), or (6) organizations.
4. Section 509(a)(3) Supporting Organizations. Guidance regarding section 509(f) of the Code, including guidance as to the requirements which charitable trusts must meet in order to satisfy the “responsiveness” requirement of Reg. § 1.509(a)-4(i)(2).
5. Section 4967 Excise Tax on “Incidental Benefit.” Guidance regarding the application of section 4967 of the Code, including defining the “incidental benefits” which provide the occasion for and measure of the tax.

### *Other Needed Guidance*

6. 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.
7. Simplification of Public Support Test. Simplify 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.
8. 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.
9. 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).
10. Exemption Procedures. Update (and perhaps consolidate) the revenue procedures regarding exemption applications (Rev. Proc. 90-27), foundation status determinations (Rev. Proc. 76-34), and group exemptions (Rev. Proc. 80-27).
11. 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.
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. 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 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.
14. Program-Related Investments. Guidance regarding the definition and scope of program-related investments of private foundations.

15. 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).

### **Low Income Taxpayers**

Joseph Barry Schmmel, Low Income Taxpayers Committee, (305) 670-0201, [jschimmel.aba@adelphia.net](mailto:jschimmel.aba@adelphia.net)

1. Revise section 1.6015-7 and, if necessary, section 1.6015-4, to reflect amendments to 6015(e) permitting Tax Court consideration of stand-alone equitable relief.
2. Revise sections 1.152-1 and 1.152-2 to implement the recommendations contained in the Section of Taxation's Report on the Uniform Definition of a Child, specifically by providing or modifying the definitions of "foster child," "eligible foster child," relationships of affinity (e.g., step-child) upon divorce or death of a spouse, "niece," "nephew," "in-law," "taxpayer," and "in violation of local law."
3. Proposed regulations under the partial payment requirements for offers-in-compromise discussed in Notice 2006-68.

### **Partnerships and LLCs**

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

1. Guidance on whether the principles of Rev. Rul. 99-6 apply in situations beyond those described in the ruling. Specifically, guidance is needed on the treatment of the purchasing partner under sections 704(c)(1)(B) and 737; the effect of liabilities when the liabilities are not shared pro rata by the partners; and the extent to which the principles of Rev. Rul. 99-6 apply to nontaxable acquisitions of partnership interests, such as acquisitions resulting from corporate mergers.
2. Guidance is needed on the application of section 743(b) and section 734(b) to securities partnerships that aggregate under Reg. section 1.704-3(e). This guidance should discuss the impact of the adjustment on individual partners' revaluation accounts.
3. Guidance is needed on the application of Reg. section 1.704-3(e) to certain securities partnerships. Specifically, guidance is needed to expand the availability of the securities aggregation rule to partnerships that originally satisfied the requirements of the rule, but that no longer satisfy such requirements because, for example, they have diversified their businesses.

4. Guidance is needed to clarify the impact of section 704(c) amounts on the allocation of creditable foreign tax expenditures (“CFTEs”) under the final section 704(b) regulations. Specifically, guidance is needed to clarify whether and how allocations under the various section 704(c) methods are taken into account in determining separate CFTE categories and whether the CFTE safe harbor applies.
5. 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 address the interaction of Prop. Reg. section 1.1248-8 with section 751(a).
6. Guidance is needed on various issues arising under section 704(c), including (i) how to apply the “second-tier” nonrecourse debt allocations under Reg. section 1.752-3(a)(2) when multiple partners share “reverse” section 704(c) on a single property with a single debt, and (ii) whether a “book down” reduces potential 704(c)(1)(B) gain in situations in which the contributed property later appreciates.
7. Guidance is needed on section 752 recourse debt allocations (i) under 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) (interpreting Reg. section 1.752-4(b)(2)(iii)), 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 the second issue. T.D. 8237 (53 FR 53140; December 30, 1988)). With respect to the second issue, such guidance might also reconsider the rule of Reg. section 1.752-4(b)(2)(i) (second sentence) (allocating debt equally among partners where a party related to each of them is the lender) that is often a trap for the unwary taxpayer and practitioner.

### **S Corporations**

Carol Kulish Harvey, S Corporations Committee, (202)378-5246, [ckulish@deloitte.com](mailto:ckulish@deloitte.com)

1. Guidance regarding form filing requirements and employer identification numbers in the case of certain F reorganizations involving S corporations and disregarded entities (including qualified subchapter S subsidiaries).

### **Standards of Tax Practice**

Kathryn Keneally, Standard of Tax Practice Committee, (212)318-3213, [kkeneally@fulbright.com](mailto:kkeneally@fulbright.com)

1. Proposed Amendments to Circular 230
2. Review of Circular 230 Section 10.35

## **Tax Accounting**

Jody J. Brewster, Tax Accounting Committee, (202) 371-7280, [jody.brewster@skadden.com](mailto:jody.brewster@skadden.com)

1. Regulations under sections 162 and 263 regarding the deduction and capitalization of expenditures for tangible assets.
2. Guidance under section 446(e) revising and improving the procedures for obtaining consent to change accounting methods.
3. Proposed regulations under section 263(a) regarding the treatment of capitalized transaction costs.
4. Guidance under section 263(a) regarding the deduction and capitalization of costs for maintenance of network assets.
5. Guidance regarding the application of statistical sampling procedures for purposes of section 199.
6. Guidance under section 199 regarding activities by a taxpayer that constitute production that is substantial in nature.
7. Regulations under section 199 permitting pass-through entities to calculate qualified production activities at the entity level without regard to the entity's size.
8. Guidance under section 263A regarding the definition of mixed service cost departments.
9. Guidance under section 118 regarding the characterization of amounts as nontaxable contributions to capital.
10. Guidance on the tax treatment of vendor allowances.
11. Guidance under section 263A regarding whether "negative" additional section 263A costs are taken into account under section 1.263A-1(d)(4).
12. Regulations under sections 381(c)(4) and (5) regarding changes in method of accounting that conform the terms and conditions to those applicable to non-automatic accounting method changes.
13. Revenue procedure under section 446 regarding changes in method of accounting for rotatable spare parts.
14. Update of Rev. Proc. 2002-9 regarding automatic changes in methods of accounting.

15. Guidance under section 460 on contracts that qualify for the rules for home construction contracts.
16. Guidance regarding the permissibility of a moving average cost method for valuing inventory.
17. Guidance under section 1.472-8 regarding the inventory price index computation (IPIC) method.
18. Guidance under section 468B regarding the tax treatment of a single-claimant qualified settlement fund.
19. Regulations under section 468B regarding escrow accounts and other funds used in like-kind exchanges. Proposed regulations were published on February 7, 2006.
20. Guidance under section 453A regarding the application of the interest charge rules to contingent payment sales.
21. Guidance under section 174 regarding changes in method of accounting from an impermissible method.
22. Regulations under sections 195, 248 and 709, as amended by the American Jobs Creation Act of 2004, regarding the elections to amortize start-up and organizational expenditures.