RECOMMENDATIONS FOR THE 2000
TREASURY-IRS GUIDANCE PRIORITY LIST

March 9, 2000

As requested in Notice 2000-10, 2000-5 I.R.B. ___, members of the committees of the Section of Taxation of the American Bar Association have identified the following tax issues that should be addressed through regulations, rulings, and other published guidance in 2000. In each case, the contact person or persons and the cognizant committee or committees are stated.

CONSOLIDATED RETURNS

1. Guidance on the application of section 172(f) (specified liability losses) in the consolidated return context. [LOW PRIORITY]

   Andrew J. Dubroff - Affiliated & Related Corporations

2. Guidance on consolidated section 108(b) attribute reduction. [HIGH PRIORITY]

   Andrew J. Dubroff - Affiliated & Related Corporations

3. Guidance regarding the interaction of Reg. § 1.1502-13(g) (intercompany debt) and section 338. [MEDIUM PRIORITY]

   Andrew J. Dubroff - Affiliated & Related Corporations

4. Modification and finalization of the proposed intercompany debt regulations. [HIGH PRIORITY]

   Andrew J. Dubroff - Affiliated & Related Corporations

5. Guidance on consolidated alternative minimum tax. [MEDIUM PRIORITY]

   Andrew J. Dubroff - Affiliated & Related Corporations

6. Guidance on section 358(g) basis adjustments following section 355 distributions. [LOW PRIORITY]

   Andrew J. Dubroff - Affiliated & Related Corporations
7. Coordination of Reg. § 1.1502-13(f)(6) and Proposed Reg. § 1.1032-3. [MEDIUM PRIORITY]

Andrew J. Dubroff - Affiliated & Related Corporations

8. Guidance regarding the application of section 267(a)/(e) to transactions between partnerships and controlling consolidated group members. [HIGH PRIORITY]

Andrew J. Dubroff - Affiliated & Related Corporations


Andrew J. Dubroff - Affiliated & Related Corporations

CORPORATIONS AND THEIR SHAREHOLDERS

1. Guidance under section 163(1) on the effect of a contingency on the issuer’s right to pay debt with stock. [MEDIUM PRIORITY]

Joan C. Arnold - U. S. Activities of Foreigners and Tax Treaties

2. Finalization of nonqualified preferred stock. [MEDIUM PRIORITY]

Jasper L. Cummings, Jr. - Corporate Tax

3. Finalizing the regulations under section 368 regarding the effect of redemptions and extraordinary dividends on continuity of interest. [HIGH PRIORITY]

Jasper L. Cummings, Jr. - Corporate Tax

4. Reconsideration of ruling guidelines in Rev. Proc. 77-037 and Rev. Proc. 86-42 related to the continuity of interest and continuity of business enterprise requirements for a corporate reorganization under section 368. [MEDIUM PRIORITY]

Jasper L. Cummings, Jr. - Corporate Tax

5. Guidance under section 368 regarding mergers of a corporation with a disregarded entity. [HIGH PRIORITY]

Jasper L. Cummings, Jr. - Corporate Tax
6. Guidance under section 368 regarding the effect of a stock redemption program on continuity of interest. [MEDIUM PRIORITY]

   Jasper L. Cummings, Jr. - Corporate Tax

7. Finalizing the regulations under section 1032. [HIGH PRIORITY]

   Jasper L. Cummings, Jr. - Corporate Tax

8. Guidance on application of the substantially all requirement of section 368(a)(1)(C) when proceeds of an asset sale are used to pay down debt of acquiring, are distributed to target’s shareholders pre-merger, or are distributed to acquiring’s shareholders post-merger. [MEDIUM PRIORITY]

   Benjamin G. Wells - Corporate Tax


   Benjamin G. Wells - Corporate Tax

10. Guidance confirming that a section 368(a)(2)(E) reorganization followed by an upstream merger will, if integrated, be treated as an “A” reorganization. [MEDIUM PRIORITY]

   Benjamin G. Wells - Corporate Tax

EMPLOYEE BENEFITS

A. RETIREMENT BENEFITS


   Substantial uncertainty exists as to the qualification requirements for cash balance plans. Among the issues that require immediate guidance are the application of the anti-cutback rules, the prohibition on back loading accruals, and age-related accruals.

   Pamela Baker - Employee Benefits

2. Guidance under section 416(d)(6) allowing relief under anti-cutback rules in common plan transactions.

   Pamela Baker - Employee Benefits
3. Guidance for 401(k) plans as to “same desk rules.”

Pamela Baker - Employee Benefits

4. Revision to existing ESOP regulations.

Pamela Baker - Employee Benefits

5. Revised master and prototype program procedures and LRM's for qualified plans.

Pamela Baker - Employee Benefits


Because of changes to the definition of “United States person,” under SBJPA many employee benefit plan trusts intended to be tax-exempt may have inadvertently become taxable as foreign trusts. A grandfather election was not widely publicized and the election period has apparently expired.

Pamela Baker - Employee Benefits

7. Regulations on the applicability of controlled group rules to tax-exempt entities, government plans, and non-stock corporations.

Pamela Baker - Employee Benefits

8. Guidance permitting service providers to participate (on behalf of their clients) in the Tax Sheltered Annuity Voluntary Correction Program.

Pamela Baker - Employee Benefits

9. Guidance concerning the proper benefits treatment of leased employees, both by the leasing companies and their clients.

Pamela Baker - Employee Benefits

10. Finalization of regulations relating to cashouts of benefits.

Pamela Baker - Employee Benefits

11. Finalization of regulations under section 401(a)(9), including clarification of the effect of naming a trust as beneficiary.

Pamela Baker - Employee Benefits
12. Guidance relating to the definition of highly compensated employee, especially in mergers and acquisitions.

   *Pamela Baker - Employee Benefits*

13. Revenue procedure regarding the determination letter program for plan amendments relating to recent legislation.

   *Pamela Baker - Employee Benefits*


   Such guidance should reconsider the constructive receipt position under Rev. Proc. 71-19 regarding nonqualified deferred compensation.

   *Pamela Baker - Employee Benefits*

B. HEALTH CARE, OTHER BENEFITS, AND EMPLOYMENT TAXES

1. Guidance on the applicability of employment taxes to employee stock purchase plans and incentive stock options.

   *Pamela Baker - Employee Benefits*

2. Issuance of proposed regulations under section 125 consolidating existing cafeteria plan guidance, and addressing change of status issues.

   *Pamela Baker - Employee Benefits*


   Under section 132(f), resolution is needed regarding whether a forfeiture requirement applies to salary reduction arrangements, and whether cash reimbursement of transit fare expenses is permissible.

   *Pamela Baker - Employee Benefits*

4. Guidance on the applicability of section 83 to options on other-than-employer stock.

   *Pamela Baker - Employee Benefits*
5. Guidance concerning the meaning of “severance pay” for purposes of section 457(e)(11)(A)(i).

   Pamela Baker - Employee Benefits

6. Proposed regulations under section 9802 explaining HIPAA’s nondiscrimination rules.

   Pamela Baker - Employee Benefits

7. Guidance on COBRA issues in mergers and acquisitions.

   Pamela Baker - Employee Benefits

8. Finalization of regulations on applicability of deduction rules to stock of parent granted to employees of a subsidiary. The ramifications under section 83 also need to be addressed.

   Pamela Baker - Employee Benefits

EXEMPT ORGANIZATIONS

1. Finalization of regulations under section 4958 other than Proposed Reg. § 53.4958-5.

   The proposed regulations have left a significant number of questions unanswered regarding “intermediate sanctions” in the case of public charities and organizations described in section 501(c)(4).

   Robert H. M. Ferguson - Exempt Organizations

2. Revisions to Proposed Reg. § 53.4958-5 with reissuance in proposed form.

   At the present time, many organizations that are subject to section 4958 are putting long-term employment relationships and similar relationships in place without the assurance that such action will be in compliance with the rules that ultimately are issued. Even though the regulations will apply only prospectively, it would be extremely helpful for the participants to know that they are playing by the rules.

   Robert H. M. Ferguson - Exempt Organizations

3. Guidance for section 501(c)(4) and section 527 organizations with respect to implications of issue advocacy and political intervention.

   Robert H. M. Ferguson - Exempt Organizations
4. Guidance under section 507 illustrating the rules that apply to terminations of private foundations.

   Such guidance would eliminate the need for wasteful and time-consuming letter rulings in routine cases.

   Robert H. M. Ferguson - Exempt Organizations

5. Guidance on Internet activities of tax exempt organizations.

   This guidance should address various exemptions and unrelated business issues arising from the Internet activities.

   Robert H. M. Ferguson - Exempt Organizations

6. Guidance clarifying and simplifying the procedures governing grants made to foreign charities by U. S. private foundations.

   Robert H. M. Ferguson - Exempt Organizations

7. Guidance revealing the Service’s post-litigation position on affinity card and mailing list arrangements.

   Robert H. M. Ferguson - Exempt Organizations

8. Guidance formalizing the criteria to be used in determining private foundation/public charity status of donor advised funds.

   Robert H. M. Ferguson - Exempt Organizations

FINANCIAL INSTITUTIONS AND PRODUCTS

1. Guidance on the deductibility of loan origination expenses by lenders. [HIGH PRIORITY]

   Taxpayers have been waiting for IRS guidance since Announcement 93-60 suspended IRS processing of Forms 3115 on loan origination expenses. In light of the Tax Court decision in the PNC case in June 1998, there is a starting point for clarifying the particular categories of expenses that the Service believes are subject to capitalization.

   Henry C. Ruempler - Banking and Savings Institutions
2. Guidance on which pre-acquisition expenses are deductible, including the treatment of pre-expansion business expenses in cases where there is no acquisition. **[HIGH PRIORITY]**

Neither the Tax Court decision in the *FMR* case nor Technical Advice Memorandum 9825005 provide clear guidance on the circumstances in which expenses incurred before a merger or business expansion are deductible. The Service should issue guidance on the extent to which section 195 applies to costs incurred by taxpayers in the acquisition context and in traditional business expansion cases.

*Henry C. Ruempler - Banking and Savings Institutions*

3. Regulations regarding FASITs as enacted in 1996, including the topics specifically identified in the legislative history as needing IRS guidance.

The effective date of FASITs was delayed until September 1997, so that the Service would have time to issue regulations, but none have been issued. While a few FASITs have been issued, the lack of regulations has deterred many other potential issuers from engaging in transactions that were authorized under the statute.

*Henry C. Ruempler - Banking and Savings Institutions*

4. Guidance on when mortgage servicing contracts are separate assets for amortization purposes under section 167(f)(3).

Proposed regulations on the amortization of mortgage servicing rights are part of the overall section 197 regulations on amortization of intangibles. The proposed regulations under section 167 are not interrelated with the existing Reg. § 1.167(a)-8.

*Henry C. Ruempler - Banking and Savings Institutions*

5. Guidance on scope of “disqualified person restrictions” under Reg. § 1.1031(k)-1(k) applicable to banks. **[MEDIUM PRIORITY]**

Guidance is needed to confirm that banks (within the meaning of section 585(a)(2)) may act as qualified intermediaries, holders of qualified escrow accounts, or trustees of qualified trusts for a taxpayer in connection with like-kind exchanges under section 1031, notwithstanding that an affiliated entity of the bank may act as the taxpayer’s investment banker or broker. As a result of recently enacted legislation permitting consolidation of financial services offered by commonly-controlled entities, affiliates of banks have been, or will be, performing investment banking or brokerage services as “routine financial services provided by a financial institution.” Under Reg. § 1.1031(k)-1(k)
(promulgated in 1991 before the relaxation of rules governing activities of banks), it is not clear that the “routine financial services” exception is applicable to an entity which (through an affiliate) acts as a taxpayer’s “investment banker or broker,” activities which (among others) are specifically proscribed by Reg. § 1.1031(k)-1(k)(2).

Henry C. Ruemplier - Banking and Savings Institutions
David Shechtman - Sales, Exchanges, and Basis

GENERAL TAX ISSUES

1. Guidance on section 121 as to definitions of residence and other new terms in the statute or the legislative history.

Annette Nellen - Sale, Exchange & Basis

2. Guidance on the tax treatment of reverse exchanges under section 1031.

Guidance is needed to assist taxpayers in identifying the fundamental limitations applicable to so-called reverse exchanges, including (i) to what extent a property can be “parked” with a qualified intermediary without “constructive” or agency issues adversely affecting the exchange, (ii) the permitted duration of the reverse exchanges, i.e., how soon after the receipt of the replacement property the disposition of the relinquished property must occur, and (iii) whether the taxpayer must cease depreciating the relinquished property after the receipt of the replacement property during the period the properties are held simultaneously.

Ronald P. Platner - Sales, Exchange & Basis


New regulations under section 1202 need to be issued on definitions of active business, qualified trade or business, and working capital needs.

Lawrence E. Crouch - Sales, Exchange & Basis

4. Issuance of regulations under section 1045 on allowing for rollover of gain on qualified small business stock.

Lawrence E. Crouch - Sales, Exchange & Basis
GIFTS, ESTATES, AND TRUSTS

1. Guidance under section 2652 following Estate of Mellinger, 112 T.C. No. 4 (1999), for making “reverse QTIP elections.”

Because of the all-or-nothing election required under section 2652(a)(3), two separate QTIP trusts are often created, and the marital deduction might be jeopardized under the principles of Estate of Mellinger. If no guidance is furnished in this area, the election that was designed to avoid transfer tax can now create transfer tax.

Catherine V. Hughes - Estate and Gift Taxes

2. Finalized regulations under section 2601 regarding modifications of GST-tax grandfathered trusts.

Douglas L. Siegler - Estate & Gift Taxes

3. Issuance of regulations allowing automatic extension of the due date for Form 706.

Beverly R. Budin - Estate & Gift Taxes

4. Updating forms for charitable remainder trusts.

Derry W. Swanger - Estate & Gift Taxes

5. Guidance on equitable adjustments and distribution of capital gain to income beneficiary.

Such guidance would clarify issues that will arise under the new principal and income legislation.

Mary Ann Mancini - Fiduciary Income Tax


The question is whether equitable adjustments cause a grandfathered trust to lose its grandfathered status.

Mary Ann Mancini - Fiduciary Income Tax
INSURANCE COMPANIES AND PRODUCTS

1. Guidance under sections 72 and 7702 relating to long-term care insurance benefit payments that accelerate a life insurance contract’s death benefit. [LOW PRIORITY]

   Taxpayers at present have no guidance on what adjustment is necessary under section 7702(f)(7)(A) to reflect long-term care insurance benefit payments that “accelerate” payment of a life insurance contract’s death benefit. At present it is unclear as to the effect of such benefit payments on premiums paid under section 7702(f)(1) and the investment in such contracts under section 72(e)(6). Likewise, it is unclear whether charges assessed against the contract’s cash surrender value to fund the payment of the benefit results in acceleration causing a deemed distribution from the contract under section 72.

   John T. Adney - Insurance Companies
   Craig R. Springfield - Insurance Companies

2. Guidance under section 817A regarding modified guaranteed contracts. [LOW PRIORITY]

   To date no regulations have been issued on section 817A regarding the tax treatment of modified guaranteed contracts or the method of calculation of the deductible amount of the reserves for such contracts. Notice 97-32 does not resolve the tax reserve issues raised by these contracts.

   John T. Adney - Insurance Companies
   Irene Price - Insurance Companies

INTERNATIONAL ISSUES

A. INBOUND TRANSACTIONS

1. Guidance under sections 871(h)(3)(B) and 881(c)(3)(B) on portfolio interest rules for loans made by partnerships. [HIGH PRIORITY]

   The relationship between a partnership as defined under section 7701(a)(30) and portfolio interest under sections 871(h)(3)(B) and 881(c)(3)(B) is not being answered by regulations. Thus, when a partnership with foreign partners is the lender and owns (for example) 10% or more of the total combined voting power of a domestic corporate borrower, it is unclear whether any
otherwise qualified foreign partner can take advantage of the portfolio interest exception even if it holds (for example) less than 1% of the lender partnership’s capital and profits interests and would not be a 10% foreign shareholder if it made the loan directly.

Dean Gordanier - U. S. Activities of Foreigners and Tax Treaties

2. Guidance under FIRPTA rules with respect to United States real property holding company stock held by partnerships. [MEDIUM PRIORITY]

The existing Reg. § 1.897-1(c)(2)(iii) and proposed regulations under section 1445 do not address the tax treatment of stock held by a partnership. Therefore, it is unclear whether (for example) a less than 1% partner of a partnership that owns 10% of the outstanding stock of a publicly traded United States real property holding company will be subject to tax under the FIRPTA rules when the partnership sells the stock.

Dean Gordanier - U. S. Activities of Foreigners and Tax Treaties

B. OUTBOUND TRANSACTIONS

1. Guidance on the overlap of the section 338 qualified stock purchase and C reorganization provisions when the transaction is followed by immediate liquidation. [MEDIUM PRIORITY]

Revenue Rulings 67-274 and 90-95 do not clearly address the tax treatment where shareholders of Corporation X exchange all of the stock of Corporation X for the voting stock of Corporation Y plus $10 and immediately thereafter as part of the plan Corporation X is liquidated into Corporation Y.

Joan C. Arnold - U. S. Activities of Foreigners and Tax Treaties

PARTNERSHIPS

1. Guidance under section 465 as to at-risk amount for guarantors who have no right of reimbursement. [LOW PRIORITY]

Proposed Reg. § 1.465-6(d) provides that “if a taxpayer guarantees repayment of an amount borrowed by another person (primary or obligor) for use in an activity, the guarantee shall not increase the taxpayer’s amount at risk.” Many tax professionals believe that this section should be interpreted as not applying when the guarantor has no right to be reimbursed should his guarantee be called. In other words, a guarantor who is ultimately responsible for payment of the guaranteed obligation if
the partnership is unable to pay is at-risk under the principles of section 465. This issue arises frequently, and it would be very helpful for the Service to publish a ruling confirming the above conclusion.

Charles Levun – Partnerships

2. Guidance under section 1031 involving partnerships. [MEDIUM PRIORITY]

Ronald P. Platner - Sales, Exchange, and Basis

3. Guidance on the application or nonapplication of section 736(b) to limited liability companies. [HIGH PRIORITY]

For the professional firm, one concern about conversion to a limited liability company is the tax treatment for retiring partners. Until the section 736(b) issue on goodwill is resolved, many professional firms are reluctant to convert from partnership to limited liability company status.

Charles R. Levun - Partnerships

4. Guidance regarding compensatory options in the partnership/LLC context. [HIGH PRIORITY]

Pass through entities, including partnerships and LLCs, may issue warrants and options to acquire capital and/or profits interests in the entity in a variety of circumstances. For example, an entity may issue such options to an employee of the entity as additional compensation. Similarly, an entity may issue warrants to a lender as additional consideration for the loan. In each case, there are a number of unresolved tax issues, such as the tax consequences, if any, to the issuer, its partners or members, and the recipient when the warrants are issued, when the warrants are exercised or expire, or if the entity incorporates and the warrant-holder receives warrants to acquire stock of the corporation. Because the use of such warrants is becoming more prevalent and the tax consequences might be significant, guidance is needed. Because of the large number of possible factual settings, appropriate guidance might take the form of a revenue ruling or rulings with factual examples and safe havens covering the most common situations.

Charles R. Levun - Partnerships
Steven G. Frost - Partnerships
TAX EXEMPT BONDS

1. Issuance of proposed regulations under section 141 relating to “refunding issues.”

   Refinancing of outstanding tax exempt bonds is a daily occurrence nationwide. The release of proposed regulations is needed because the only authority on the topic today is the proposed regulations issued in 1994, which have not been revised to reflect the final private activity bond regulations issued in 1997 or other considerations.

   Milton S. Wakschlag - Tax Exempt Financing

2. Issuance of proposed regulations under section 141 relating to allocation and accounting rules.

   Every bond issue requires an exact determination as to how its proceeds are being spent, since the tax law on what does and what does not qualify for financing is very detailed and unforgiving. Proposed regulations on the allocation of proceeds to property, the rules for mixed use facilities, the allocation of proceeds to common areas, and the allocation of proceeds among bond issues and other sources of funds were issued in 1994 and have not been revised to reflect the final private activity bond regulations issued in 1997 or other considerations.

   Milton S. Wakschlag - Tax Exempt Financing

3. Issuance of proposed regulations under section 145(b)(2) relating to outstanding tax exempt nonhospital bonds.

   Charitable hospital organizations must respond to rapid changes in the health care industry through affiliations, mergers, joint ventures, disaffiliations, purchases, sales of assets, and other strategic initiatives. These transactions can result in the retroactive loss of tax-exemption for any outstanding nonhospital bonds (even implicating bonds issued for members of a health care system that has long since been dismantled), if they cause the $150,000,000 cap on such bonds to be exceeded. Although this cap was lifted in 1997, it still applies to refunding bonds, working capital bonds, and bonds issued before August 1997, which continues to haunt hospital reorganizations.

   Milton S. Wakschlag - Tax Exempt Financing

Although arbitrage rules for bond interest rate hedging have been well developed for some time, the treatment of asset hedges (i.e., hedges of investments made with bond proceeds), which is equally important in arbitrage analysis, has been left unclear. Amendments to the arbitrage regulations issued in May 1997 stated that “comments are requested relating to the proper treatment of asset hedges for purposes of section 148,” but no action has yet been taken.

Milton S. Wakschlag - Tax Exempt Financing

5. Finalization of Temporary Reg. § 1.141-7T and -8T regarding special rules for output facilities.

Temporary/proposed regulations on the private use of output facilities were issued in January 1998 “with the expectation the Treasury and the IRS will reexamine them in light of new developments within the next three years.” Although the political firestorms over utility deregulation and the continued role of municipal utilities in a deregulated market have not subsided, guidance under current law is needed for bond issuance in this light-volume sector of the industry.

Milton S. Wakschlag - Tax Exempt Financing

6. Finalization of Proposed Reg. § 1.148-1(e) relating to investment-type property.

Proposed regulations on this topic appeared in 1999, raising more questions than they answered. Aside from the prepayment of pension obligations, which seems to be one of the primary concerns of the regulations, guidance is needed on financing advance payments for services and supplies and the prepayment of service and supply contracts during their term.

Milton S. Wakschlag - Tax Exempt Financing


Milton S. Wakschlag - Tax Exempt Financing

8. Revision to Reg. § 1.149(b)-1 relating to federally guaranteed bonds.

Growing interaction between state and local governments and the federal government, such as in the area of highway and other infrastructure projects, tests the limits of the prohibition on enhancing a bond issue with a federal guarantee. The rule has existed for decades in statutory or administrative form, without substantial regulatory guidance.

Milton S. Wakschlag - Tax Exempt Financing