

Section of Taxation

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June 15, 2018

The Honorable David Kautter
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

David Kautter
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20024

William M. Paul
Acting Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Second Set of Recommendations for 2018-2019 Priority Guidance Plan

Dear Messrs. Kautter and Paul:

The American Bar Association Section of Taxation (the "Section") welcomes the opportunity to provide a second set of recommendations for inclusion in the 2018-2019 Priority Guidance Plan. While the first set of recommendations addressed solely guidance projects related to Public Law 115-97 (the "Act"), this set also refers to high-priority guidance projects that do not relate to the Act. These recommendations represent the views of the Section. 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 recommendations were made by members of the following committees within the Section.

Capital Recovery and Leasing
Exempt Organizations
Pro Bono & Tax Clinics

Employee Benefits
Foreign Activities of U.S. Taxpayers
Tax Accounting

Although the members of the Section who participated in preparing this list have clients who might be affected by the federal income tax principles addressed by these recommendations, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these recommendations.

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We will be happy to discuss the recommendations with you or your staffs.

Sincerely,



Karen L. Hawkins
Chair, Section of Taxation

Enclosure

cc: Robert J. Neis, Benefits Tax Counsel, Department of the Treasury
Douglas Poms, Deputy International Tax Counsel, Department of the Treasury
Thomas West, Tax Legislative Counsel, Department of the Treasury
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**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**Second Set of Recommendations for the 2018-2019
Department of the Treasury and Internal Revenue Service
Priority Guidance Plan**

As requested in Notice 2018-43 (the “Notice”),¹ the Section of Taxation of the American Bar Association (the “Section”) has identified the following tax issues that we recommend be addressed through regulations, rulings, or other published guidance in 2018-2019. Some recommendations relate to Public Law 115-97 (the “Act”)² and others refer to high-priority guidance projects that do not relate to the Act. In each case, the name and contact information for a representative of the committee making the suggestions is provided.

EMPLOYEE BENEFITS

Kathryn Kennedy, Employee Benefits Committee, (312) 987-1418, 7Kennedy@jmls.edu

1. Guidance as to the changes made by the Act to section 162(m),³ particularly the section 162(m) transition relief for remuneration that is provided pursuant to a written binding contract that was in effect on November 2, 2017, as well as guidance under new section 83(i).
2. Guidance regarding the expansion of health reimbursement accounts as directed under President Trump’s Executive Order 13813.⁴
3. Guidance regarding the elimination by the Act of the employer deduction for entertainment, amusements, and recreation expenses, with limited exceptions for employee meals, under section 274(n).
4. Guidance regarding the elimination by the Act of the employer deduction for qualified transportation fringe benefits and certain other commuting expenses under section 132(f).
5. Guidance regarding the implementation of the new employer credit for paid family and medical leave under section 45S.

¹ 2018-43 I.R.B. 1235.

² An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (sometimes referred to as the “Tax Cuts and Jobs Act” or “TCJA”).

³ 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.

⁴ Exec. Order No. 13813, 82 Fed. Reg. 48385 (October 12, 2017).

The Employee Benefits Committee also continues to recommend including guidance needed on the items below from last year or prior years:

6. Guidance expanding on Regulation section 1.410(b)-2(f) and the application of section 410(b)(6)(C) in connection with any event that results in a person becoming or ceasing to become a member of a group described in subsections (b),(c), (m), or (o) of section 414.
7. 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 particular plan sponsor or plan participants.
8. Guidance updating and conforming the application of the controlled group rules under sections 414(b) and (c) and the affiliated service group rules under section 414(m) to reflect current common business structures, including how the management function rules under section 414(m)(5) are to be applied.
9. Guidance under section 72(p) providing rules on how to treat transferred participant loans in connection with a plan-to-plan merger as part of a business merger or acquisition.
10. Guidance on IRA issues, including valuation and reporting of IRA assets, application of section 4975(c)(3) and the definition of “beneficiary” for purposes of applying section 408(e)(2)(A), and the application of section 4975 generally in connection with the new Department of Labor conflict of interest regulation.
11. Guidance allowing for expanded availability of qualified longevity annuity contracts.
12. Guidance on the application of current statutes, regulations and other guidance to lifetime income insurance products such as guaranteed lifetime withdrawal benefits and guaranteed minimum withdrawal benefits.
13. Guidance providing relief for plans that continue to have missing participants following reasonable location efforts or participants who fail or refuse to cash distribution checks.

EXEMPT ORGANIZATIONS

Lisa Johnsen, Exempt Organizations Committee, (206) 709-3212,
lisa.johnsen@gatesfoundation.org

Recommendations related to the Act, in order of priority:

1. Guidance under section 512(a)(7), requiring payments for certain employee fringe benefits to be treated as unrelated business taxable income.

2. Guidance under new section 4960, taxing the payment of compensation of certain employees in excess of \$1,000,000 and certain excess parachute payments, including whether transitional relief will be granted.
3. Guidance under section 512(a)(6), requiring separate computation of unrelated business income tax for each trade or business.
4. Guidance under section 512(b) clarifying that income earned by an organization described in section 511(a)(2) from a controlled foreign corporation by application of Subpart F of the Internal Revenue Code (sections 951-965, including, without limitation, the Global Intangible Low-Taxed Income under section 951A and the repatriation tax under section 965) are excluded from the computation of such organization's unrelated business taxable income.
5. Guidance under new section 4968, taxing the net investment income of certain private colleges and universities.

The Exempt Organizations Committee also continues to recommend including guidance needed on the items below from last year or prior years:

6. Proposed regulations pursuant to sections 4958, 4966, and 4967 regarding donor advised funds.⁵
7. Finalize regulations under section 6104(c) relating to publication of information to state officials.
8. Finalize regulations under section 7611 relating to church tax inquiries and examinations.
9. In the event the Treasury Department is not prohibited at any time during the fiscal year from finalizing regulations or other guidance relating to the standard that is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4), proposed regulations under section 501(c) relating to political campaign intervention.⁶

⁵ Notice 2017-73 requested comments on specific proposals relating to proposed regulations on donor advised funds, and the ABA Tax Section's detailed responses, with which the Committee concurs, may be found here:

<https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/041918comments.pdf>.

⁶ See ABA Section of Taxation, *Commentary on IRS 1993 Exempt Organizations Continuing Professional Education Technical Instruction Program Article on Election Year Issues* (February 21, 1995); ABA Section of Taxation, *Comments on Proposed Regulations Regarding Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities* (May 7, 2014), available at <https://www.americanbar.org/groups/taxation/policy.html>

10. Revenue ruling under section 4944 regarding the qualification of an equity investment in a limited liability company as a program-related investment.⁷
11. Guidance under section 4941 regarding a private foundation's investment in a partnership in which disqualified persons are also partners.⁸
12. 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.

FOREIGN ACTIVITIES OF US TAXPAYERS

Kimberly Majure, Foreign Activities of U.S. Taxpayers Committee, (202) 533-5270, kmajure@kpmg.com

1. Update Regulation section 1.6038-4 to reflect principles contained in the instructions of the Organization for Economic Cooperation and Development's (OECD) country-by-country report that are not necessarily clear on the face of the OECD template (which the regulations follow closely). For example, how (if at all) will the US guidance react to commentary in the OECD peer review report?
2. Guidance on characterization of taxation of transactions in the cloud. This guidance would help taxpayers understand where digital tax issues are heading in the United States (and would tangentially help with analysis for BEAT, etc., purposes).

PRO BONO AND TAX CLINICS

Christine Speidel, Pro Bono and Tax Clinics Committee, (610) 519-3895, christine.speidel@law.villanova.edu

1. Finalize proposed regulations⁹ under sections 2, 32, 63, and 152 on the definition of dependents and related provisions (Proposed Regulations). This regulation is especially timely following the Act, which temporarily reduced the personal exemption deduction to zero.¹⁰ Taxpayers struggle with the uniform definition of "qualifying child," which was enacted by Congress in 2004 but is not yet reflected in the Treasury Regulations. The guidance and examples provided in the Proposed Regulations would help taxpayers comply with the law and would

⁷ See ABA Section of Taxation, *Comments on New Examples of Program-Related Investments in Proposed Regulations Section 53.4944-3(b)* (August 8, 2012), available at <https://www.americanbar.org/groups/taxation/policy.html>

⁸ See ABA Section of Taxation, *Comments on Issues on Which Precedential Guidance is Needed* (June 22, 2016), available at <https://www.americanbar.org/groups/taxation/policy.html>

⁹ 82 Fed. Reg. 6370 (2017).

¹⁰ This has created confusion in the practitioner community on the role of dependents in individual income taxation during these tax years. We understand Service intends to issue guidance on the effect of the zeroed deduction on the definition of qualifying relative in section 152(d) and we support this as a priority guidance item. However, we believe it is also important to finalize the broader regulation project.

facilitate the Service’s administration of the relevant provisions. Final regulations would replace several revenue rulings and other guidance.

2. Guidance under section 61(a), relating to the exclusion of attorneys’ fees from the prevailing party’s income from a civil lawsuit. Official guidance on this issue would reduce unnecessary taxpayer burden from uncertainty, and facilitate uniform application of the tax laws. In some cases, including many brought under the Fair Debt Collection Practices Act (FDCPA), a taxpayer will lose money by bringing a case if the attorneys’ fee award is taxable to the taxpayer.¹¹ Victims of abusive, unfair, or deceptive debt collection practices may forgo litigation because of the net cost if the tax treatment is uncertain. This frustrates the public policy behind these causes of action.¹² This topic is particularly timely considering the Service’s use of private debt collectors, who are subject to the FDCPA under section 6306(g).
 - a. Private Letter Rulings (PLRs) have held that attorneys’ fees are not taxable to the client if the fee is awarded directly to a public interest law firm and the client has no obligation to pay their attorneys.¹³ This holding is important to many taxpayers, yet PLRs only bind the Service as to the specific taxpayer who requested the ruling. Official guidance on this issue would reduce unnecessary taxpayer burden in terms of uncertainty, and facilitate uniform application of the tax laws.
 - b. Guidance is also requested regarding lawyers in the private bar who take cases with an agreement which provides they will take no fee from the client but will request a fee award for compensation. It is our understanding that the Service has declined to issue a PLR on this issue.
3. Request public comment and consider revisions to Revenue Procedure 99-21¹⁴, regarding procedures and standards for showing financial disability under section 6511(h). Allowing public comment on this issue would further improve tax administration by alerting the Service to taxpayer burdens caused by the current Revenue Procedure.

The Revenue Procedure allows only a “physician” to certify a disability, and defines “physician” narrowly, excluding licensed psychologists and other professionals generally considered competent to assess mental impairments.¹⁵ This rule burdens taxpayers with mental disabilities who qualify as financially disabled under the statute, except that they are treated by a licensed psychologist

¹¹ For example, if a debt collector uses false statements or abusive language, but does not succeed in bullying the consumer, the FDCPA provides for statutory damages of \$1,000, plus costs and attorneys’ fees. *See* 15 U.S.C. § 1692k. This discourages abusive conduct regardless of the consumer’s vulnerability.

¹² *See* 15 U.S.C. § 1692, *Congressional findings and declarations of purpose*.

¹³ *See, e.g.*, PLR 201015016 & PLR 201552001.

¹⁴ 1999-1 C.B. 960.

¹⁵ *See Hoff Stauffer, Administrator of the Estate of Carlton Stauffer v. IRS*, No. 15-CV-10271-MLW, Magistrate’s Report and Recommendation on Defendant United States’ Motion to Dismiss (Feb. 14, 2017).

or another provider who is not a “physician.” Section 6511(h) specifically allows a mental impairment as a disabling condition.

It would also be helpful to have guidance regarding the documentation and substantive showing required in cases where a taxpayer was unable to manage their financial affairs due to domestic abuse.

TAX ACCOUNTING; CAPITAL RECOVERY AND LEASING

David Auclair, Tax Accounting Committee, (202) 521-1515, david.auclair@us.gt.com;
Tracy Watkins, Capital Recovery and Leasing Committee, (202)370-8195,
Tracy.Watkins@rsmus.com

1. Guidance under section 162(f) and new section 6050X (issues not addressed by Notice 2018-23).
2. Guidance under section 163(j) regarding limitation of business interest.
 - a. Guidance on how other code provisions impact what constitutes business interest for purposes of section 168(j) (e.g. sections 263A and 467).
 - b. Whether an election under section 163(j) for an electing real property trade or business requires a one-time election or annual election.
 - c. Guidance on what is meant by “trade or business” (e.g. section 446 or case law) in relation to an electing real property trade or business.
3. Definitional and operational guidance under section 168.
 - a. Section 168(g)(8):
 - i. Whether alternative depreciation system (ADS) must apply to nonresidential real property, residential rental property, and qualified improvement property placed in service by a taxpayer in a taxable year prior to a taxpayer becoming an electing real property trade or business. If all such prior year property must use ADS, whether the class life at the time the property was placed in service or the class life of the property at the time of the election applies.
 - ii. Whether section 168(g)(8) applies to qualified leasehold improvement property, qualified restaurant property, or qualified retail improvement property of an electing real property trade or business.
 - b. Section 168(k):

- i. Guidance on when the acquisition of a custom item or self-constructed item occurs and whether a taxpayer may rely on the existing rules related to binding contracts.
 - ii. Whether guidance similar to Rev. Proc. 2011-26¹⁶ will apply to allow taxpayers to elect 100 percent bonus depreciation for certain components of larger self-constructed property when the components are acquired and placed in service after September 27, 2017.
 - iii. Whether guidance addressing the interplay of section 280F and 100% bonus depreciation will provide a less drastic outcome than Rev. Proc. 2011-26 for luxury automobiles.
 - iv. Guidance related amendment language regarding acquisition dates and placed in service dates that conflicts with the effective dates of the amendment (*i.e.*, section 168(k)(8)).
- 4. Definitional and operational guidance regarding the deduction for qualified business income.
 - a. Applying the rule in the calculation of qualified business income when flowing through multiple tiered entities.
 - b. Clarification regarding the ability/requirement to net the computation of losses from more than one trade or business against gains from another business.
 - c. Whether the taxpayer may consider a management company an integral part of the operating trade or business and not a specified business activity if substantially all of the management fee company's income is from a qualifying trade or business.
 - d. How the rules apply to the qualification of real property rental income as qualified business income.
 - e. If grouping is allowed, whether a taxpayer may treat rental of real estate to a related C corporation as trade or business income under the self-rental principals.
 - f. Guidance regarding the determination of items effectively connected with a business (*e.g.*, section 1245 gains and losses, retirement plan contributions for partners and sole proprietors, the section 162(l) deduction, and one-half of self-employment income).

¹⁶ Rev. Proc. 2011-26, 2011-14 I.R.B. 608

- g. In determining the unadjusted basis of assets, how are items expensed under section 179 subject to bonus depreciation treated.
 - h. How the unadjusted basis of assets held January 1, 2018 impact the limitation calculation.
 - i. The determination of the unadjusted basis of property subject to section 743(b) basis adjustments and impact on the limitation calculation.
 - j. The effect, if any, on net investment income tax calculations.
- 5. Guidance regarding Small Business Accounting Method Reform and Simplification.
 - a. Guidance regarding the transition rules for section 263A for taxpayers who meet the \$25,000,000 small business definition and required method change.
 - b. Guidance regarding the annual election under section 266 to capitalize taxes and carrying costs in lieu of deducting the interest, for taxpayer's owning real estate.
 - c. Guidance regarding the transition rules for section 448 for taxpayers who meet the \$25,000,000 small business definition and want to change to the cash method of accounting.
 - d. Guidance clarifying that the aggregation of gross receipts under section 448 for affiliated taxpayers is required in calculating any limitations or exceptions to the general rule, for purposes of the \$25,000,000 small business definition and required method change.
 - e. Guidance regarding the transition rules for section 460 for taxpayers who meet the \$25,000,000 small business definition and required method change.
 - f. Guidance regarding the transition rules for section 471 for taxpayers who meet the \$25,000,000 small business definition and required method change.
 - g. Guidance clarifying the accounting for inventory as non-incidental and the costs required to be capitalized. Specifically, what costs are required to be capitalized as non-incidental materials and supplies for a manufacture of goods?
 - h. Guidance regarding the transition rules for section 263A(f) for the two-year exemption from the capitalization of interest during the post-production period for beer, wine, and distilled spirits.

- i. Guidance regarding how taxpayers will make this change. Will they do so by filing an accounting method change to apply the exemption and another to begin capitalizing interest after the two-year period?
6. Operational guidance under section 451.
 - a. Guidance regarding the procedural rules relating to changes in method of accounting for income inclusion under section 451(b).
 - b. Guidance regarding the change in law under section 451(b) and (c) and the interrelation with the adoption of the Accounting Standard Codification (ASC) 606.
 - c. Clarification of whether the application of section 451 applies to taxpayers in industries where the recognition of revenue through unbilled accounts receivable is common practice or where commission are recognized before they are earned.
 - d. Guidance regarding what constitutes a special method of accounting exempted from the application of section 451.
 - e. Clarification regarding the application of section 451 to income subject to the rules under sections 1271 – 1288. Specifically, how do the rules under 451 impact the revenue recognized on original issue discount instruments and items subject to the market discount rules?
 - f. Clarification of when a change in financial reporting results in a tax accounting method change and consideration of simplified procedures to make that change if required.

The following reflects high priority guidance items not related to the Act (priority should be given first to guidance above relating to the Act):

1. Final regulations under section 263A regarding the inclusion of negative amounts in additional section 263A costs. Proposed regulations were published on September 5, 2012.
2. Guidance under sections 167 and 168 for determining whether certain assets used by a wireline telecommunication service provider are primarily used for providing one-way or two-way communication services.
3. Revenue procedure under section 263(a) regarding the capitalization of natural gas transmission and distribution property.
4. Guidance regarding the treatment of deferred revenue in stock acquisitions.
5. Regulations under section 453A regarding contingent payment sales.

6. Regulations under section 472 regarding dollar-value last-in, first-out (LIFO) inventories, including rules for combining pools as a result of a change in method of accounting, certain corporate acquisitions, and certain nonrecognition transactions.
7. Final regulations amending section 1.472-8 regarding the inventory price index computation (IPIC) method.