June 17, 2014

The Honorable Mark Mazur  
Assistant Secretary (Tax Policy)  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Room 3120  
Washington, DC 20220

Re: Recommendations for 2014-2015 Guidance Priority List

Dear Messrs. Mazur and Wilkins:

The American Bar Association Section of Taxation welcomes the opportunity to provide recommendations for inclusion in the 2014-2015 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 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 submitted by the following committees:

- Affiliated and Related Corporations
- Bankruptcy and Workouts
- Corporate Tax
- Civil and Criminal Tax Penalties
- Employee Benefits
- Exempt Organizations
- Fiduciary Income Tax
- Financial Transactions
- Foreign Activities of U.S. Taxpayers
- Investment Management
- Partnerships and LLCs
- Real Estate
- Sales, Exchanges and Basis
- Tax Exempt Financing
- U.S. Activities of Foreigners and Tax Treaties

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

Sincerely,

Michael Hirschfeld  
Chair

Enclosure
American Bar Association
Section of Taxation
Recommendations for the 2014-2015
Treasury-IRS Guidance Priority List

As requested in Notice 2014-18,¹ the Section of Taxation of the American Bar Association has identified the following tax issues that we recommend be addressed through Regulations, rulings, or other published guidance in 2014-2015. In each case, the name and contact information for a representative of the committee making the suggestion are provided.

AFFILIATED AND RELATED CORPORATIONS
Matthew E. Gareau, Affiliated and Related Corporations Committee, (202) 879-5387, magareau@deloitte.com


2. Final Regulations under Treas. Reg. § 1.1502-77 relating to the status of the agent for the consolidated group. Regulations were proposed on May 30, 2012.

3. Final Regulations under Treas. Reg. § 1.1502-91 regarding redetermination of consolidated net unrealized built-in gain and loss. Regulations were proposed on October 24, 2011.

4. Regulatory clarification regarding the application of the “end-of-the-day” and “next-day” rules of Treas. Reg. § 1.1502-76(b)(1)(ii), particularly with respect to the treatment of closing day stock option and “success based” consulting fee deductions.

5. Updated guidance on the treatment of consolidated tax credits, including treatment of credits allocated to and from members departing and joining consolidated groups.

6. Regulatory clarification regarding the consolidated group continuation rules of Treas. Reg. § 1.1502-75(d)(2) and (3), in particular coordination of existing Regulations with the principles of Rev. Rul. 82-152² and general “substance over form” principles.

7. Regulations providing guidance on the meaning of “successor” for purposes of section 1504(a)(3).

² 1982-2 C.B. 205.
8. Regulatory clarification of the treatment of a selling consolidated group if a section 336(e) election is made for a departing group member, where the qualified stock disposition occurs over time.

**BANKRUPTCY AND WORKOUTS**
Lee Zimet, Bankruptcy and Workouts Committee, (973) 602-5194, lzimet@deloitte.com

1. Final Regulations under section 108\(^3\) regarding the treatment of disregarded entities.

2. Guidance as to when contingent liabilities are treated as liabilities for purposes of sections 108(d)(3) (insolvency) and 1017(b)(2) (limitation on basis reduction).

3. Guidance regarding the application of paragraphs (5) and (6) of section 382(l) to a consolidated group.

4. Guidance regarding the potential application of section 382(l)(6) to acquisitions of subsidiaries of bankrupt entities.

5. Guidance regarding the application of section 597 (and the Regulations thereunder), taking into account recent changes in how failed bank transactions have been structured in recent years.

**CIVIL AND CRIMINAL TAX PENALTIES**
Josh Ungerman, Civil and Criminal Tax Penalties Committee, (214) 749-2427, jungerman@meadowscollier.com

1. Correction of the Internal Revenue Manual (IRM) that references a 10-year statute of limitations on collecting the FBAR penalty through administrative offsets to properly reflect that, under 31 USC 3716(e)(1), there is no statute of limitations on administrative offsets.\(^4\)

2. Revision of the IRM to provide consistent FBAR penalty mitigation guidelines. Some revenue agents and their managers are applying non-willful penalties across the board (per account, per year, for all open years) in every case, while others are applying the mitigation guidelines and issuing no penalty warning letters.


4. Guidance on (and expansion of the use of) waivers of limitations (Form 2750) in trust fund recovery penalty investigations in cases where, if given more time, the

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\(^3\) References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.

\(^4\) See I.R.M. 8.11.6.3.1.1(2) (Oct. 28, 2013).
employer/business can satisfy the outstanding trust fund liabilities and avoid the individual assessments under section 6672.

5. Additional guidance regarding non-resident non-filer streamlined compliance procedures, including guidance about the $1,500 tax threshold and compliance risk factors. Some hypotheticals would be helpful.

6. Guidance on when failure to pay penalties are subject to abatement. Some revenue officers and appeals officers maintain that all tax must be paid in full before any failure to pay penalties can be abated, which is contrary to the practice of other Service representatives.

7. Guidance regarding restitution based assessments (RBAs). Private practitioners should be included in the IRS/DOJ working group that is (and has been) addressing these issues. Recent guidance on RBAs has caused great concern – for example, the refusal to honor designations for payments remitted on tax periods that include, or will include, RBAs; the failure to offer a remedy where a later audit confirms that the RBA exceeds the civil tax liability; the refusal to process Offers in Compromise that do not include a restitution order (where restitution was entered prior to August, 2010) on the grounds that the Offer does not include full payment of the restitution.

CORPORATE TAX
Julie H. Rodgers, Corporate Tax Committee, (617) 526-6543, julie.rodgers@wilmerhale.com

1. Guidance relating to the application of sections 355 and 361 to distributions to creditors where the debt held by the creditors is issued in anticipation of the distribution, including guidance clarifying what constitutes “in anticipation”.

2. Guidance regarding transactions (including recapitalizations) in which a distributing corporation acquires or retains control of a corporation, in anticipation of a distribution of the corporation’s stock, though the use of classes of shares having different voting powers.

3. Additional guidance under section 336(e), in particular relating to the application of the consistency rules and the general application of the rules in cases where the QSD occurs in multiple steps.

4. Regulations under section 312 regarding the allocation of earnings and profits in acquisitive and divisive reorganizations.

6. Guidance relating to application or non-application of the investment company rules under sections 351(e) and 368(a)(2)(F) to common transactions.

7. Removal of transactions involving fast-pay arrangements as defined in Treas. Reg. § 1.7701(l)-3(b) from the listed transactions set forth in Notice 2009-59.5

EMPLOYEE BENEFITS
Martha Hutzelman, Employee Benefits Committee, (614) 775-9134, mhzelm@insight.rr.com

1. Safe harbor section 401(k) Plan guidance under sections 401(k)(12) and (13) regarding certain mid-year changes and certain business transactions.

2. Further guidance addressing issues regarding the U.S. Supreme Court’s Defense of Marriage Act (DOMA) decision in United States v. Windsor,6 including, but not limited to, specific transactions to which the Windsor decision applies as of June 26, 2013 and other retroactivity issues; anti-cutback rule issues; interaction with Title I of ERISA; application to employee benefit plans other than qualified retirement plans; and issues regarding corrective measures.

3. Guidance that revises the specific List of Required Modifications (LRM) language issued in connection with section 403(b) pre-approved plans to address LRM language issues.

4. Checklists regarding interim amendments and required amendments with due dates with respect to qualified retirement plans.

5. Guidance that clarifies whether amendments should be required to a qualified retirement plan if such amendment is not applicable to the type of plan involved.

6. Guidance regarding application of the limit on out-of-pocket (OOP) maximums under Public Health Service (PHS) Act section 2707(b) to a plan’s reference pricing model.

7. Guidance that clarifies the health plan identification (HPID) Regulations (2012 HIPAA regulations) regarding self-insured health plans.

8. Guidance regarding the definition of a single plan for purposes of section 413(c), taking into account ERISA’s exclusive benefit rule so that multiple employer plans can exist under ERISA.

9. Guidance to permit correction of “one bad apple” in multiple employer plans (MEPs).

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10. Guidance regarding Open Multiple Employer Plan (Open MEP) structure.

11. Guidance regarding the affiliated service group definition under section 414(m), including further definition of an organization performing management functions under section 414(m)(5) and the application of controlled group and affiliated service group rules under the Affordable Care Act (ACA).

12. Guidance regarding health reimbursement arrangements (HRAs) and (a) the opt-out requirements under Notice 2013-54 for integrated HRAs, (b) section 6055 reporting requirements for HRAs, and (c) taxable reimbursements from HRAs for domestic partner benefits.

13. Guidance regarding how to handle uncashed checks issued by an employee benefit plan, an update of rules regarding forfeitures for missing participants and guidance to provide automatic relief for delayed IRA rollover checks.

14. Guidance in the form of consolidated, clarified and updated Regulations under section 4975 regarding leveraged and unleveraged employee stock ownership plans (ESOPs).

15. Guidance that clarifies the recently opened Employee Plans Voluntary Closing Agreement Program.

16. Guidance regarding section 402(b) and its application to foreign pension and deferred compensation plans.

EXEMPT ORGANIZATIONS
Robert Wexler, Exempt Organizations Committee, (415) 421-7555, Wexler@adlercolvin.com

1. Guidance for section 501(c) exempt organizations other than those exempt under section 501(c)(3) that have not filed an application for recognition of exemption within 27 months of creation regarding procedures for requesting retroactive recognition of exemption and standards for granting that treatment.

2. Guidance regarding how to obtain a revised determination letter without the need for filing a new exemption application on Form 1023 or 1024, where there is a mere change in the form or state of incorporation, including situations where the change is accomplished by a process of domestication rather than creation of a new entity.  

3. Guidance regarding the standards for recognizing organizations engaged in the publication of information that is useful to the individual and beneficial to the community, including general news, as exempt under section 501(c)(3).

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4. Guidance updating Rev. Proc. 92-94, including to (i) confirm that support from a non-U.S. governmental entity counts as public support in the same manner as support from a federal, state, or local governmental entity counts for purposes of the public support calculation under section 509(a), (ii) revise the definition of “currently qualified” in light of the current five-year calculation period for public support and to provide that an affidavit is currently qualified if a foreign organization in the first five years of its existence reasonably can be expected to qualify as publicly supported, (iii) clarify that grantors need not evaluate foreign hospitals for compliance with section 501(r), (iv) clarify that foreign schools must attest that they do not discriminate on the basis of race, color or national and ethnic origin, but are exempt from the specific requirements of Rev. Proc. 75-50, and (v) clarify that sponsoring organizations of donor-advised funds may make equivalency determinations pursuant to Rev. Proc. 92-94 when making grants to foreign organizations.

5. In addition to regulations pursuant to section 4966 regarding donor advised funds, as set forth in the 2013-2014 Priority Guidance Plan, Regulations and other guidance pursuant to sections 4958 and 4967.


7. 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.

8. Guidance to clarify that borrowing in order to make charitable grants or to support charitable programs does not normally constitute acquisition indebtedness within the meaning of section 514(c), including examples clarifying the application of the "but for" and "reasonably foreseeable" tests under section 514(c)(1)(C) to situations in which a charity borrows to fund charitable programs or grants.

FIDUCIARY INCOME TAX
Lewis J. Saret, Fiduciary Income Tax Committee, (202) 965-7748, lewis.saret@gmail.com

1. Guidance under section 643(i) regarding a deemed distribution by reason of use of foreign trust property. Section 643(i) provides that, if a Trustee of a foreign trust permits a United States grantor, beneficiary or relative of a grantor or beneficiary to use property of the trust without payment for the fair market value of the use of such property, such use will be treated as a distribution from the trust. It would be

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helpful to provide guidance in this area, specifically with respect to the following items: (1) who will be required to determine the fair market value of such property; (2) a standard for the proper valuation of such property; (3) whether the specific allowance of the use of such trust property by the applicable trust agreement still will be treated as a distribution under section 643(i); (4) whether there is going to be a safe harbor de minimis usage of property that would not be treated as a distribution, either by a certain low value of the property or by usage for a shorter term, such as no more than $50,000 of fair market value or 7 days of usage; and (5) information about how such usage will be required to be reported.

2. Guidance under sections 661, 662, 2501 and 2612 regarding decanting. Decanting is the process by which a trustee exercises its power to distribute trust principal to or for the benefit of a beneficiary by distributing assets to a new trust. The Service includes decanting in its “no-ruling” list with respect to the following: (a) whether decanting gives rise to a section 661 distribution deduction or results in inclusion in gross income under section 662; (b) whether decanting results in a taxable gift being made under section 2501; and (3) whether decanting causes loss of GST exempt status or results in a taxable distribution or taxable termination under section 2612. Eleven states have adopted decanting statutes and at least two others are in the process of enacting decanting statutes. Most other states allow decanting under their common law.

3. Guidance under section 1001 regarding the severance of trusts. The Service has issued many private letter rulings addressing whether the non-pro rata division of a trust will result in the recognition of gain or loss. Most recently, in a private letter ruling, the trustees of a qualified terminable interest property trust (QTIP trust) proposed to divide the QTIP trust into two separate trusts. The Service ruled that a non-pro rata division of the QTIP trust’s assets would not result in gain or loss recognition. In Rev. Rul. 2008-41, however, the Service ruled that the division of a trust that qualifies as a charitable remainder trust under section 664 into separate trusts must be done on a pro rata basis. Thus, there appears to be a difference in the treatment of a severance of a charitable remainder trust. Accordingly, it would be helpful to have guidance on whether a non-pro rata division of a trust, including, but not limited to, a charitable remainder trust, will result in the recognition of gain or loss and, if so, whether such gain or loss can be avoided by funding each new trust with assets fairly representative of appreciation and depreciation rather than dividing each asset on a pro rata basis.

4. Guidance under section 2010(c)(4) on the mechanics of electing portability of the estate tax exclusion amount, including the extent to which the election may be deemed to have been made and relief measures for the failure to make a timely election.

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12 PLR 201118007 (May 6, 2011).
5. Guidance under section 2631(c) confirming that a taxpayer’s GST tax exemption under section 2631(c) may be allocated to testamentary transfers in 2010 even if the executor elects out of the estate tax.

6. Guidance regarding post-2012 generation-skipping tax issues. If Congress does not change the law, many of the same uncertainties with respect to the GST tax that troubled taxpayers in 2010 will resurface. Current guidance on the application of the GST tax after 2012 to transfers made prior to 2013 could preempt much of the uncertainty, including, for example, the effect of: (i) previous allocations of GST tax exemption in excess of the 2013 exemption; (ii) deemed allocations to prior transfers under section 2632(c); (iii) elections in and out of automatic allocations under section 2632(c)(5); (iv) retroactive allocations in the case of the death of a non-skip person under section 2632(d); and (v) qualified severances under section 2642(a)(3).

7. Guidance regarding the coordination of preparer penalties under sections 6694 and 6695A, specifically whether the penalties under the sections are exclusive or may be aggregated.

8. Guidance under section 1411 regarding: (i) the tracking and taxation of undistributed net investment income of a foreign estate or trust; and (ii) the treatment of S corporation stock disposed of by a Qualified Subchapter S Trust (“QSST”).

FINANCIAL TRANSACTIONS
Matthew Stevens, Financial Transactions Committee, (202) 327-6846,
matthew.stevens@ey.com

1. Guidance on the treatment of distressed debt, including Regulations relating to accruals of interest and discount, application of payment ordering rules when debt is not paid in full, and further mitigating character mismatches with respect to accrued interest and discount that is never paid.

2. Final Regulations under section 871(m) on dividend equivalent payments.

3. Guidance regarding cross-border securities lending and expansion of relief to cover cascading derivative payments.


4. Guidance under Treas. Reg. § 1.1001-3 regarding circumstances where there is a change in either the corporate legal obligor or the tax obligor (e.g., check-the-box elections, F reorganizations), including the application of Treas. Reg. § 1.1001-3(f)(7)(ii), relating to deterioration in financial condition of the obligor.

5. Guidance under section 1058 addressing securities lending in light of recent case law.17

6. Regulations under section 446 on notional principal contracts (NPCs) relating to the inclusion in income or deduction of a contingent nonperiodic payment, and guidance relating to the character of payments made pursuant to an NPC.

7. Final Regulations under section 446 regarding the category of swaps and similar agreements that are within the scope of section 1256(b)(2)(B) and therefore are excluded from the definition of a “section 1256 contract.”

8. Guidance on the characterization of credit default swaps and other credit derivatives.

9. Regulations under section 163(l), including the definition of substantial amount, the time for testing, and the proper standard for an issuer option preceded by a holder option.

10. Revised Regulations under section 249 addressing the manner of demonstrating that an amount is attributable to the cost of borrowing and not to a conversion feature.

11. Guidance on amortization of debt issuance costs and original issue discount on revolvers and lines of credit.

12. Rules for contingent payment debt instruments where timing rather than amount creates the contingency.

13. Final Regulations under section 263(g) addressing capitalization of interest and carrying costs in the case of straddles.


15. Regulations under sections 163(e)(5) and 163(i), including treatment of convertible debt, VRDIs and CPDIs.

16. Guidance on the characterization, particularly for withholding tax purposes, of (i) consent fees for debt modifications and waivers; (ii) standby letter of credit fees

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and commitment fees; and (iii) positive rebates, borrow fees, negative repo rate payments and negative rebates on cross-border securities loans and repos.

17. Regulations on prepaid forward contracts.\(^{18}\)

18. Publish an updated list of qualified board or exchanges for purposes of section 1256.


**FOREIGN ACTIVITIES OF U.S. TAXPAYERS**

Joseph M. Calianno, Foreign Activities of U.S. Taxpayers Committee, (202) 521-1505, joe.calianno@us.gt.com

1. Final Regulations under section 909, relating to foreign tax splitter events.

2. Guidance under section 901(m), relating to disqualified foreign tax credits arising in covered asset acquisitions.


4. Guidance under section 367(d), relating to transfers of intangible property to foreign corporations, including regulations implementing Notice 2012-39.\(^{19}\)

5. Guidance under section 987, relating to foreign currency exchange gain or loss of qualified business units having a functional currency different from the home office.


7. Final Regulations under section 959, including the treatment of previously taxed earnings in the absence of positive earnings and profits.

8. Guidance on sales and services under section 954(d), foreign base company sales income.

9. Regulations pursuant to Notice 2007-13,\(^{20}\) regarding the substantial assistance rules for foreign base company services income.

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\(^{19}\) 2012-31 I.R.B. 95.

\(^{20}\) 2007-1 C.B. 410.
10. Guidance on cloud computing transactions, including guidance on source and
character determinations.

11. Regulations under Notice 2012-15, relating to the application of sections 367(a)
and (b) to transactions under section 304.

12. Regulations under section 5000C, relating to the excise tax on certain foreign
procurement payments, including guidance on withholding procedures and the
application of the tax to subcontractors.

INVESTMENT MANAGEMENT
William Zimmerman, Investment Management Committee, (215) 963-5023,
wzimmerman@morganlewis.com

1. Final Regulations amending the examples in Treas. Reg. § 1.851-5 relating to the
application of the “controlled group” rules in section 851(c).

2. Guidance addressing investment in commodities and commodity-linked
derivatives by regulated investment companies (RICs) through controlled foreign
corporations (CFCs) and commodity-linked notes.

3. Guidance regarding the tax treatment of exchange-traded notes.

4. Guidance addressing the treatment of anticipated foreign tax refunds, under
sections 853 and 905(c), received by RICs from European Union countries.

5. Guidance confirming that RICs can generally “look through” their interests in a
partnership to the partnership’s underlying assets for purposes of the asset
diversification test under section 851(b)(3). To date, the Service’s published
guidance has been limited to specific factual situations.

6. Guidance on the application of the “cure” provisions in sections 851(d)(2) and (i),
added by the RIC Modernization Act of 2010, including the schedules referred to
in sections 851(d)(2)(A)(i) and (i)(1)(A) and the meaning of “due to reasonable
cause and not due to willful neglect” in sections 851(d)(2)(A)(ii) and (i)(1)(B).
By way of example, we note that Treas. Reg. § 1.856-7 provides guidance to real
estate investment trusts (REITs) concerning a REIT's failure to meet its gross
income requirements.

PARTNERSHIPS AND LLCS
Adam Cohen, Partnerships and LLCs Committee, (303) 295-8372,
acohen@hollandhart.com

1. Regulations under section 751(b) on unrealized receivables and inventory.

2. Final Regulations regarding series LLCs.

3. Guidance on the definition of a limited partner for SECA purposes.

4. Guidance on whether a partner can be an employee of a partnership.

5. Regulations concerning the fractions rule under section 514(c)(9).

6. Guidance regarding the application of Treas. Reg. § 1.267(b)-1(b) to partners and partnerships.

7. Regulations establishing a new de minimis rule under section 704(b).

8. Guidance regarding the boundaries on qualifying income under section 7704(d)(1)(E).

9. Guidance on the proper treatment of contingent liabilities under sections 743(b) and 755.

10. Guidance on section 704(c) layers relating to partnership mergers.

11. Guidance on whether the 5% threshold of section 897(c)(2) is applied at the level of a partnership-stockholder or of that stockholders partners

REAL ESTATE
Jon Finkelstein, Real Estate Committee, (202) 756-8426, jfinkelstein@mwe.com

1. Additional clarification to Rev. Proc. 2014-20\textsuperscript{23} regarding the definition of “secured by real property” for purposes of section 108(c) where the taxpayer indirectly owns an interest in the disregarded entity borrower through multiple tiers of disregarded entities.

2. Final Regulations under section 460 relating to the home construction contracts exemption and its application to land development contracts and condominium developers and contractors.

3. Guidance regarding the meaning of “actively and regularly engaged in the business” of lending money for purposes of section 465.

\textsuperscript{23} 2014-9 I.R.B. 614.
4. Guidance regarding the treatment of cancellation of indebtedness income as “unrelated business taxable income” under section 512.

5. Guidance regarding the treatment of a guaranteed payment under section 707(c) to a REIT for purposes of section 856.

6. Guidance regarding the treatment of a deemed loan arising in connection with prepaid rent under section 467 with respect to the use of real property as a mortgage for purposes of section 856.

7. Revisions to Treas. Reg. § 1.856-5(c) addressing distressed debt acquisitions and modifications.

8. Consider withdrawing Notice 2007-55\textsuperscript{24} addressing the treatment of certain distributions under section 897(h)(1).

9. Regulations under the Foreign Investment in Real Property Tax Act (FIRPTA) providing that the 5% publicly traded FIRPTA stock test in section 897(c)(3) is applied to stock owned by partnerships at the partner level (rather than at the partnership level).

SALES, EXCHANGES AND BASIS
Mary Foster, Sales, Exchange and Basis Committee, (425) 646-4020, mfoster@1030services.com

1. Guidance clarifying the effect of a non-recognition transaction under sections 351, 721, or 731 immediately before or after an exchange of like kind property upon the qualification of the exchange as a like kind exchange under section 1031. In Rev. Rul. 75-292\textsuperscript{25} and Rev. Rul. 77-337,\textsuperscript{26} the Service held that, under the circumstances described in the rulings, a non-recognition transaction immediately before or after a like kind property exchange caused the exchange not to qualify as a like kind exchange under section 1031 because the taxpayer has not “held” the property in question “either for productive use in a trade or business or for investment.” Subsequent case law casts doubt upon these Revenue Rulings, recognizing that an indirect interest in like kind property before or after another non-recognition transaction should satisfy the purposes and intent of section 1031. In the absence of an official change in position by the Service, however, taxpayers use burdensome or contorted transaction structures that would otherwise be unnecessary to satisfy the requirements of section 1031. We recommend that Rev. Rul. 75-292 and Rev. Rul. 77-337 be revoked and superseded by guidance permitting taxpayers to engage in a non-recognition transaction under sections 351, 721, or 731 before or after a like kind exchange without disqualifying the like kind exchange under section 1031, so long as title

\textsuperscript{25} 1975-2 C.B. 333.
\textsuperscript{26} 1977-2 C.B. 305.
to the like kind property passes through the taxpayer pursuant to the like kind exchange.

2. Guidance clarifying the scope of the “routine financial services” exception for acting as a section 1031 exchange accommodator. Under Treas. Reg. § 1.1031(k)-1(k), a so-called “disqualified person” (generally defined to include family members and agents of the taxpayer, as well as entities 10% or more of the equity interests of which are owned directly or indirectly by a taxpayer or the taxpayer’s family members or agents) cannot act as a qualified intermediary, trustee of a qualified trust, or holder of a qualified escrow account (a “1031 Accommodator”) in connection with a section 1031 deferred like-kind exchange. An exception to this general rule permits financial institutions to provide “routine financial services” (a term not defined in the Regulations) without giving rise to “disqualified person” status. A recent case involving a dispute over the acquisition of a 1031 Accommodator business highlights the practical difficulties encountered by both taxpayers and bank-affiliated 1031 Accommodators due to the lack of clarity regarding the scope of “routine” versus “non-routine” financial services.27 The Service has recognized the important role played by banks (as defined in section 581) among 1031 Accommodators as “closely regulated entities that have historically acted as neutral and independent holders of funds.”28 To eliminate the ambiguity in the current Regulations and allow taxpayers the freedom to select bank-affiliated 1031 Accommodators without fear of disqualifying their exchanges, we recommend an amendment to the current Regulations to clarify that any services which the Office of the Controller of the Currency (in the case of a national bank) or the relevant state regulatory agency (in the case of a state-chartered bank) permits the bank to provide (directly or through an affiliated entity) shall be considered “routine.”

3. Guidance under section 1031 regarding offsetting "mortgage boot" where unsecured debt is retired by a purchaser of relinquished property (or by a qualified intermediary using buyer funds).

4. Guidance under section 1031 regarding the treatment of nonrecourse debt retired by a deed in lieu of foreclosure or by foreclosure as “mortgage boot” without regard to the fair market value of the property secured by the debt. A similar issue was narrowly addressed in PLR 201302009.29

5. Guidance under sections 167 and 1031 pursuant to Notice 2013-1330 as to whether property held simultaneously for sale and for lease (also known as "dual-use property") is eligible for depreciation deductions and/or like kind exchange treatment.

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28 See REG-107175-00, 2001-1 C.B. 971.
29 Jan. 11, 2013.
1. Final Regulations on the allocation and accounting provisions of section 141.

2. Final Regulations on the public approval provisions of section 147.

3. Guidance on and expansion of the safe harbors for determining private use of management contracts for bond financed facilities through updates to Rev. Proc. 97-13.\(^31\)

4. Guidance on record retention requirements for tax exempt bonds and tax credit bonds, including safe harbor guidance regarding any records required to support the periodic returns required to be filed in the case of direct pay Build America Bonds and other direct pay tax credit bonds.

5. Final Regulations with respect to arbitrage rules related to qualified hedge and yield reduction payments.\(^32\)

6. Final Regulations on the definition of “issue price” for tax-exempt bonds, Build America Bonds, and other direct pay tax credit bonds.\(^33\)

7. Final Regulations with respect to the financing of short-term and long-term working capital deficits.\(^34\)

8. Guidance on bond financing of grants.\(^35\)


\(^31\) 1997-1 C.B. 632.
10. Guidance with respect to the financing of facilities associated with Accountable Care Organizations.

**U.S. ACTIVITIES OF FOREIGNERS AND TAX TREATIES**

David Shapiro, U.S. Activities of Foreigners and Tax Treaties Committee, (215) 854-6339, david.shapiro@shapirotaxlaw.com

General Item

Treaty Item
1. Guidance on the application of treaty provisions to hybrid entities for non-FDAP items, *e.g.*, effectively connected income not attributable to a permanent establishment; branch profits tax; or application of the limitation on benefits article.

Inbound Items
1. Final Regulations under section 892.
2. Guidance to clarify section 877A status of individuals who receive certificates of loss of nationality reporting a loss of nationality prior to the adoption of section 877A, but which are issued after the effective date of section 877A.

Outbound Item
1. Final Regulations under section 7874 regarding disqualified stock and further addressing the de minimis exception and issues raised in connection with the issuance of the Temporary Regulations.