July 8, 2013

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

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Room 3026
Washington, DC 20224

Re: Recommendations for 2013-2014 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 2013-2014 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 submitted by the following committees:

- Affiliated and Related Corporations
- Partnerships and LLCs
- Civil and Criminal Tax Penalties
- Pro Bono and Tax Clinics
- Corporate Tax
- Real Estate
- Exempt Organizations
- Sales, Exchanges and Basis
- Fiduciary Income Tax
- Tax Accounting
- Financial Transactions
- Tax Exempt Financing

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

Sincerely,

Rudolph R. Ramelli
Chair

Enclosure
As requested in Notice 2013-22, 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 2013-2014. 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. 82-152 and general “substance over form” principles.

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

8. Clarification about how section 336(e) applies to consolidated groups.

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

1. Guidance on restitution-based assessments under section 6201(a)(4):
   - How will restitution be assessed when a defendant/taxpayer filed a joint return with his or her spouse who is not a defendant (and therefore not

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2 References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.
subject to a restitution order)? Will the spouse be liable for the restitution-based assessment, or will the spouse receive a notice of deficiency? If the spouse successfully challenges the merits of the proposed adjustments, will the Service reduce the defendant/taxpayer’s restitution-based assessment accordingly? Can the spouse call the defendant/taxpayer as a witness in the audit, administrative appeal and/or court to challenge the amount of the restitution-based assessment, despite the inability to challenge under section 6201(a)(4)(C)?

- Does the Service intend to forego civil audits in most cases where the court orders restitution and the Service makes a restitution-based assessment?

- If the Service audits a defendant and finds the actual tax due is less than the restitution order, what steps will the Service take to reduce the restitution-based assessment? A Chief Counsel Notice suggests that the Service will contact the Tax Division to seek a reduced order of restitution, but does not explain how this will be accomplished after the order becomes final. 3

- If a defendant paid the restitution and then, after the restitution-based assessment, the Service determines that the tax due is less than the restitution assessed, how will the Service reduce the assessment under section 6404? (Under section 6404, the Secretary is authorized to abate the “unpaid” portion of an assessment which is excessive in amount or erroneously assessed.)

- If the Service does not audit after the criminal proceedings, how does a defendant challenge the amount of the restitution-based assessment if the amount exceeds the tax due, where section 6201(a)(4)(C) prevents any challenge?

- The Service is refusing to consider an offer-in-compromise with respect to a restitution-based assessment. 4 What if the taxpayer truly cannot pay? What are the taxpayer’s options?

- Will the Service reduce a restitution-based assessment when a valid net operating loss carryback or carryforward eliminates the liability? If so, how does a taxpayer obtain this relief?

- Where a defendant/taxpayer pays restitution prior to sentencing, will the Service post the restitution as of the date of payment? Or will it assert that the payment is not effective until after the restitution-based assessment is made?

2. Guidance on First Time Abate under I.R.M. 20.1.1.3.6.1:

- How does the Service define a “significant” amount in determining when a First Time Abate (“FTA”) conclusion will not apply?

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• Is any assessed penalty in the three years prior to the period at issue a “significant” penalty that bars FTA?

3. Guidance on penalty abatements (account posting issues, etc.):
   • Guidance confirming that failure to pay penalties can be abated even where the tax has not yet been paid in full.
   • Guidance requiring that penalty abatements must be entered as of the date the penalty was originally assessed, so taxpayers do not pay interest on an abated penalty. For example, a penalty is imposed on 6/30/2010 and abated on 6/30/2012. Because the Service enters the abatement as of the date of the decision to abate (instead of the date of the original assessment), the taxpayer avoids the penalty, but continues to be liable for the interest that accrued over the last two years.
   • Guidance preventing the accrual of additional penalties during consideration and/or after abatement of penalties based on reasonable cause or FTA.
   • Guidance requiring reduction of an assessed estimated tax penalty when the original tax assessed is reduced due to amended returns or audit adjustments. Furthermore, when the estimated tax penalty is reduced, the reduction should be entered as of the date the initial estimated tax penalty was assessed to avoid the accrual of interest on an amount that is abated.

4. Additional guidance on pre-assessment appeals rights with respect to international penalties, including penalties for failure to file Form 3520-A.

CORPORATE TAX
Martin Huck, Corporate Tax Committee, (202) 327-5819, Martin.Huck@ey.com

1. Guidance relating to the “no rule” positions outlined in Rev. Proc. 2013-3, with priority on:
   • Guidance relating to “north-south” issues where the “north” is a distribution to which section 355(a) otherwise applies;
   • Guidance relating to section 361 distributions to creditors where the debt held by the creditors is issued in anticipation of the distribution, including guidance clarifying what constitutes “in anticipation.”


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

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6 Id.
7 Id.
8 1978-1 C.B. 140.
4. Guidance relating to the allocation of earnings and profits in divisive reorganizations.

5. 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 qualified stock distribution (QSD) occurs in multiple steps.

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

1. Guidance regarding the measurement and permissible level of political campaign activity by section 501(c) exempt organizations other than those exempt under section 501(c)(3), including but not limited to unified standards distinguishing political campaign advertising from issue advocacy.

2. Guidance for 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.

3. Guidance regarding how to obtain a revised determination letter without the need for filing a new exemption application on Form 1023 or Form 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.9

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

5. Guidance updating Rev. Proc. 92-94,10 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. 75-50,11 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.

6. In addition to guidance pursuant to section 4966 regarding donor advised funds, as included in the 2012-2013 Priority Guidance Plan, guidance pursuant to sections 4958 and 4967.

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7. Guidance updating the definition of “control” in Treas. Reg. § 1.512(b)-1(l)(4) to conform to the changes made by the Tax Reform Act of 1997.\(^\text{12}\)

8. 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 \emph{de minimis} standard or otherwise.

9. 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.\(^\text{13}\)

\textbf{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 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 will be treated as a distribution under section 643(i); (4) whether there would be a safe harbor \emph{for 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 short 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 on 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 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.\(^\text{14}\) 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 severance of trusts. The Service has issued many private letter rulings addressing whether the non-pro rata division of a trust will result in

\(^{12}\) Pub. L. No. 105-34, 111 Stat. 788.

\(^{13}\) See ABA Section of Taxation, “Comments on the Scope of Section 514 of the Internal Revenue Code” (April 9, 2012), available at \url{http://www.americanbar.org/content/dam/aba/administrative/taxation/040912comments.authcheckdam.pdf}.

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 Revenue Ruling 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 different 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 for Federal income tax purposes, 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.

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 GST 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 recur. Current guidance on the application of the GST tax after 2012 to transfers made prior to 2013 could eliminate 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); (v) late allocations pursuant to section 9100 relief under section 2642(g); and (vi) 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 the application of the new 3.8% tax on unearned income to estates and trusts.

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

15 PLR 201118007 (May 6, 2011).
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 mitigation of character mismatches with respect to accrued interest and discount that is never paid.

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

3. Regulations 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.

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

5. Guidance under section 1058 addressing securities lending in light of recent case law.\(^\text{19}\)

6. Guidance regarding cross-border securities lending.\(^\text{20}\)

7. Final Regulations under section 871(m) on dividend equivalent payments.\(^\text{21}\)

8. Guidance on application of Treas. Reg. § 1.1001-3(f)(7)(ii), relating to deterioration in financial condition of the obligor, in the case of section 368(a)(1)(F) reorganizations, check-the-box elections and other circumstances where there is a change in either the corporate legal obligor or the tax obligor.

9. Guidance on the characterization, particularly for withholding tax purposes, of consent fees for debt modifications and waivers.

10. Guidance on characterization, including for withholding tax purposes, of standby letter of credit fees and commitment fees.

11. Regulations on prepaid forward contracts.\(^\text{22}\)

12. Regulations under sections 163(e)(5) and 163(i), including treatment of variable rate debt instruments (VRDIs) and contingent payment debt instruments (CPDIs).

**PARTNERSHIPS AND LLCS**

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

1. Guidance providing a safe harbor for determining when a party will be respected as a partner in a tax credit partnership, including transactions giving rise to low-income housing credits, new markets credits, rehabilitation credits, or energy credits.\(^\text{23}\) In addition, guidance is requested under section 7701(o) regarding the application of the


\(^{20}\) Notice 2010-46, 2010-1 C.B. 757.


economic substance doctrine to these transactions. In particular, guidance is requested
with respect to the applicability of language in the Joint Committee on Taxation report
which states that the doctrine is not intended to disallow tax benefits if the realization of
those tax benefits is consistent with the Congressional purpose or plan that the tax
benefits are designed to effectuate.

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

3. Proposed Regulations under sections 704, 734, 743, and 755 arising from the American
Jobs Creation Act of 2004,24 regarding the disallowance of certain partnership loss
transfers and no reduction of basis in stock held by a partnership in a corporate partner.
Interim guidance was issued in Notice 2005-32.25

4. Proposed Regulations under section 752 regarding related person rules.

5. Final Regulations regarding series LLCs.

6. A notice requesting comments prior to issuing Proposed Regulations regarding a bottom
guarantee or a minimum net worth requirement under the section 752 and/or section 707
Regulations. It is our understanding that Treasury and the Service may propose a
modification to the Regulations under section 752 and/or section 707 that would require a
partnership to disregard a bottom guarantee of a partnership liability in determining
whether any portion of the liability is treated as a recourse liability. We also understand
that Treasury and the Service may impose a net worth requirement under section 752
and/or section 707. We recommend that prior to making such a fundamental change,
Treasury and the Service should issue a notice and request for comments prior to issuing
Proposed Regulations.

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

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

9. Proposed Regulations under Treas. Reg. § 1.337(d)-3 relating to partnership transactions
involving a corporate partner’s stock or other equity interests.

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

11. Proposed Regulations establishing a new de minimis rule under section 704(b).26

PRO BONO AND TAX CLINICS
George Willis, Pro Bono and Tax Clinics Committee, (714) 628-2531, gwillis@chapman.edu

1. Guidance under section 61(a) relating to the exclusion of attorneys’ fees from the
prevailing individual’s income where the fees are awarded directly to a Legal Aid

26 See ABA Section of Taxation “Comments on Proposed Regulations Removing the Substantial Economic
Effect De Minimis Rule” (May 22, 2012), available at
http://www.americanbar.org/content/dam/aba/administrative/taxation/052212comments.authcheckdam.pdf.
Organization in connection with its representation of an individual (or group of individuals) in cases where the taxpayer has no obligation to pay attorneys’ fees to the Legal Aid Organization.  

2. Updated guidance under Treas. Reg. § 1.6050P-1(e)(1)(ii) with respect to what procedure taxpayers should follow to prevent taxation of the full amount of discharged debt to multiple individuals when a creditor complies with the requirement in that provision that:

   In the case of multiple debtors jointly and severally liable on an indebtedness, the amount of discharged indebtedness required to be reported under this section with respect to each debtor is the total amount of indebtedness discharged. For this purpose, multiple debtors are presumed to be jointly and severally liable on an indebtedness in the absence of clear and convincing evidence to the contrary.

   If each debtor who receives a Form 1099-C for the full amount of the debt reports that full amount as income, the forgiveness of that debt will result in taxation of the same amount to multiple individuals, an inappropriate result. It would be helpful for the Service to provide guidance on how taxpayers should address this situation, particularly when only one of the debtors received and used all of the funds loaned.

3. Guidance updating Treas. Reg. § 1.152-1 to clarify support-related issues as these pertain to the dependency exemption. Treas. Reg. § 1.152-1(a)(2), last updated in 1971, needs to be updated. There are two problems with the Regulations. First, the Service continues to apply a support test where the taxpayer is claiming a qualifying child. The support test was eliminated in 2005, and the Service should not continue to request this documentation. Second, the Service continues to treat public benefits such as TANF and SSI as support provided by the child. In fact, this is not support provided by the child, but rather it is being supplied to a parent or guardian by a government entity.

4. Updated guidance concerning section 32(k). Section 32(k) places restrictions on taxpayers who improperly claim the earned income tax credit. There are different penalties for fraudulent, reckless and improper claims which culminate in the taxpayer being banned from claiming the credit for a period of years. The Service does not provide prior notice to taxpayers of the consequences of an improper claim, nor is adequate guidance provided as to what constitutes an improper claim. Unfortunately, both Treas. Reg. § 1.32-3 and I.R.S. Significant Service Advice Memorandum 200245051 lack detailed guidance and as a result taxpayers and examiners have no guidance to understand the ban. We recommend (1) the development of more detailed criteria for determining whether and when the ban may be imposed, (2) the development of a process for providing the taxpayer with notice and an opportunity to contest the ban prior to its imposition (and that notice be provided well before a Notice of Deficiency is issued), and (3) the development of a process whereby a taxpayer may apply to have the ban lifted early if the taxpayer becomes compliant with his or her Federal tax obligations and is in fact eligible to claim the credit.

5. Guidance under section 7434(d). The Code provides for civil damages to a person harmed by another person’s fraudulent filing of information returns. Section 7434(d)

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27 PLR 201015016 (Apr. 16, 2010).
28 Nov. 8, 2002.
states that any person bringing an action “shall provide a copy of the complaint to the Internal Revenue Service upon the filing of such complaint with the court.” There is no guidance as to what documents are sufficient, where they should be submitted, etc. Therefore, more detailed guidance is needed by taxpayers and practitioners.

6. Guidance expanding preparation authority for Volunteer Income Tax Assistance (“VITA”) program preparers. Tax return preparers participating in the VITA program are precluded from preparing certain returns with issues common to the low income community. For example, current rules state that a VITA site is allowed to prepare Form 982 (Reduction of Tax Attributes Due to Discharge of Indebtedness) only when a Form 1099-C has been issued for a debt related to (1) a home foreclosure or (2) an unsecured credit card. Therefore, in situations where a taxpayer has both a Form 1099 for a home foreclosure (VITA-allowable) and a Form 1099-C for a repossessed car (VITA-unallowable), the site cannot prepare the return. VITA preparers should not be precluded from preparing Form 982 where the reported cancelled debt is from a common consumer transaction.

7. Individual Taxpayer Identification Number (ITIN) procedures require a more thorough revision and update. In 2012 the Service updated the ITIN application process and imposed new rules on Certified Acceptance Agents effective January 1, 2013. Among other things, the new process creates certain verification procedures for Certified Acceptance Agents (CAAs) and also limits the method by which ITINs for minors may be obtained. These rules hinder effective representation and tax compliance. We recommend that the Service further review and revise ITIN procedures and the CAA requirements.

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

1. Guidance under section 108(c), with particular focus on the definition of “secured by real property.”

2. Final Regulations under section 460 relating to the home construction contracts exemption.

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

4. Guidance regarding the treatment of cancellation of indebtedness income as unrelated business taxable income under section 512.

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30 IR 2012-98 (Nov. 29, 2012).


5. Guidance simplifying section 514(c)(9)(E) and the fractions rule.\(^{33}\)

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

7. Guidance regarding the treatment of a deemed loan arising under section 467 in connection with prepaid rent for the use of real property as a real estate asset for purposes of section 856(c)(5)(B).

8. Guidance revising Treas. Reg. § 1.856-5(c) addressing distressed debt acquisitions and modifications.

9. Guidance reconsidering, revising or withdrawing Notice 2007-55\(^{34}\) addressing the treatment of certain distributions under section 897(h)(1).

10. Regulations 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).

In addition to the foregoing, we requested suggestions from the Tax Credit and Equity Financing Committee and the New Markets Tax Credit Committee. Those suggestions follow.

1. Guidance under section 42(d)(1) on the inclusion of tax-exempt bond issuance costs that would amortize during the construction period of a project and thus be capitalized into depreciable basis.

2. Guidance under section 42 on casualty losses in a non-presidentially declared disaster area as to the availability of tax credits in a year where a building has a casualty, is repaired within a reasonable time, but is not repaired prior to the end of the tax year of the casualty. Rev. Proc. 2007-54\(^{35}\) provides guidance for presidioally declared disaster areas, but does not address other casualties. Chief Counsel Advice 200134006\(^{36}\) and 20091301237 conclude credits are lost for the year of the casualty if the casualty is not repaired by the end of the year. Guidance is requested to address unintended hardships for projects which have a casualty late in the year, repair the casualty quickly, but appear to be at risk of permanently losing credits for such year because the repair is not completed by the end of the year.

3. Formal guidance under section 42 with respect to the continued qualification of over-income tenants covered by an extended use agreement after a transfer of the project and the applicability of the conclusions in the Guide for Completing Form 8823, the Low-


\(^{35}\) 2007-2 C.B. 293.


\(^{37}\) March 27, 2009.
Income Housing Credit Agencies Report of Noncompliance or Building Disposition.\textsuperscript{38} While the Guide addresses the issue, it provides that taxpayers may not use or cite to the Guide.

4. Formal guidance concerning the exception under section 42(d)(6) for any federally-assisted or state-assisted building.

5. Guidance on whether the otherwise lawful non-renewal of the lease of a tenant by reason of such tenant's income exceeding the maximum income limitation required upon initial occupancy or some higher income limitation violates section 42. Guidance is requested whether the answer changes if renewal of the lease would cause a termination or diminution of rights or benefits under other government programs.

6. Guidance under section 142 on whether low-income housing projects which have lost their rural status are held harmless at the highest national non-metropolitan median income that the project achieved if the projects’ income limits were originally determined using the national non-metropolitan median income afforded to rural projects under section 42(i)(8).

7. Guidance addressing when allocations of state tax credits to members of a partnership will be respected as allocations rather than as a disguised sale of credits.\textsuperscript{39}

8. Guidance with respect to the definition of “control” for the reasonable expectations test in Treas. Reg. § 1.45D-1(d)(6)(ii)(B) where a Community Development Entity (CDE) makes an equity investment in a Qualified Active Low-Income Community Business (QALICB) but does not acquire management control.


10. Guidance with respect to the definition of “redemption” set forth in Treas. Reg. § 1.45D-1(e)(3)(i) applicable to a CDE taxable as a corporation where such entity has made qualified low-income community investments in multiple years and would like to dispose of an investment and distribute proceeds from the disposition that would exceed its accumulated earnings and profits.

11. Guidance under the redemption safe harbor set forth in Treas. Reg. § 1.45-1(e)(3)(iii) to address the application of the safe harbor to changes in taxable income due to the application of the original issue discount rules.

SALES, EXCHANGES AND BASIS
Mark E. Wilensky, Sales, Exchanges and Basis Committee, (516) 747-0300, mwilensky@meltzerlippe.com

1. Guidance clarifying the effect of a non-recognition transaction under section 351, 721, or 731 immediately before or after an exchange of like kind property upon the like kind property exchange qualifying for non-recognition under section 1031. In Rev. Rul. 75-

\textsuperscript{38} Revised Oct. 2009
\textsuperscript{39} See Virginia Historic Tax Fund 2001 LP v. Commissioner, 639 F.3d 129 (4th Cir. 2011).
the Service held that a non-recognition transaction under section 351, 721, or 731 immediately before or after a like kind property exchange disqualifies the 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 a new Revenue Ruling permit taxpayers to engage in a non-recognition transaction under section 351, 721, or 731 before or after a like kind exchange without disqualifying the like kind exchange under section 1031, so long as title to the like kind property passes through the taxpayer pursuant to the like kind exchange.42

2. Guidance clarifying the scope of the “routine financial services” exception for acting as a section 1031 exchange accommodator. Under 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.43 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.”44 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).

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41 1977-2 C.B. 305.
42 We note that such guidance could be limited to circumstances in which no binding commitment exists to engage in the exchange under section 1031 or the other non-recognition transaction at the time of the first transaction.
44 REG-107175-00, 2001-1 C.B. 971, 972.
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. Because this is an issue that is important to many taxpayers, we recommend the issuance of guidance upon which all taxpayers may rely.

5. Guidance under sections 167 and 1031 pursuant to Notice 2013-13 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.

TAX ACCOUNTING
Jan Skelton, Tax Accounting Committee, (202) 220-2082, janskelton@deloitte.com

1. Revenue Procedure under section 168(k)(4) regarding the election to accelerate carryover AMT credits in lieu of claiming bonus depreciation.


3. Revenue Procedure under section 179(f) regarding qualified real property.


5. Guidance under section 199 addressing benefits and burdens of ownership.

6. Final Regulations under section 263(a) regarding the capitalization of costs related to tangible property.

7. Revenue Procedure under section 263(a) regarding the capitalization of electric generation property.

8. Revenue Procedure under section 263(a) regarding the capitalization of natural gas transmission and distribution property.

9. Revenue Procedure under section 263(a) regarding the capitalization of cable network property.

10. Final Regulations under section 263A regarding the inclusion of negative amounts in additional section 263A costs.

11. Final Regulations under sections 263A and 471 regarding sales-based royalties and sales-based vendor allowances.

12. Proposed Regulations under section 263A to update and clarify the Regulations.


45 Jan. 11, 2013.
47 1997-1 C.B. 680.
14. Proposed Regulations under section 453 addressing the exchange of property for an annuity.

15. Proposed Regulations under section 460 addressing the application of the lookback interest rules to certain pass-through entities with tax-exempt owners.

16. Final Regulations under section 460 regarding home construction contracts.48

17. Proposed Regulations under Treas. Reg. § 1.461-4(d)(5) addressing contingent liabilities assumed in connection with a sale of a trade or business.


19. Proposed Regulations on the carryover of last-in, first-out (LIFO) layers following a section 351 or section 721 transaction.

TAX EXEMPT FINANCING
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1. Guidance on and expansion of the safe harbors for determining private use of management contracts for bond financed facilities through updates to Revenue Procedure 97-1.49

2. Guidance on the definition of “issue price” for tax-exempt bonds, Build America Bonds, and other direct pay tax credit bonds.50

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

4. Guidance with respect to the financing of short-term and long-term working capital deficits.

5. Guidance on bond financing of grants.51

6. Guidance with respect to arbitrage rules related to qualified hedge and yield reduction payments.


7. 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.

8. Final Regulations on the allocation and accounting provisions of section 141.