July 25, 2011

Hon. Douglas Shulman  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Re: Recommendations for 2011-2012 Guidance Priority List

Dear Commissioner Shulman:

The American Bar Association Section of Taxation welcomes the opportunity to provide recommendations for inclusion in the 2011-2012 Treasury-IRS Guidance Priority List. These recommendations represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The enclosed list contains recommendations made by the members of various committees within the Section of Taxation. I hope you find the suggestions helpful as you formulate the new Priority Guidance List. The recommendations include items in the following areas of the practice:

- Administrative Practice
- Bankruptcy and Workouts
- Capital Recovery and Leasing
- Civil and Criminal Tax Penalties
- Corporate Tax
- Employee Benefits
- Employment Taxes
- Estate & Gift Taxes
- Exempt Organizations
- Fiduciary Income Tax
- Financial Transactions
- Foreign Activities of U.S. Taxpayers
- Individual and Family Taxation
- Insurance Companies
- Investment Management
- Low Income Taxpayers
- Partnerships and LLCs
- Real Estate
- S Corporations
- Tax Exempt Financing
- U.S. Activities of Foreigners

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

Sincerely,

Charles H. Egerton  
Chair, Section of Taxation

Enclosure

cc: Emily McMahon, Deputy Assistant Secretary (Tax Policy), Department of the Treasury  
William J. Wilkins, Chief Counsel, Internal Revenue Service
RECOMMENDATIONS FOR THE 2011-2012 TREASURY-IRS GUIDANCE PRIORITY LIST

As requested in Notice 2011-39,¹ 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 2011-2012. In each case, the name and contact information for a representative of the committee making the suggestion are provided.

ADMINISTRATIVE PRACTICE
Fred Murray, Administrative Practice Committee, (202)861-4141, counselor@att.net

1.  Guidance providing for the development of a process for higher level pre-assessment review of cases before a section 6707A² penalty or a section 6662(b)(6) penalty is proposed including a taxpayer conference or other method for a taxpayer to address the issues involved before the final assessment decision is made.

2.  Final Regulations updating section 10.34(a) of Circular 230, including the 2008 changes to section 6694. The Tax Section submitted comments on this topic on June 4, 2009.³

3.  Guidance on the economic substance doctrine as recently codified in section 7701(o), including application of the penalty under sections 6662(b)(6), as referenced above, and 6662(i). The Tax Section submitted comments on this topic on January 18, 2011.⁴

BANKRUPTCY AND WORKOUTS
George Nelson, Bankruptcy and Workouts Committee, (281) 451-0661, GNelson382@gmail.com

1.  Final Regulations under section 108 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 application of section 597 (and the Regulations thereunder), taking into account changes in how failed bank transactions have been structured in recent years.

¹ 2011-20 I.R.B. 786.
² References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.
1. Proposed Regulations under section 263(a) regarding the treatment of capitalized transaction costs in contexts such as stock acquisitions and tax-free reorganizations.

2. Final Regulations under section 263(a) regarding the treatment of expenditures with respect to tangible property.

3. Guidance under section 263(a) regarding capitalization or deduction of electric utility transmission and distribution costs.


5. Guidance on the application of the principles of Clajon Gas Co. v. Commissioner, to asset classification determinations under Revenue Procedure 87-56.

CIVIL AND CRIMINAL TAX PENALTIES
Charles Rettig, Civil and Criminal Tax Penalties Committee, (310)281-3243, retig@taxlitigator.com

1. Review of the voluntary disclosure practice policy set forth in Internal Revenue Manual section 9.5.11.9 with consideration of further encouraging voluntary disclosures by taxpayers who may not have actual criminal exposure but are concerned about potential application of civil penalties that may be imposed after voluntarily disclosing prior non-compliance with an emphasis on encouraging non-compliant taxpayers to “get right” with the government to ensure ongoing, future compliance and providing clear standards of civil penalty mitigation for taxpayers voluntarily coming into compliance.

2. Guidance providing increased discretion and penalty guidance for field examiners and managers with respect to the impact of penalties on taxpayers in a recessionary economy.

3. Guidance providing increased collection discretion and penalty abatement guidance for field collection revenue officers and managers with respect to the impact of collection actions and penalties on taxpayers in a recessionary economy.

4. Guidance providing determinable standards of care for valuations including guidance on the meaning of the safe harbor exception “more likely than not the proper value” and protocols, guidelines and examples for the application of the safe harbor provision.

5. Guidance regarding the “Top 10” employment tax audit priorities to clarify worker status and employment tax priorities including examples setting forth potential liabilities for taxes and penalties to minimize the pyramiding of employment tax liabilities that often occurs in a recessionary economy making it difficult for both the Internal Revenue Service (the “Service”) and the employer to achieve timely resolution of controversies.

6 354 F.3d 786 (8th Cir. 2004).
8 June 26, 2009.
9 I.R.C. § 6695A(c).
6. Guidance applying the “mailbox rule” that applies to tax filings\(^\text{10}\) to reports of foreign bank and financial accounts to avoid holding filers responsible for delivery delays beyond their control.

7. Guidance requiring that Administrative Law Judges selected for Circular 230 disciplinary proceedings have tax practice experience to increase the integrity of Circular 230 disciplinary proceedings.

8. Guidance providing incentives for businesses not currently under audit to properly classify workers prospectively and creating an informal voluntary disclosure program emphasizing employment tax and worker classification issues, which might provide graduated worker Classification Settlement Program treatment for employers who voluntarily contact the Service before the Service has:

   a. initiated a civil examination or criminal investigation of the employer, or has notified the employer that it intends to commence such an examination or investigation;
   
   b. received information from a third party (e.g., an informant, another governmental agency, or the media) alerting the Service to the specific employer’s noncompliance; or
   
   c. initiated a civil examination or criminal investigation that is directly related to the specific liability of the employer.

**CORPORATE TAX**

Joseph M. Pari, Corporate Tax Committee, (202)346-7870, jpari@dl.com

1. Consolidated Returns:

   a. Guidance regarding the application of section 172(h) to a consolidated group.
   
   b. Guidance concerning the interaction of Regulation sections 1.1502-11, -28, and -36.
   
   c. Guidance regarding the application of Regulation section 1.267(f)-1(c)(1)(iv) to certain losses between members of a controlled group as defined in section 267(f)(1).
   
   d. Guidance regarding the impact of intercompany transactions on the gross receipts test of section 165(g)(3)(B).

2. Corporations and their Shareholders:

   a. Guidance regarding recovery of stock basis in section 301 distributions.
   
   b. Final Regulations regarding the section 355(b) active trade or business requirement.

\(^{10}\) See I.R.C. § 7502.
c. Guidance under section 355(d) to expand the exception to the definition of “purchase” for transfers between members of the same affiliated group to include corporations listed in section 1504(b).

d. Revenue rulings regarding application of final Regulations to all-cash D reorganizations.

e. Guidance regarding issues in the no-net-value Proposed Regulations.

f. Guidance regarding section 357(d).

g. Guidance regarding step transaction issues when there is a stock acquisition that is not a qualified stock purchase followed by the liquidation of the acquired corporation.

EMPLOYEE BENEFITS
Joni L. Andrioff, Employee Benefits Committee, (312)486-4301, jandrioff@deloitte.com

1. Final Regulations under section 411(b) regarding required adjustments in accrued benefits for delayed retirement.¹¹

2. Guidance under sections 409(p)(2) and 4979A regarding the consequences of prohibited allocations of securities in an S corporation employee stock ownership plan (“ESOP”).

3. Guidance on the prohibition against discrimination in favor of highly compensated individuals in insured group health plans under section 10101 of Patient Protection and Affordable Care Act (the “PPACA”).¹²

4. Guidance on the establishment of simple cafeteria plans under section 9022 of the PPACA.

5. Guidance on the application of the PPACA to Health Reimbursement Arrangements.

EMPLOYMENT TAXES
William H. Weissman, Employment Taxes Committee, (925)927-4545, wweissman@littler.com


2. Guidance clarifying the tax treatment of supplemental unemployment benefits or sub pay for FICA tax purposes.

¹¹ Reg. § 1.411(b)-2.
1. Guidance under section 643(i) regarding distribution that is deemed to occur 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, including: (i) who will be required to determine the fair market value of such property; (ii) a standard for the proper valuation of such property; (iii) 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); (iv) whether de minimis usage of property will 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 seven days of usage; and (v) information about how such usage will be required to be reported.

2. Guidance regarding decanting, which 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. In Revenue Procedure 2011-3, the Service added decanting to its “no-ruling” list with respect to the following: (i) whether decanting gives rise to a section 661 distribution deduction or results in inclusion in gross income under section 662; (ii) whether decanting results in a taxable gift being made under section 2501; and (iii) whether decanting causes loss of generation-skipping transfer tax (“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. As a result, decanting is being used more and more by practitioners across the country.

3. Guidance under section 1001 with respect to severance of trusts and 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 may 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. 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 Private Letter Ruling 201118007, the trustees of a qualified terminable interest property (“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 a difference in the treatment of a severance of a charitable remainder trust.

4. Guidance under section 2001 regarding “recapture” of tax on gifts protected by the gift tax unified credit. The Tax Relief, Unemployment Insurance Reauthorization, and Job

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14 Jan. 25, 2011.
Creation Act of 2010 (the “2010 Tax Act”)\(^\text{16}\) increased the applicable exclusion amount for estate and gift tax purposes to $5 million. However, absent further legislation, the 2010 Tax Act, and its predecessor, the Economic Growth and Tax Relief Act of 2001,\(^\text{17}\) will sunset and the applicable exclusion amount for gift and estate tax purposes will return to $1 million. These circumstances raise the possibility that a taxable gift made currently that is not subject to current gift tax because of the $5 million exclusion amount may be subject to a “recapture” of transfer tax at death. If the tentative tax credited for prior gifts is calculated by using the unified credit available at the time the gift was made and if the unified credit has been reduced at the time of death, a “recapture” would result at death because the apparently applicable methodology for computing the estate tax gives no “gift taxes payable” credit for the amount of the unified credit that was in existence at the time of the gift but is no longer available at death. This potential recapture is adding more uncertainty to the transfer tax law and adding to taxpayer difficulty in understanding the transfer tax system. Although there is no possibility for this type of recapture until after 2012, current guidance would be helpful to remove this uncertainty.

5. **Guidance with respect to portability under section 2010(c)(4) including:**

   a. Clarification of the apparent discrepancy between Example 3 in the report prepared by the staff of the Joint Committee on Taxation\(^\text{18}\) and section 2010(c)(4) as added by the 2010 Tax Act. Specifically, Example 3 of the Joint Committee Report uses the Wife’s $7 million applicable exclusion amount, but section 2010(c)(4)(B)(i) appears to contemplate use of a $5 million basic exclusion amount in the circumstances of Example 3.

   b. The mechanics of electing portability of the estate tax exclusion amount, including: (i) a simplified estate tax return for small estates or for estates that are non-taxable by reason of the marital deduction; (ii) who may make the election when there is little or no property for a statutory executor under section 2203 to “possess,” and (iii) the extent to which the portability election may be deemed to have been made and relief measures for the failure to make a timely election.

   c. The use of a deceased spouse’s unused exclusion amount for gift tax purposes including: (i) the ordering of the use of the predeceased spouse’s unused exclusion amount and the donor spouse’s basic exclusion amount and (ii) the limits on portability when a surviving spouse uses the deceased spousal unused exclusion amount and then, after remarrying, is widowed again and receives still more deceased spousal unused exclusion amount.

6. Guidance 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.

7. Guidance on the application of the GST tax after 2012 to transfers made before 2013 because, if Congress does not change the law, many of the same uncertainties with

\[^{16}\text{Pub. L. No. 111-312, 124 Stat. 3301.}\]
\[^{17}\text{Pub. L. No. 107-16, 115 Stat. 38.}\]
\[^{18}\text{Staff of the Joint Committee on Taxation, Technical Explanation of the Revenue Provisions Contained in the “Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010” Scheduled for Consideration by the United States Senate 53 (Dec. 10, 2010).}\]
respect to the GST tax that troubled taxpayers in 2010 will resurface 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 “9100 relief” under section 2642(g); and (vi) qualified severances under section 2642(a)(3).

8. Guidance on the coordination of the penalties imposed on tax return preparers under sections 6694 and 6695A, specifically whether the penalties under these sections are exclusive or may be aggregated.

EXEMPT ORGANIZATIONS
Suzanne R. McDowell, Exempt Organizations Committee, (202)429-6209, smcdowell@steptoe.com

1. Update Revenue Procedure 92-94, to reflect the changes in the public support test and to simplify the procedures for foreign equivalency determinations, including the establishment of an affidavit repository.

2. Guidance regarding what constitutes non-deductible political campaign activity under sections 162(e) and 6033(e), consistent with interpretations of the legislative lobbying limit and the candidate electioneering prohibition under section 501(c)(3). In the wake of the Supreme Court’s decision in Citizens United v. Federal Election Commission, we have seen a substantial increase in corporate political expenditures by section 501(c)(6) trade associations and section 501(c)(4) social welfare organizations, raising issues not addressed by the existing Regulations, which focus mainly on lobbying activity rather than electioneering.

3. Guidance regarding the measurement and extent of political campaign activity by section 501(c)(4) social welfare organizations, section 501(c)(6) trade associations, and other organizations exempt under subsections in section 501(c) other than subsection 501(c)(3), as applicable, to assist in applying the requirements that their non-political exempt activities remain primary following the decision in Citizens United.

4. Guidance concerning the application of reserved Regulation section 1.527-6(b)(3), “Expenditures allowed by Federal Election Campaign Act” in light of the Citizens United decision, which broadens the scope of activity that must be constitutionally permitted under existing law.

5. Guidance regarding when statements that propose to voters an issue-based “litmus test” for choosing candidates to support or oppose, but do not refer to any specifically identified candidate or political party, would violate the prohibition against intervention in a political campaign for organizations described in section 501(c)(3), or violate the primary purpose test for organizations described in sections 501(c)(4), 501(c)(5), and 501(c)(6).

6. Guidance clarifying that borrowing to make charitable grants or to support charitable programs does not normally constitute acquisition indebtedness within the meaning of

20 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).
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.

7. Guidance updating the definition of “control” in Regulation section 1.512(b)-4 to conform to the changes made by the Tax Reform Act of 1997.21

8. Guidance providing procedures for obtaining a revised determination letter without the need for filing a new exemption application on Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, or Form 1024, Application for Recognition of Exemption Under Section 501(a), when there is a mere change in the state of incorporation.22

9. 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 Regulation section 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.

10. In addition to guidance updating the Regulations on group returns, which was included on the prior year’s Priority Guidance Plan, guidance updating Revenue Procedure 80-27,23 with respect to the process for applying for group exemptions.

11. Guidance regarding the application of section 501(m) and commercial-type insurance. Following the Supreme Court’s decision in Rush Prudential HMO, Inc. v. Moran,24 the Service’s withdrawal of its health maintenance organization (“HMO”) audit guidelines in this area, and the expiration of the 18-month directive suspending the application of section 501(m) to HMOs, there is no guidance concerning the Service’s interpretation of section 501(m).

12. Guidance on the applicability of the estate and gift taxes to bequests and inter vivos gifts to organizations described in section 501(c)(4), including reviewing and updating as appropriate Revenue Ruling 82-216,25 which states that “gratuitous transfers to persons other than organizations described in section 527(e) are subject to gift tax absent any specific statute to the contrary, even though the transfers may be motivated by a desire to advance the donor’s own social, political, or charitable goals.”

13. Guidance on the deductibility under section 170 of gifts made to a disregarded entity, the sole owner of which is an organization described in section 501(c)(3).

14. Guidance confirming 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).

15. Guidance under sections 1441 and 861 through 863 for withholding on grants and other payments made by 501(c) organizations outside the U.S., including (i) clarifying when a grant constitutes a gift upon which no withholding is required and (ii) clarifying the consequences when grants involve travel to or from the United States.

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FINANCIAL TRANSACTIONS
Lucy W. Farr, Financial Transactions Committee, (212)450-4026, farr@davispolk.com

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

2. Final Regulations under section 446 and section 1234A relating to the treatment of notional principal contracts with contingent nonperiodic payments.

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

4. Final Regulations addressing the definition of “publicly traded” debt under section 1273.

5. Guidance on market discount, the accrual of original issue discount and the application of the payment ordering rule in the context of debt instruments when there is substantial uncertainty of repayment.

6. Guidance under section 871(m).

7. Proposed Regulations under section 475 to permit debt obligations of a securities or commodities dealer that have an embedded section 475 security or commodity, as applicable, to be marked to market in whole or part.


FOREIGN ACTIVITIES OF U.S. TAXPAYERS
Mark Harris, Foreign Activities of U.S. Taxpayers Committee, (404)676-7160, mharris5@NA.KO.com

1. Guidance regarding the treatment of intangibles under sections 367(d).

2. Guidance under section 987.

3. Guidance regarding the application of the look-through rules to passive foreign investment companies.


5. Guidance under Regulation section 1.367(b)-8.

6. Guidance addressing issues with respect to dual consolidated losses.

Guidance providing competent authority relief for self-initiated adjustments, particularly if the adjustments are made to avoid U.S. or foreign penalties.

7. Guidance with respect to foreign tax credits including guidance regarding the definition of a splitter, guidance under section 901(m), and guidance regarding sections 960 and 904(d)(6).
INDIVIDUAL AND FAMILY TAXATION
Megan L. Brackney, Individual and Family Taxation Committee, (212) 808-8100, mbrackney@kflaw.com

1. Revise Proposed Regulations regarding the section 104(a)(2) exclusion from income for amounts received on account of personal physical injury or physical illness. The Tax Section submitted Comments on this topic on February 3, 2010.  

2. Finalize Temporary Regulation section 1.041-1T, which addresses the recognition of gain in a corporate redemption as a result of a marital dissolution, and provide guidance regarding redemptions in other entities, such as partnerships.

3. Revise Regulation section 1.6015-5(b)(1) to extend the statute of limitations on claims for equitable relief under section 6015(f).

INSURANCE COMPANIES
Craig R. Springfield, Insurance Companies Committee, (202) 347-2230, crspringfield@davis-harman.com

1. Guidance under section 1035 regarding exchanges involving qualified long-term care insurance contracts, including guidance regarding:
   a. the partial exchange of an annuity contract (such as a single premium immediate annuity) for a qualified long-term care insurance contract;
   b. the application of the principles of Regulation section 1.1035-1 (e.g., regarding exchanges that relate to the same insured) in the context of an exchange involving a qualified long-term care insurance contract; and
   c. the application of section 7702B(b)(2)(C) when an annuity contract or life insurance contract with tax-deferred income is exchanged for a qualified long-term care insurance contract.

2. Guidance regarding the circumstances in which annuity payments constitute “substantially equal periodic payments” (“SEPPs”) for purposes of section 72(t)(2)(A)(iv) and (q)(2)(D), including (i) whether annuity payments that satisfy the minimum distribution requirements of Regulation section 1.401(a)(9)-6 constitute SEPPs, (ii) guidance on what other types of annuity payments may constitute SEPPs, and (iii) clarification that the methodologies described in Revenue Ruling 2002-62 are not the exclusive methodologies for calculating SEPPs.

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27 2002-2 C.B. 710.
INVESTMENT MANAGEMENT
Joseph A. Riley, Investment Management Committee, (212)728-8715, jriley@willkie.com

1. Guidance clarifying the application of Notice 97-64\textsuperscript{28} to capital gain reporting by regulated investment companies following the enactment of the Regulated Investment Company Modernization Act of 2010.\textsuperscript{29}

2. Guidance clarifying the effective date of the Regulated Investment Company Modernization Act of 2010 amendments to section 1212(a) regarding capital loss carryover expirations for purposes of the excise tax provisions of section 4982.

LOW INCOME TAXPAYERS
Kathryn J. Sedo, Low Income Taxpayers Committee, (612)625-5515, sedox001@umn.edu

1. Guidance under section 32 regarding the temporary absence of qualifying children for earned income tax credit (“EITC”) purposes to clarify the conditions in which a temporary absence by reason of education for school-aged children meets the criteria for the EITC.

2. Guidance under section 6050P regarding when a Form 1099-C, Cancellation of Debt, should be issued because many creditors seem to be interpreting Regulation section 1.6050P-1(b)(2) to require that a Form 1099-C be sent out by creditor before the debt is actually forgiven.

3. Guidance under Regulation 1.6050P-1(e)(1)(ii) with respect to what procedure taxpayers should follow to prevent taxation of the full amount of the 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 one debt will result in taxation of the same amount to multiple individuals, a patently unfair and unwarranted result. If the Treasury does not wish to alter the requirement of the regulations and remove the presumption of joint and several liability, it would be very helpful for the Service to provide guidance on how taxpayers should address that situation, particularly when only one of the debtors received and used all of the funds loaned.

PARTNERSHIPS & LLCs
Steven R. Schneider, Partnerships and LLCs Committee, (202)721-1145, sschneider@goulstonstorrs.com

1. Guidance regarding the application of Revenue Ruling 99-6,\textsuperscript{30} Situation 1, to (i) nonrecognition transactions and (ii) situations in which the terminating partnership has liabilities, section 751 property, or section 704(c) property.

\textsuperscript{28} 1997-2 C.B. 323.
\textsuperscript{29} Pub. L. No. 111-325, 124 Stat. 3537.
\textsuperscript{30} 1999-1 C.B. 432.
2. Guidance allowing securities partnerships that use an aggregation method for qualified financial assets under Regulation section 1.704-3(e) to treat basis adjustments under sections 734(b) and 743(b) as separate assets and to recover them under a reasonable method, rather than allocating the basis adjustments to particular partnership assets.

3. Guidance confirming that subpart F inclusions and qualified electing fund inclusions are qualifying income for purposes of section 7704 regardless of whether cash equal to such inclusions are distributed.

4. Regulations addressing the American Jobs Creation Act of 2004\(^{31}\) changes to sections 734, 743, and 755.

5. Regulations on partnership options.

6. Guidance under section 751(b) to first update the Regulations to reflect the hypothetical sale approach to measuring shares of hot assets and then to adopt an exchange model that minimizes the recognition of capital gain in hot asset exchanges to the maximum extent possible.

7. Clarification of certain section 704(c) issues set forth in Notice 2009-70.\(^ {32}\)

8. Guidance modifying or clarifying the application of Revenue Ruling 84-53\(^ {33}\) and Regulation section 1.704-3(a)(7) to transfers of partial interests (i) in nonrecognition transactions and (ii) when the transferred interest and the retained interest are not identical.

9. Revoke or modify Regulation section 1.267(b)-1(b) to take into account the enactment of section 267(b)(10) in 1982, and the amendment of section 707(b)(1) in 1986.

10. Guidance suspending the enforcement of the anti-chanring rules of section 197(f)(9) in the interests of sound tax administration.

11. Guidance on the allocation of partnership liabilities under Regulation section 1.752-4(b)(2)(iii) in light of the Tax Court’s decision in *IPO II v. Commissioner*.\(^ {34}\)

12. Guidance under Regulation section 1.704-2(f)(6) concerning whether cancellation of indebtedness income of a partnership should be included in chargeback before other items of income.

**REAL ESTATE**

Eliot L. Kaplan, Real Estate Committee, (602)528-4036, ekaplan@ssd.com

1. Revisions to Regulation section 1.514(c)-2. The Tax Section submitted comments on this topic on January 19, 2010.\(^ {35}\)


\(^{32}\) 2009-2 C.B. 255.

\(^{33}\) 1984-1 C.B. 159.

\(^{34}\) 122 T.C. 295 (2004).

\(^{35}\) ABA Section of Taxation, “Comments on Concerning Partnership Allocations Permitted Under Section 514(c)(9)” (January 19, 2010), available at
2. Guidance under section 108(c), with particular focus on definition of “secured by real property.”

3. Guidance regarding the determination of a partner’s insolvency and the application of Revenue Ruling 92-53\(^{36}\) in the context of discharged nonrecourse debt of a partnership.

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

5. Guidance regarding treatment of an interest in a money market fund as a “cash item” under section 856(c)(4)(A) The Tax Section submitted comments on this topic on April 22, 2009.\(^{37}\)

6. Revisions to the Regulations under section 337(d) for real estate investment trusts (“REITs”) involved in exchanges under section 1031 and dispositions under section 1033 and clarification regarding the treatment of tax-exempt entities as C corporations under these Regulations. The Tax Section submitted comments on this topic on May 1, 2008.\(^{38}\)

7. Revisions to Regulation section 1.856-5(c) addressing distressed debt acquisitions and modifications.

8. Guidance regarding REIT preferential dividend issues to extend Private Letter Ruling 201109003.\(^{39}\)

9. Guidance to address unresolved issues relating to stock dividends by REITs.

10. Final Regulations under section 460 relating to the home construction contracts exemption. The Tax Section submitted comments on this topic on April 27, 2009.\(^{40}\)

11. Comprehensive guidance regarding transactions involving distressed debt.


\(^{39}\) Aug. 24, 2010.

12. Regulations providing that the five percent publicly traded stock test in section 897(c)(3) is applied to stock owned by partnerships at the partner level (rather than the partnership level).

S CORPORATIONS
John B. Truskowski, S Corporations Committee, (312)443-0257, jtruskowski@lockelord.com

1. Guidance providing (i) that the Service will issue private letter rulings regarding whether gross receipts from royalties, rents, dividends, interest, and annuities constitute passive investment income for purposes of section 1362(d)(3) or (ii) objective tests or safe harbors for certain common situations without adverse inferences with respect to other situations. This guidance is needed because excessive passive investment income can cause an S election to terminate, the Regulations on passive investment income are subjective, taxpayers cannot rely on private letter rulings issued to other taxpayers and it is important for corporations to have a high degree of certainty as to their S corporation status.

2. Guidance addressing issues related to the change in section 1374(d)(7)(B) and particularly how this provision applies to installment sales that originated in 2009, 2010, 2011, and in earlier years.

3. Guidance confirming that instruments, obligations, and arrangements that are not treated as a second class of stock pursuant to Regulation section 1.1364-1(l)(4) will not be treated as stock for other purposes of subchapter S (e.g., for purposes of allocating income or the holder being treated as an ineligible shareholder). Differences between Regulation section 1.1364-1(l)(4), which states “[i]nstruments, obligations, or arrangements are not treated as a second class of stock for purposes of this paragraph (l) unless they are described in paragraphs (l)(4)(ii) or (iii) of this section,” and Regulation section 1.1364-1(b)(5), which states “[f]or purposes of subchapter S, an instrument or obligation that satisfies the definition of straight debt in paragraph (l)(5) of this section is not treated as outstanding stock” suggest that these instruments, obligations, and arrangements may constitute stock for other purposes of subchapter S. We believe, for example, that if a corporate bank held a warrant issued by Corporation S that was excluded from second class of stock status under Regulation section 1.1364-1(l)(4)(iii)(B)(1), the warrant should not be treated as stock for purposes of causing the corporate bank to be treated as an ineligible stockholder thereby disqualifying Corporation S from status as a “small business corporation” under section 1361(b)(1)(B).


5. Guidance clarifying that section 267(e) does not apply to S corporations owned by an ESOP. Section 267(a)(2) requires matching of payor deductions and payee income in transactions between related taxpayers. For example, if taxpayers are related and the payor of compensation uses the accrual method of accounting but the payee uses the cash method, the payor cannot deduct an accrued payment until it is actually paid. Generally, a corporation and another party are related if the other party owns more than 50% in

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42 2003-1 C.B. 998.
value of the stock of the corporation. However, under section 267(e)(1)(D) relating to pass-through entities, such as S corporations, there is no 50% minimum ownership requirement. Therefore, any shareholder of an S corporation is deemed to be related to the S corporation. Although an ESOP may own the stock of an S corporation, it is not clear whether the participants in the ESOP are also considered shareholders under the constructive stock ownership rule of section 267(c)(1). If so, deductions would be allowed for the accrual of compensation to an employee participating in the ESOP only when the compensation is actually paid.

6. Guidance providing that suspended losses are taken into account in a subsequent year by first netting the income for the subsequent year and the suspended loss and then taking into account any distributions from the S corporation rather than taking into account distributions first and then suspended losses.

STANDARDS OF TAX PRACTICE
Scott D. Michel, Standards of Tax Practice Committee, (202) 862-5030, sdm@capdale.com

1. Final Regulations on the inclusion of the Registered Return Preparer Program in Circular 230.

2. Final Regulations on section 10.34 of Circular 230, relating to standards for tax return preparation. The Tax Section submitted comments on this topic on June 4, 2009.43

TAX EXEMPT FINANCING
Jeremy Spector, Tax Exempt Financing Committee, (212) 692-8283, jaspector@mintz.com

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 Revenue Procedure 97-13.44

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


44 1997-1 C.B. 632.
7. Guidance on bond financing of grants. The Tax Section submitted comments on this topic on January 5, 2011.\(^{45}\)

8. Guidance with respect to solid waste disposal facilities. The Tax Section submitted comments on this topic on February 23, 2010.\(^{46}\)

**U.S. ACTIVITIES OF FOREIGNERS AND TAX TREATIES**  
Alan I. Appel, U.S. Activities of Foreigners and Tax Treaties Committee, (212) 541-2292, aiappel@bryancave.com

1. Guidance under sections 1471 through 1474 (“Chapter 4”) with respect to:
   a. the definition of “primarily” and substantial” in definition of Foreign Financial Institution (“FFI”);
   b. possible exceptions to FFI and identification of additional deemed compliant entities;
   c. with respect to pass-through payments to eliminate double withholding and minimize under and over withholding;
   d. required due diligence and compliance for FFIs and required due diligence and compliance for Non Financial Foreign Entities (“NFFEs”); and
   e. coordination of withholding under sections 1441 through 1464 (“Chapter 3”) and Chapter 4.

2. Guidance with respect to qualified foreign corporations to update Notice 2006-101\(^{47}\) to clarify which new income tax treaties are determined to be satisfactory under section 1(h)(11)(C)(i)(II).

3. Guidance updating the “per se list” of Regulation section 301.7701-2(b) to address new entities such as the Colombian SAS and to consolidate all guidance into a single Regulation or Ruling.

4. Guidance for deferred compensation to individual expatriates under section 877A to:
   a. address double taxation of covered expatriate (nonresident alien) receiving eligible deferred compensation for foreign services (i.e. U.S. tax on eligible deferred compensation deemed imposed under section 871, but no double tax relief for nonresident aliens (“NRAs”)); and


\(^{47}\) 2006-2 C.B. 930.
b. provide a procedure for a foreign payer to elect, under section 877A(d)(3)(A)(ii), to be treated as U.S. person for purposes of the withholding obligation under section 877A(d)(1).

5. Guidance regarding application of section 892 in the context of distressed debt, especially mortgages.

6. Guidance under section 7874 on the “substantial presence” test, ideally including one or more safe harbors.

7. Guidance regarding the estate and gift tax treatment of a non-resident alien’s interest in assets held through a partnership.

8. Guidance regarding claims of treaty benefits by a hybrid treaty entity (with for example a non-treaty owner) for non-fixed, determinable, annual, periodical income, such as:

   a. effectively connected income not attributable to a permanent establishment;

   b. reduced rate of, or exemption from, branch profits tax; and

   c. application of limitation of benefits provisions for the hybrid entity.