Input to 1999 Treasury-IRS Priority Guidance Plan

December 15, 1998

Guidance on Subjects Stemming from 1998 Legislation

1. Extension of attorney-client privilege.
   Thomas H. Meyerer, Administrative Practice
2. Shifting of burden of proof.
3. Global netting of interest.
4. Procedures for requesting non-binding mediation.
5. Due process in filing notices of liens.
6. Disclosures in trust fund tax collection.
7. Designation of deposits of tax to periods.
8. Innocent spouse relief (to the extent not addressed by Notice 98-61).

Cynthia Lepow, Domestic Relations

Consolidated Returns

1. Finalize temporary consolidated section 382 and SRLY regulations (§§ 1.1502-21T, -22T, and -90T to 99T).
2. The temporary regulations expire in 1999, and finalization is needed before that time to provide taxpayer certainty and avoid transitional issues.

Terrill A. Hyde, Affiliated and Related Corporations Council Director


Many consolidated groups are AMT taxpayers and the absence of final regulations governing the application of the AMT provisions is detrimental to both the Service and taxpayers.

Terrill A. Hyde, Affiliated and Related Corporations Council Director

Corporations and Their Shareholders

1. Proposed regulations under section 358(g).
2. The Service is currently caveating rulings regarding the basis of subsidiary stock following an intragroup spin, and regulations are needed to provide taxpayer certainty.

Terrill A. Hyde, Affiliated and Related Corporations Council Director
3. Final regulations under section 1032.
4. Proposed regulations issued under section 1032 provide helpful guidance on some common "zero basis" issues. The zero basis problem arises in a number of contexts, including a shareholder’s transfer or deemed transfer of its shares to a corporation to compensate the corporation’s employees. As proposed, the regulations would not become effective until finalized. Transactions are hindered by a lack of this guidance.

*Louis S. Freeman, Julie Divola, Corporate Tax*

5. Guidance under section 368 regarding corporate transactions involving disregarded entities.
6. Single member entities are now commonly used within corporate structures. Substantial uncertainty exists, however, regarding the proper treatment of reorganizations involving single member entities. Issues include (i) the proper treatment of a state law merger of a corporation into a single member entity that is treated for tax purposes as a division of a domestic corporation and (ii) the state law merger of a corporation into a single member entity that has elected for tax purposes to be treated as an association.

*Louis S. Freeman, Julia Divola, Corporate Tax*

7. Proposed regulations under section 355(d) and (e).
8. The Service is currently working on proposed regulations under section 355(d) and (e). Open issues under these provisions have imposed significant limitations on legitimate corporate distributions. For example, the following issues have led to substantial uncertainty under section 355(e): the definition of a "plan," the treatment of public trading, application of the rules to predecessors and successors, application of the rules to multiple controlled corporations, interpretation of the statute of limitations, and the potential for retroactive application of the basis adjustment rules. Proposed regulations may be issued before year-end. To the extent that the proposed regulations are not issued by year-end or to the extent that significant issues under section 355(d) or (e) are not covered by the proposed regulations, such guidance should be given priority in 1999.

*Louis S. Freeman, Julie Divola, Corporate Tax*

10. Open issues under the nonqualified preferred stock rules have led to a significant amount of uncertainty in structuring a variety of transactions including corporate formations, mergers and acquisitions, recapitalizations, and other stock exchanges. Guidance is needed because taxpayers are engaging in current conduct with substantial uncertainty about the tax treatment. Areas of uncertainty include the definition of "preferred stock" for purposes of the statute and the impact of a meaningful conversion feature, the determination of when a contingency is remote, the application of the exception for exchanges of nonqualified preferred stock for nonqualified preferred stock, and the application of the nonqualified preferred stock rules in transactions governed by section 1036.

*Louis F. Freeman, Julie Divola, Corporate Tax*

11. Guidance as to the application of King Enterprises.
12. The legislative history under section 338 indicates that section 338 was intended to replace the treatment of a stock purchase as an asset purchase under the Kimball-Diamond doctrine. Uncertainty exists, however, as to whether the congressional intent set forth in the legislative
history would also change the result in *King Enterprises*. That is, should the transaction have been treated as a taxable asset purchase or does the *King Enterprises* result continue to apply to create a tax-free reorganization?

*Louis F. Freeman, Julie Divola, Corporate Tax*

13. Update Revenue Procedure 77-37 and Revenue Procedure 86-42 to conform with COI/COBE regulations.
14. The preambles in the final and temporary and proposed COI/COBE regulations indicate that Revenue Procedure 77-37 and Revenue Procedure 86-42 will be modified to the extent they are inconsistent with the regulations.

*Louis F. Freeman, Julie Divola, Corporate Tax*

15. Guidance under section 368(a)(1)(C) regarding the treatment of warrants as liabilities.
16. The final regulations under sections 354, 355, and 356 (T.D. 8752) and Revenue Ruling 98-10 make it clear that an exchange or assumption of stock rights is generally tax-free. Under Revenue Ruling 68-637, an assumption of outstanding warrants and options of the target by an acquirer in a "C" reorganization was treated as an assumption of liabilities. Revenue Ruling 98-10 modified Revenue Ruling 68-637 to provide that section 354 applies to the exchange of options and warrants if the options and warrants constitute securities. Revenue Ruling 68-637 was not modified, however, as it relates to the treatment of the assumption of warrants and options for purposes of the "solely for voting stock" requirements of section 368(a)(1)(C). Accordingly, Revenue Ruling 68-637 should be modified to provide that an assumption of warrants and liabilities would not be considered an assumption of liabilities in a "C" reorganization. Such modification would eliminate a similar issue raised by Revenue Ruling 70-107, which provides that, in a subsidiary "C" reorganization, a parent’s assumption of the target’s employee stock options violates the "solely for voting stock" requirement. Although General Counsel Memorandum 39102 concluded that Revenue Ruling 70-107 is incorrect, Revenue Ruling 70-107 has not been revoked.

*Louis F. Freeman, Julie Divola, Corporate Tax*

17. Guidance under section 1045 regarding qualified small business rollovers.
18. Section 1045(b)(5) provides that "rules similar to the rules of subsections (f), (g), (h), (i), (j), and (k) of section 1202 shall apply." The vague nature of this language gives rise to a substantial number of issues in this area. Similarly, guidance under section 1202, particularly as it relates to the definition of small business stock, would be helpful.

*Louis F. Freeman, Julie Divola, Corporate Tax*

19. Application of the installment sale rules in a section 338(h)(10) transaction.

Uncertainty about the ability to apply the installment sale rules in connection with a stock purchase treated as an asset purchase under section 338(h)(10) causes significant impediments when structuring such transactions. This issue arises most commonly for small businesses, particularly S corporations.

*Louis F. Freeman, Julie Divola, Corporate Tax*

**Employee Benefits**
A. Retirement Benefits

1. Guidance on whether and under what terms the refinancing of an exempt loan to an ESOP satisfies the prohibited transaction rules under section 4975.

2. Prior to 1997, the IRS issued a number of private letter rulings on whether refinancings of exempt ESOP loans were prohibited transactions. Because of the lack of any other guidance in the area from the IRS and the DOL, and the draconian consequences under section 4975 of stumbling unknowingly into a prohibited transaction, taxpayers came to rely heavily on the ability to obtain such rulings. Since early 1997, however, the Service has imposed an informal moratorium on private letter rulings on ESOP refinancing transactions, and there are a number of ruling requests pending. The IRS should issue guidance under section 4975 so that these transactions can proceed.

Ronald D. Aucutt, Vice Chair (Committee Operations)

3. Guidance regarding the qualified plan coverage of non-resident aliens who do not receive U.S. source income, including the treatment of such employees for purposes of sections 401(k) and 415.

4. Many multinational companies are currently considering whether the companies may cover certain internationally mobile, nonresident alien employees without U.S. source income in their qualified plans. In Private Letter Ruling 8228116 the Service ruled that a parent corporation could provide benefits to nonresident alien employees of one of its foreign subsidiaries, and in Private Letter Ruling 8144028 the Service ruled that a plan sponsor could selectively include in its qualified plans certain nonresident alien employees not earning U.S. source income. Other than these private letter rulings, the Service has not issued any guidance in this area.

Thomas D. Terry, former Section Chair

5. Guidance under section 411(d)(6) allowing relief from the anti-cutback rules in common plan transactions.

6. T. David Cowart, Employee Benefits

7. Guidance significantly relaxing (or abolishing) the "same desk rule" as applied to 401(k) plans.

8. T. David Cowart, Employee Benefits

9. Impact of the "same desk rule" for terminations of employment where there has not been a corporate level merger (e.g., acquisition of a group of people).

Joy M. Mercer, Closely Held Businesses

10. Guidance continuing the TVC program beyond its December 31, 1998, expiration and updating it and expanding its application.

11. Updated ESOP regulations to reflect current transactions and changes in the law.

12. T. David Cowart, Employee Benefits

13. Final guidance relating to rollovers and determining whether the payor plan is qualified.

14. T. David Cowart, Employee Benefits

15. Final regulations regarding loans to participants.

16. T. David Cowart, Employee Benefits

17. Guidance regarding cash balance plans.

18. T. David Cowart, Employee Benefits

19. Proposed regulations under section 403(b) in order to administer tax-sheltered annuities.
24. *T. David Cowart, Employee Benefits*
25. Re-proposed regulations under section 401(a)(9) explaining the minimum distribution requirements.
26. *T. David Cowart, Employee Benefits*
27. Guidance regarding the proper benefits treatment of leased employees, both by the leasing companies and by their clients.
28. *T. David Cowart, Employee Benefits*
29. Guidance regarding affiliated service groups, especially management service affiliated service groups under section 414(m)(5).
30. *T. David Cowart, Employee Benefits*
31. Tax aspects of welfare plans for self-employed individuals, partnerships, LLCs, LLPs, and S corporations.
32. *Joy M. Mercer, Closely Held Businesses*
33. Contribution/deduction limits and compensation definitions for qualified retirement plans for LLCs.

*Joy M. Mercer, Closely Held Businesses*

**B. Health Care, Other Benefits, and Employment Taxes**

1. Guidance regarding the taxation of disability benefits where premiums are paid with pre-tax employee contributions under a section 125 cafeteria plan.
2. The regulations governing the taxation of employer-provided disability benefits apply a three-year lookback to determine what percentage of disability coverage is employer-paid (and hence taxable) when benefits are paid to disabled employees under plans where employers and employees share the cost of coverage. In addition, the regulations require consideration of the group of employees covered by the plan as opposed to applying on an individual-by-individual basis. The structure of the regulations, which have been substantially unchanged for over 40 years, simply does not reflect the widespread use and availability of cafeteria plans to pay disability premiums. This has been a "no ruling" area for many years even though guidance is sorely needed.

*Thomas D. Terry, former Section Chair*

3. New proposed regulations consolidating existing cafeteria plan guidance.
4. *T. David Cowart, Employee Benefits Committee*
5. Finalized proposed regulations regarding the change in status rules.
6. *T. David Cowart, Employee Benefits Committee*
7. Proposed regulations explaining HIPAA’s nondiscrimination rules.
8. *T. David Cowart, Employee Benefits Committee*
10. *T. David Cowart, Employee Benefits Committee*
11. Final regulations on the application of employment taxes to nonqualified deferred compensation.
12. *T. David Cowart, Employee Benefits Committee*
13. Update Revenue Procedure 71-19 regarding the Service’s ruling positions on nonqualified deferred compensation arrangements.

*T. David Cowart, Employee Benefits Committee*
Financial Institutions and Products

1. Safe harbor under section 562(c) for expense waivers and reimbursements of multiple class mutual funds.
2. Revenue Procedure 96-47, which sets forth tax requirements applicable to mutual funds having multiple classes, does not address the methods under which a mutual fund service provider may waive fees or reimburse expenses of the fund while remaining in compliance with the Revenue Procedure. Fee waivers and expense reimbursements are common in the mutual fund industry, and multiple class funds, like their single class counterparts, ought to be able to receive waivers and reimbursements without risking adverse tax results.

*Shawn K. Baker, Regulated Investment Companies*

3. Guidance under section 851(b)(3) regarding the issuer of certain repurchase agreements and pre-refunded municipal bonds.
4. The identity of the "issuer" of certain repurchase agreements and pre-refunded municipal bonds for purposes of section 851(b)(3) is not defined. Section 851(c)(5) provides that undefined terms under section 851(b)(3) shall have the same meaning as used under the Investment Company Act of 1940. Under the 1940 Act, the U.S. government is treated as the issuer of certain repurchase agreements and pre-refunded municipal bonds, provided the instruments meet specific criteria. The Service might consider adopting a rule conforming the treatment of such instruments for tax purposes to the treatment under the 1940 Act.

*Shawn K. Baker, Regulated Investment Companies*

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

*Henry C. Ruempler, Banking and Savings Institutions*

7. Guidance on which pre-acquisition expenses are deductible, including the treatment of pre-expansion business expenses in cases where there is no acquisition.
8. Neither the Tax Court decision in the *FMR* case nor Technical Advice Memorandum 9825005 provide clear guidance on the circumstances under which expenses incurred before a merger or business expansion are deductible. The Service should issue guidance on the extent to which section 195 applies to costs incurred by taxpayers in the acquisition context and in traditional business expansion cases.

*Henry C. Ruempler, Banking and Savings Institutions*

9. Regulations regarding FASITs as enacted in 1996, including the topics specifically identified in the legislative history as needing IRS guidance.
10. The effective date of FASITs was delayed until September 1, 1997, so that the Service would have time to issue regulations, but none have been issued. While a few FASITs have been issued, the lack of regulations has deterred many other potential issuers from engaging in transactions that were authorized under the statute.
11. Guidance on when mortgage servicing contracts are separate assets for amortization purposes under section 167(f)(3).
12. Proposed regulations on the amortization of mortgage servicing rights are part of the overall section 197 regulations on amortization of intangibles. The proposed regulations under section 167 are not interrelated with the existing Reg. § 1.167(a)-8.

13. Regulations pursuant to Notice 97-64.

In Notice 97-64, the Service described temporary regulations to be issued regarding how regulated investment companies, real estate investment trusts, and their shareholders must apply section 1(h) to their capital gains dividends. According to the Service, RICs, REITs, and their shareholders must use the guidance in Notice 97-64 until the temporary regulations are issued. The Notice is beneficial, as it resolves many technical issues relating to the netting of capital gains and losses. As several commentators have indicated, however, there are technical issues in the Notice that could be resolved with the issuance of temporary regulations.

Shawn K. Baker, Regulated Investment Companies

General Tax Issues

1. Guidance on the definition of a "principal residence" and other terms in new section 121.
2. The Taxpayer Relief Act of 1997 repealed section 1034 and greatly modified section 121. While new section 121 uses the term "principal residence" that was also used in old section 1034, it is questionable whether that definition is still to be used. Thus, guidance would be helpful. Also, guidance is needed on what "use" of a residence means. The legislative history of the 1997 Act uses the term "occupied," and the statute is not specific. Under old sections 1034 and 121, temporary absences could be ignored in determining whether the residence was a principal residence, but it is not clear that this is still true under new section 121. Thus, guidance on how temporary absences affect measurement of the two years of use (or three years of non-use) would be appropriate. Finally, section 121(c)(2)(B) indicates that the regulations are to provide additional reasons why an individual might be able to obtain the benefit of section 121 even though more than one residence is sold within a two-year time period. It would be helpful for regulations to be issued soon to explain what those reasons might be.

Adam Handler, Sales, Exchanges & Basis

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

Adam Handler, Sales, Exchanges & Basis
5. Guidance on section 1031 exchanges involving partnerships.

6. Guidance is needed to address the apparent disparity between the position of the Service, as expressed in Revenue Rulings 77-337 and 77-297, and the view of the Ninth Circuit Court of Appeals as expressed in Bolker v. Commissioner, 760 F.2d 1039 (1985), which held that a taxpayer had the requisite section 1031 holding purpose if the taxpayer did not intend to use the property for personal purposes or to liquidate the investment. Guidance also is needed to clarify to what extent members of an LLC that holds qualifying property can make an election under section 761 to permit a subsequent exchange under section 1031.

Adam Handler, Sales Exchanges & Basis

7. Complete the regulations under section 1202.

Section 1202, the 50% gain exclusion for qualified small business stock owned over five years, was enacted in 1993. The regulations under those provisions are incomplete. Guidance is needed on the numerous definitions included in section 1202, such as active business, qualified trade or business, and working capital needs. The addition of section 1045 in 1997 to allow for rollover of gain on qualified small business stock has heightened the need for complete regulations.

Adam Handler, Sales, Exchanges & Basis

Gifts, Estates, and Trusts

1. Reexamination of Revenue Ruling 89-89.
2. Revenue Ruling 89-89, 1989-2 C.B. 231, allows an individual retirement account (IRA) to qualify for an estate tax marital deduction, but apparently only if the surviving spouse receives all the "income" earned on the IRA. This test is frequently met as a matter of course, but it is ordinarily not guaranteed in all events, leaving doubt about the availability of the marital deduction for this common and simple planning technique.

Beverly R. Budin, Estate and Gift Taxes

3. Proposed regulations under section 2057.
4. Many issues have arisen under the section 2057 estate tax deduction for qualified family-owned business interests ("QFOBIs"). The separate instructions for Form 706, Schedule T provide some guidance, but that guidance is not complete.

Robert M. Bellatti, Estate and Gift Taxes

5. Revised regulations for determining the continued grandfathered status of trusts for GST tax purposes.

Under the Tax Reform Act of 1986, the generation-skipping transfer (GST) tax does not apply to certain trusts that were irrevocable on September 25, 1985. The application of this rule to determine the continued grandfathered status of such trusts, particularly trusts that undergo various types of revisions or reformations, has been the subject of a great many ruling requests, which often are complex and time-consuming. As the passage of time makes such trusts more likely candidates for modernization, the frequency of such ruling requests is likely to increase. Substantial cost and frustration could be avoided by the promulgation of standards that are more objective and easier to predict than the standards currently used for ruling purposes.
Insurance Companies and Products

1. Proposed regulations under section 338(h)(10) regarding the mechanics of making a 338(h)(10) election in connection with the purchase of an insurance company target.
   *Michael A. Bell, Insurance Companies*

2. Guidance under section 809 regarding a stock life insurance subsidiary of a mutual holding company.
   *Michael A. Bell, Insurance Companies*

3. Final regulations under section 832(b)(4) regarding accounting for gross premiums written and unearned premiums.
   *Michael A. Bell, Insurance Companies*

4. Revenue procedure regarding uniform closing agreements for modified endowment contracts.
   *Michael A. Bell, Insurance Companies*

5. Guidance under sections 72 and 7702 on the tax treatment of long-term care insurance benefit payments that accelerate a life insurance contract’s death benefit, including the treatment of long-term care benefit charges assessed against the contract’s cash surrender value.
   *Michael A. Bell, Insurance Companies*

6. Revenue procedure regarding uniform closing agreements for modified endowment contracts.
   *Michael A. Bell, Insurance Companies*

7. Final regulations under section 832(b)(4) regarding accounting for gross premiums written and unearned premiums.
   *Michael A. Bell, Insurance Companies*

8. Revenue procedure regarding uniform closing agreements for modified endowment contracts.
   *Michael A. Bell, Insurance Companies*

9. Guidance under sections 72 and 7702 on the tax treatment of long-term care insurance benefit payments that "accelerate" payment of the death benefit of a related life insurance contract. This issue affects the compliance of contracts as life insurance for federal tax purposes. Also, the effect of such benefit payments on premiums paid under section 7702(f)(1) and on the investment in the contract under section 72(e)(6) is unclear. In addition, it is unclear whether charges assessed against the contract’s cash surrender value to fund the benefit acceleration result in deemed distributions from the contract under section 72. If deemed distributions arise, policyholders may have income and insurance companies may have reporting obligations in respect of such income.
   *Michael A. Bell, Insurance Companies*

10. Guidance under section 817A regarding the tax treatment of modified guaranteed contracts.
    *Michael A. Bell, Insurance Companies*

Section 817A provides special rules regarding the tax treatment of modified guaranteed contracts. Congress expressly left the resolution of several key issues to regulations, including the interest rate applicable in calculating the deductible amount of the reserves for such contracts. The Service addressed some of the issues, on an interim basis, in Notice 97-32. The crafting of regulations under section 817A in 1999 would provide an efficient means of clarifying certain issues raised in the Notice and furnishing guidance on other issues not addressed by the Notice. Alternatively, Notice 97-32 could be revised during 1999.

*Michael A. Bell, Insurance Companies*

International Issues

1. Finalize regulations under section 987.

2. Timely guidance on the regulations under section 987 is needed in order to permit U.S. taxpayers to reasonably predict and calculate their U.S. tax liability and the foreign tax credit implications triggered by their foreign branches. The Tax Reform Act of 1986 enacted section 987 to govern a taxpayer’s reporting of the financial results of a foreign branch that conducts business in a foreign currency that is different from the branch’s home office currency. In addition, section 987
requires taxpayers to make adjustments for transfers of property between the branch and its home office. Transfers include post-1986 remittances that give rise to ordinary gains and losses as determined by section 987. Because the Code states that the adjustments are to be made "as prescribed by the Secretary," the lack of final regulations leaves taxpayers without guidance on how to calculate such adjustments.

Alan L. Fischl, Foreign Activities of U. S. Taxpayers

3. Guidance clarifying that cross-border lending by banks subject to foreign withholding tax is not an abusive arrangement intended to be covered by Notice 98-5.
4. The premise and the examples in Notice 98-5 apply to transactions undertaken outside the ordinary course of business, for the purposes of maximizing foreign tax credit capacity. The general language of the Notice, however, could be construed to disallow foreign tax credits on cross-border lending subject to withholding taxes. An exchange of letters between Treasury and an industry trade association gives some indication that Treasury does not intend to apply Notice 98-5 to cross border-lending, but that is not sufficient guidance to taxpayers.

Henry C. Ruempler, Banking and Savings Institutions

5. Guidance on the use of the "80/20" rules.
6. Timely guidance on the use of the "80/20" rules through the issuance of regulations under section 861(c) is necessary because of the many issues that remain unaddressed in that area. The first issue is the fact that detailed guidance, including examples, of the methodology behind the look-through rule is not currently detailed in the regulations. Next, the existing regulations do not define the term "active conduct of a trade or business in a foreign country" under section 861(c)(1)(B). Further, regulations are necessary in order to clarify the proper methodology for calculating the 80 percent foreign business requirements in the instance where a U.S. company has a foreign branch/disregarded entity or is a partner in a foreign partnership. Additionally, the "80/20" exception in section 861(a)(1)(A) refers only to interest paid by resident alien individuals or domestic corporations, not U.S. citizens or partnerships. This seems to be an oversight, but the regulations should clarify the issue. Also, the need exists for a clarification of the degree of evidence that must be presented to meet the "satisfaction of the Secretary" standard in section 861(c)(1)(A). Finally, guidance would be appreciated on how the "80/20" rules apply in the context of a consolidated group.

Alan L. Fischl, Foreign Activities of U. S. Taxpayers

7. Finalize regulations under section 865(j).
8. Timely guidance on the regulations under section 865(j) is necessary in order to permit U.S. taxpayers to reasonably predict and calculate the foreign tax credit implications triggered by a loss on the sale of the stock of their foreign affiliates. While section 865(f) provides rules on when gain from a stock sale of a foreign affiliate should be sourced as foreign income, the section does not address the appropriate treatment of losses from such a sale. The treatment of losses is instead governed by section 865(j), which simply states that Treasury will issue regulations relating to the treatment of losses from the sale of personal property. Because section 865(f) does not specifically provide guidance about how losses on the sale of stock should be sourced, when coupled with the Service’s preference to continue to use the regulations under sections 861 and 862 to determine a taxpayer’s source of loss, taxpayers lack guidance on how to source losses from the sale of foreign stock. The proposed regulations issued in July 1996 that deal with this subject permit taxpayers to elect retroactively to apply the regulations to all post-1986 tax years.
If the final regulations are not issued soon, taxpayers will be unable to fully benefit from the retroactive election.

*Alan L. Fischl, Foreign Activities of U. S. Taxpayers*

9. Finalize regulations under section 367(b).

Timely guidance on the regulations under section 367(b) is needed because, as described in Prop. Reg. § 1.367(b)-6, a taxpayer’s treatment of a number of situations under section 367(b) rests on the language of the final regulations. For example, Notice 88-71, 1988-2 C.B. 374, provided in part that the ordering rules of the section 367(b) regulations for certain post-exchange distributions out of earnings and profits of a foreign corporation would not be effective for taxable years beginning after December 31, 1986, to the extent superseded by the Tax Reform Act of 1986. Notice 89-30, 1989-1 C.B. 670, provided in part that regulations under section 367(b) would be issued to prevent double counting of earnings and profits that might otherwise result from certain post-exchange distributions and stock sales. Notice 89-79, 1989-2 C.B. 392, provided in part that, if a foreign corporation makes the election described in section 953(d), and if the foreign corporation subsequently becomes an actual domestic corporation, then the corporations’ shareholders are required to include in income the pre-1988 taxable year earnings and profits of the corporation to the extent provided in section 367(b) and the regulations under that section. For pre-effective date exchanges described in section 367(b), the taxpayer may use any reasonable method to comply with the above three notices as they relate to section 367(b).

*Alan L. Fischl, Foreign Activities of U. S. Taxpayers*

Subchapter S

2. The Service has issued some guidance since the 1996 statutory change permitting banks to be S corporations. Additional guidance is needed, especially in the case of QSSS elections.

*Henry C. Ruempler, Banking and Savings Institutions*

3. Guidance related to electing small business trusts (ESBTs), including the effect on ESBT qualification of beneficiary powers of withdrawal and an ESBT’s ability to use a non-calendar fiscal year.
4. *Joy M. Mercer, Closely Held Businesses*
   *Ronald D. Aucutt, Vice Chair (Committee Operations)*
5. Impact of "dividends" made by S corporations that are 100% owned by ESOPs.

*Joy M. Mercer, Closely Held Businesses*

Tax-Exempt Bonds

1. Finish the section 141 private activity bond regulations.
2. Section 141 defines a "private activity bond." Final regulations have been issued, but with certain sections "reserved" – in particular, "refundings," "allocation and accounting," and "output property." (Output property is problematic, since legislation is expected to be proposed that would affect the results). Completion of the reserved sections is necessary to make sense of many aspects of the other sections. This project is on the 1998 plan but has not been completed.
David A. Caprera, Tax-Exempt Financing

3. Modify existing arbitrage regulations regarding the value of investments.
4. The current hot topic in this area remains "yield burning" (the artificial pricing of bond-financed investments). Proposed regulations need to be finalized (with improvements as appropriate). In addition, existing final Reg. §§ 1.148-5(d)(2) and -5(d)(3) continue to create problems of difficulty of application and potential for unintended punitive consequences.

David A. Caprera, Tax-Exempt Financing

5. Define "federal guaranty."
6. A prohibition on federally-guaranteed tax-exempt bonds was first made a part of the Code in 1982. Since then practitioners have struggled with questions of what federal guaranty actually means. The letter rulings that have been issued have been fact specific and provide little general guidance.

David A. Caprera, Tax-Exempt Financing

7. Conform tax-exempt bond "reissuance rules."
8. The 1.1001-3 regulations have an exception for the tax-exempt bond reissuance rules announced in Notice 88-130. The Notice references the rules under section 1001. This circular regime should be replaced by current guidance (probably additional 1001 regulations) that is internally consistent and complete.

David A. Caprera, Tax-Exempt Financing

9. Define "manufacturing."
10. David A. Caprera, Tax-Exempt Financing
12. David A. Caprera, Tax-Exempt Financing
13. Clarify the treatment of solid waste bonds for recycling facilities.
14. David A. Caprera, Tax-Exempt Financing
15. Further amplify and expand the term "common management and control."
16. David A. Caprera, Tax-Exempt Financing
17. Explain the $150 million test for certain 501(c)(3) bonds.