April 29, 2020

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Specific Substantive and Procedural Provisions Impacted by the COVID-19 Emergency

Dear Commissioner Rettig:

Enclosed please find a follow up to our preliminary letter from April 3, 2020 regarding the response to the COVID-19 emergency as authorized under section 7508A. These comments are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Tom Callahan
Chair, Section of Taxation

Enclosure

cc: Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Jeffrey Van Hove, Senior Advisor, Office of Tax Policy, Department of the Treasury
Hon. Michael J. Desmond, Chief Counsel, Internal Revenue Service
Sunita Lough, Deputy Commissioner, Services and Enforcement, Internal Revenue Service
These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Mary I. Slonina. The following individuals provided substantial assistance in drafting these Comments: Ellen Aprill, Leslie Book, Sheri Dillon, Lucy Farr, Keith Fogg, Mary Foster, Richard LaFalce, Kurt Lawson, Scott Levine, Ed Leyden, Mark O. Norell, Allie Petrova, Matthew Rappaport, Larry Sannicandro, Christine Speidel, Martha Steinman, Elizabeth Stevens, David Strong, Jeanne Sullivan, Timothy Todd, Carolyn O. Ward, Kenneth C. Weil, and Mark Wilensky. These Comments were reviewed by Lisa Zarlenga of the Section’s Committee on Government Submissions and by Eric Sloan, the Vice Chair of Government Relations for the Section.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: April 29, 2020
EXECUTIVE SUMMARY

These Comments respond to the request by the Department of Treasury ("Treasury") and the Internal Revenue Service (the “Service”) for input regarding specific substantive tax-related issues arising as a result of the coronavirus disease 2019 ("COVID-19") emergency. We have also included recommendations on certain procedural provisions and guidance provided in the context of the COVID-19 emergency. These Comments supplement the preliminary comments on the COVID-19 emergency submitted by the Section on April 3, 2020.1 We anticipate providing additional comments in subsequent letters, including comments addressing the implementation of the Families First Coronavirus Response Act or the Coronavirus Aid, Relief, and Economic Security Act.

On March 13, 2020, President Trump issued Presidential Proclamation 9994 proclaiming the COVID-19 outbreak in the United States as a national emergency under the National Emergencies Act, beginning March 1, 2020.2 In addition, on that same date, the President issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the “Stafford Act”) in which he declared COVID-19 a national emergency (the “Emergency Declaration”). The Emergency Declaration instructed the Secretary of the Treasury (the “Secretary”) “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to section 7508A(a).”3

Section 7508A(a) provides Treasury and the Service with authority to postpone deadlines under the internal revenue laws for up to one year for taxpayers determined by the Secretary to be affected by a federally declared disaster as defined in section 165(i)(5)(A). Section 165(i)(5)(A) defines the term “federally declared disaster” to mean “any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the [Stafford Act],” which, as discussed, the President declared on March 13. As of April 11, 2020, the Federal Emergency Management Agency (“FEMA”) issued Major Disaster Declarations for the COVID-19 emergency for all 50 states and the District of Columbia.4

We commend Treasury and the Service for making broad use of these powers in a swift and decisive manner through the issuance of numerous items of guidance over the last several weeks. As the COVID-19 emergency continues, the Section continues to identify substantive issues that would benefit from additional guidance, clarification, or action. The following specific recommendations, which are organized by topic, are within Treasury and the Service’s authority to implement pursuant to section 7508A or other authority as applicable.

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3 Unless indicated otherwise, all “section” references are to the Internal Revenue Code of 1986, as amended (the “Code”), and all “Treas. Reg. §” are to the Treasury regulations promulgated under the Code, each as in effect as of the date of these Comments.

4 The FEMA website reflects these Major Disaster Declarations, including declarations for particular U.S. territories. See https://www.fema.gov/disasters.
I. Postponement of Due Dates

Every FEMA Major Disaster Declaration with respect to the COVID-19 emergency lists January 20, 2020 as the start date of the “Incident Period.” However, Notice 2020-23\(^5\) extends “Specified Time-Sensitive Action” deadlines falling on or after April 1, 2020.

Section 7508A(d)(1) mandates a defined postponement period for “qualified taxpayers” from the earliest incident date of the federally declared disaster until the latest incident date plus 60 days. Section 7508A(d)(2) defines qualified taxpayer to include individuals whose principal residence is located in a disaster area; it also includes taxpayers whose principal place of business (other than the business of performing services as an employee) is located in a disaster area. Since FEMA has issued Major Disaster Declarations for all 50 states and the District of Columbia, presumably, the vast majority of U.S. taxpayers fall into the section 7508A(d)(2) definition of qualified taxpayer. Therefore, the Section recommends that Treasury and the Service apply the section 7508A(d)(1) mandatory postponement period by providing that deadlines falling on or after January 20, 2020 are postponed to the later of (i) July 15, 2020 or (ii) the latest day of the Incident Period of the federally declared disaster plus 60 days.

In conjunction with the above recommendation, the Section provides the following comments on specific deadlines:

A. Clarification of Section 1031 Deadlines.

1. **Confirm that Section 17 of Revenue Procedure 2018-58 Applies to the Section 1031 Deadline Postponements.** Revenue Procedure 2018-58\(^6\) includes a number of deadline extensions that apply to section 1031 like-kind exchanges. In this regard, taxpayers can choose: (i) section 6(26), which lists the 45-day identification deadline and the 180-day exchange period deadline in a deferred exchange under section 1031(a)(3), and section 6(27), which lists the deadlines of Revenue Procedure 2000-37\(^7\) for qualified exchange accommodation arrangements; and (ii) section 17, which provides for postponement of the 45-day and 180-day periods by 120 days or to the last date of the general disaster extension period, whichever is later if: (a) the sale of the relinquished property closes on or before the date of the federally declared disaster, and (b) the last day of the 45-day or 180-day period falls on or after the date of the federally declared disaster. Notice 2020-23 authorizes postponement of the section 1031 deadlines, but it does not explicitly provide whether section 17 applies to the section 1031 deadline postponements.

2. **The Postponement Date in Section 17 of Revenue Procedure 2018-58 Should Apply as of January 20, 2020.** Section 17 postpones section 1031

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\(^5\) 2020-18 I.R.B. 742
\(^6\) 2018-50 I.R.B. 990.
deadlines “that fall on or after the date of a federally declared disaster.” Thus, the deadline postponements start on the date the incident occurs. As referenced above, that date according to FEMA is January 20.

**Recommendation.** Many taxpayers were unable to meet the section 1031 deadlines falling prior to April 1, 2020 due to the COVID-19 emergency and the various governmental restrictions and business closures. Thus, taxpayers in the middle of a section 1031 exchange have been unable to view real properties, obtain appraisals for financing, close purchases, etc. Accordingly, we recommend that the Service clarify that the section 17 postponements commence on the FEMA incident date of January 20, 2020 until the later of (i) July 15, 2020, or (ii) the latest day of the Incident Period specified for the federally declared disaster plus 60 days, in accordance with section 7508A(d)(1)(B).

**B. Postpone Other Opportunity Zone Investment Deadlines.** We appreciate that Notice 2020-23 extended the 180-day period to invest eligible gains as provided in section 1400Z-2(a)(1)(A). However, given the difficulty in performing due diligence to make investments and to complete construction projects, we recommend extending the periods for meeting the following additional requirements:

1. Whether a qualified opportunity fund satisfies the 90% test imposed by section 1400Z-2(d)(1).
2. Whether a qualified opportunity zone business satisfies the 70% test imposed by section 1400Z-2(d)(3)(A)(i).
4. It would also be helpful to clarify that the Emergency Declaration automatically extends the working capital safe harbor by up to 24 months and the reinvestment period for a qualified opportunity fund by up to 12 months.

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8 For example, an individual residing in California with a 45-day identification deadline of March 20, 2020 in a deferred exchange would have been under a state-issued “stay-at-home” order not to leave her residence and would have been unable to look at potential replacement properties.
C. **Additional Deadline Relief.** We recommend that the Service consider issuing additional guidance to extend certain deadlines that are not listed in Notice 2020-18,\(^9\) Notice 2020-20,\(^10\) Notice 2020-23, Revenue Procedure 2018-58, or Treas. Reg. § 301.7508A-1(c)(1)(iv) – (vi), such as the following:

1. Section 6213(b)(2) - Math error abatement request.
2. Section 6227 - Partner request for administrative adjustment.
3. Section 6230(b) - Partner math error abatement request.
4. Section 6326 – Administrative appeal of liens.
5. Section 6532(c) - Wrongful levy suit.
6. Section 7433(d)(3) - Suit for damages from wrongful collection.

D. **Tolling of Judicial Deadlines.** Deadlines to file a case in Tax Court are among the most legally consequential deadlines that taxpayers encounter. Notice 2020-23 helpfully postpones these deadlines on or before July 15 for petitions or complaints that would have been due between April 1 and July 15. We are concerned that this relief may not be sufficient for two reasons. First, it does not provide relief to taxpayers whose deadlines ran between January 20 and April 1, when relief under Notice 2020-23 begins.\(^11\) Second, it gives little relief to taxpayers whose deadlines will expire on or shortly after July 15. For example, taxpayers who receive a Statutory Notice of Deficiency dated April 15 or later currently receive no deadline extension.\(^12\) We suggest that judicial filing deadlines be tolled for any period between January 20 and either July 15 or the date on which the relevant court clerk’s office opens, whichever is later, plus 60 days in accordance with section 7508A(d)(1)(B).

E. **Late-Filed Returns per Rev. Rul. 2007-59.** Notice 2020-18 and Notice 2020-23 may inadvertently mislead taxpayers, and representatives, as these notices state that they “extend ... key deadlines for individuals and businesses.” This statement is not correct in the bankruptcy-tax context. Revenue Ruling 2007-59\(^13\) holds that tax returns filed within a deadline postponed under section 7508A are still late-

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\(^10\) 2020-16 I.R.B. 660.

\(^12\) I.R.C. § 6213(a).

\(^13\) 2007-2 C.B. 582.
filed for purposes of the Bankruptcy Code.\textsuperscript{14} We are concerned that this apparent disconnect between the postponements of Notices 2020-18 and Notice 2020-23 with Revenue Ruling 2007-29 may create confusion among taxpayers and representatives.\textsuperscript{15} With respect to taxes due on returns filed after the April 15, 2020 statutory deadline and on or before July 15, 2020, we recommend the Service instruct the insolvency unit not to file objections to (i) discharge in Chapter 7 cases, or (ii) provisions in plans under other chapters of the Bankruptcy Code dealing with whether that tax is discharged, solely because the return is considered late-filed under Revenue Ruling 2007-59. We also recommend that the Service add a warning to public statements dealing with the postponement of due dates that postponement of due dates for purposes of the Code does not necessarily mean that due dates are postponed for rules outside the Code, \textit{e.g.}, the Bankruptcy Code.

\section*{II. Employee Benefits}

A. \textbf{Deem Distributions Made on Account of Loss of Income or Other Disruptions Caused by COVID-19 To Be Made on Account of a Hardship.} Sections 401(k)(2)(B)(i), 403(b)(11), and 457(d)(1)(A) allow plans subject to those sections to make distributions on account of hardship (or, in the case of section 457, an unforeseeable emergency). Treas. Reg. § 1.401(k)-1(d)(3)(ii) defines a hardship to include certain expenses incurred on account of a Presidentially declared disaster under the Stafford Act, and Treas. Reg. § 1.403(b)-6(d)(2) uses the same definition for section 403(b) plans, but the regulations under section 457 have no such rule. In Announcement 2017-13,\textsuperscript{16} dealing with Hurricane Irma, and a number of prior announcements dealing with other natural disasters, the Service provided that a qualified plan would not be treated as failing to satisfy any requirement under the Code merely because it made a loan or a hardship distribution to an employee or former employee affected by the disaster. We would recommend a similar announcement be issued for the COVID-19 emergency.

\textsuperscript{14} Title 11 of the United States Code.

\textsuperscript{15} One example of such confusion is a taxpayer questioning whether April 15, 2020 or July 15, 2020 is the “last due date” of a 2019 return for purposes of 11 U.S.C. § 523(a)(1)(B)(ii). Another example of potential confusion is that in Chapter 13 of the Bankruptcy Code, taxpayers may be surprised to learn that the Service may expect the payment of postpetition interest on taxes on returns filed between April 16, 2020 and July 15, 2020 even though those taxes were fully paid under a Chapter 13 plan. Tax due on returns filed between April 16 and July 15 are deemed filed late within two years of the petition date under Rev. Rul. 2007-59. This tax would be nondischargeable under the two-year rule of 11 U.S.C. §§ 523(a)(1)(B)(ii) and 1328(a)(2). This means postpetition interest would continue to run. But the same tax would also be entitled to priority under the three-year rule and paid-in-full under a Chapter 13 plan. 11 U.S.C. §§ 507(a)(8)(A)(i). Postpetition interest does not run under the three-year rule because the tax is discharged. \textit{See} 11 U.S.C. § 1328(a) (taxes paid under the three-year rule dischargeable because they are omitted from the list of nondischargable taxes in section 1328). The discharge of taxes under the three-year rule is one of the last remaining vestiges of the superdischarge, which was in place in Chapter 13 prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). \textit{See} P.L. 109-8, 119 Stat. 23.

\textsuperscript{16} 2017-40 I.R.B. 271.
B. Health and Welfare.

1. Relief for Employers During Section 4980H Stability Periods. Under Treas. Reg. § 54.4980H-3, an employer can use a look-back measurement method to determine if certain employees are “full-time” for purposes of section 4980H shared responsibility payment for employers. If an employer uses the look-back measurement method, it is required to treat the employee as a full-time employee for purposes of section 4980H during the entire related stability period, for so long as the employee remains employed. This means that the employer must offer affordable, minimum value health coverage to the employee during such period or may owe a shared responsibility payment under section 4980H. In connection with the spread of COVID-19, many employers have been required to close temporarily under government order or due to decreased demand and have made hard decisions about retaining workforce. There are a variety of competing considerations between terminating employees or placing them on a temporary (generally unpaid) leave (furlough). Among other things, placing employees on leave (furlough) can streamline the return to work process, while still allowing employees to take advantage of unemployment compensation. Some employers are no longer able to continue subsidizing health coverage during this time. If the employer terminates the employee’s employment the employee who loses coverage is eligible for benefits under the Consolidated Omnibus Budget Reconciliation Act, and there is no risk of a section 4980H shared responsibility payment for the employer. However, if the employer instead places the employee on leave (furlough), it appears the employer is at risk of a section 4980H shared responsibility payment in connection with such employees who are in the middle of a stability period for which they are treated as full-time. These requirements particularly impact employers in industries such as retail and restaurant that historically have used the look-back measurement method because their workforces tend to be variable hour or seasonal. We recommend that relief be provided so that in limited circumstances an employer would not be subject to a shared responsibility payment where they chose to furlough the employee rather than terminate the employment relationship.

2. Relief for Section 4980H W-2 Affordability Safe Harbor. Under section 4980H, an employer must offer affordable, minimum value health coverage to full-time employees or may owe a section 4980H shared responsibility payment. Treas. Reg. § 54.4980H-5(e) provides several safe harbors to determine whether the coverage offered by an employer meets the affordability standard. The Form W-2 (Wage and Tax Statement) safe harbor, Treas. Reg. § 54.4980H-5(e)(2)(ii), provides that coverage will be treated as affordable with respect to an employee if the required contribution for the employer’s lowest cost self-only coverage that provides minimum value for the year does not exceed a percentage of that employee’s Form W-2 wages from that employer for the calendar
year. Employers rely on these safe harbors in setting their contribution rates at the beginning of the plan year, and in doing so, they assume there will not be any extraordinary events impacting the Form W-2 wages of their employees. The COVID-19 emergency is forcing employers to take drastic action, including furloughing employees and reducing employee salary, in order to secure the future of their business. Employers who set their contribution rates at the beginning of the current plan year intending to use the Form W-2 safe harbor may now be unable to do so, as the Form W-2 wages of their employees will be less than expected at the end of the year. We recommend that relief be provided so that an employer can continue to use the Form W-2 safe harbor under an alternate methodology, such as looking at affordability on a monthly basis based on the wages paid during the month that are ultimately reported in Box 1 of Form W-2 or determining affordability for the year based on the actual Box 1 Form W-2 wages, multiplied by a fraction, the numerator of which is 52 and the denominator of which is the number of weeks during 2020 that the employee was not on furlough due to the COVID-19 emergency.

3. Relief for Section 4980H Full-Time Status Determination. Treas. Reg. § 54.4980H-3(d)(6) contains an averaging rule to prevent periods of unpaid leave for Family and Medical Leave Act ("FMLA"), Uniformed Services Employment and Reemployment Rights Act, and jury duty from reducing an employee’s hours of service during a measurement period for purposes of determining if an employee is a full-time employee under section 4980H. We recommend that unpaid leave due to COVID-19 be treated in the same manner, even if it was not officially FMLA leave. We further recommend that relief prevent the COVID-19 emergency from negatively impacting an employee’s hours for purposes of determining if he or she should be treated as full-time during the related stability period.

4. Additional Cafeteria Plan Changes in Status Events. Cafeteria plans may allow employees to make mid-year changes to elections only as permitted under Treas. Reg. § 1.125-4. These regulations allow for changes to occur following a variety of events that occur in the ordinary course, but which may have been unanticipated at the time the initial election was made. In connection with the COVID-19 emergency, many employers are considering changes to benefits that may not permit mid-year changes to elections. For example, employment status changes (such as furloughs and reduced pay) are not resulting in a change in status event for which the employee can change the initial election. Insurance carriers and some employers are also interested in reopening enrollment to allow eligible individuals who did not initially elect health coverage to now opt into coverage. Unless this is a new benefit package option (which constitutes a change in coverage under Treas. Reg. § 1.125-4(f)(3)(iii)), reopening enrollment is not an event that allows employees to change their prior election. Related issues come up in the context of dependent care flexible spending accounts ("FSAs").
from home need dependent care now that schools and day care centers are closed; however, the dependent care available to them with social distancing requirements may not meet the requirements of section 129. Further, in the context of dependent care FSAs, some employers would like to now provide subsidies to employees to help them pay for dependent care; however, it is not clear that the addition of this benefit is an event that would allow an employee to reduce their dependent care FSA election by the amount of the now available subsidy. We recommend adding additional change in status events to address the COVID-19 emergency, including (a) commencement or ending of a COVID-19 emergency-related furlough or layoff, (b) a school closure or reopening impacting the employee or covered family members, (c) commencement or ending of a COVID-19 government order impacting the employee or covered family members, and (d) a change in rate of compensation impacting the employee or covered family members. Election changes due to these additional change in status events would need to be consistent with the event, as is required currently.

C. Clarification Regarding Certain Working Condition Fringe Benefits. We recommend that the working condition fringe benefit treatment of employer-provided home office support (e.g., computer, software) during the COVID-19 emergency under section 132(a)(3) and Treas. Reg. § 1.132-5.

III. Exempt Organizations

A. Prioritize Form 1023. We recommend the prioritization of exemption applications for COVID-19 related Forms 1023 (Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code).

IV. Tax-Exempt Bonds

A. Relief from “Private Business Use” Rules. For tax-exempt bonds to maintain their tax-exempt status, the facilities financed by the bonds may not be used for excessive private business use (“PBU”). PBU arises when facilities financed by tax-exempt bonds are used by (i) a tax-exempt organization in an unrelated trade or business, or (ii) a private (for-profit) user in a trade or business. The maximum amount of PBU per bond issue is five percent. Some tax-exempt organizations that have financed their facilities using tax-exempt debt would like to partner with hospitals to provide housing for health-care workers or with other tax-exempt organizations to provide housing for vulnerable populations affected by COVID-19 (e.g., homeless individuals). However, they are concerned that permitting use of their bond-financed facilities for these new and different purposes may result in excessive PBU. It would be helpful to provide relief from or clarification of the application of the PBU rules for bond-financed facilities for COVID-19-related purposes.
B. Relief for Working Capital Financings. The circumstances of the COVID-19 emergency are resulting in unprecedented needs for working capital by state and local governments and section 501(c)(3) organizations eligible to benefit from tax-exempt financings under section 145. Working capital financings are permitted under the Code and Regulations, although only in limited circumstances and subject to complex rules. We recommend a simplified and streamlined approach for working capital financing related to costs resulting from the COVID-19 emergency. The proposed approach is consistent with relief previously provided by the Service in private letter rulings, would provide state and local government administrative relief, and would provide certainty with regard to structuring working capital financings.\(^\text{17}\)

C. Relief from Potential Reissuance. The Code and Regulations currently provide special rules for tax-exempt financings relating to reissuance considerations under section 1001, most notably several Notices and Proposed Regulations addressing “qualified tender bonds,” some of which were provided in connection with the 2008 financial crisis. Generally, such guidance provides that a reissuance will not occur provided certain rules are satisfied. We recommend that the relief provided in connection with the 2008 financial crisis be provided during a “relief period” with respect to the COVID-19 emergency and also recommend certain additional relief only for purposes of sections 103 and 141-150.\(^\text{18}\)

D. Relief from Deadlines. Rules addressing tax-exempt financings set forth a number of deadlines with respect to the use of proceeds of tax-exempt bonds and projects financed by such bonds. We recommend relief be provided from the following:


2. Section 142(d) and Revenue Procedure 2004-39\(^\text{19}\) – Set-aside requirement for bond proceeds to fund residential rental housing facilities within certain time periods.

3. Section 142(d)(3) – Rehabilitation requirement within the two-years.

4. Treas. Reg. § 1.148-3(g) – Arbitrage rebate due dates.

5. Treas. Reg. § 1.148-2(e)(2) – Three-year temporary period for proceeds of bonds to be used for capital projects and qualified mortgage bonds.


\(^\text{17}\) The Section will provide detailed recommendations in a separate comment letter.

\(^\text{18}\) The Section will provide detailed recommendations in a separate comment letter.

\(^\text{19}\) 2004-2 C.B. 49.
7. Treas. Reg. § 1.148-7(d) and (e) – Avoidance of arbitrage rebate if the proceeds of the bonds are spent within certain enumerated time frames.


9. Section 149(e) – Information reporting deadlines.

V. Treatment of Debt and Losses

A. Provide Relief from the Consequences of Debt Modification. We respectfully recommend that the Service provide an election that would allow a borrower to treat a debt issue, regardless of size, as being a “small debt issue” that is treated as not being traded on an established market under Treas. Reg. § 1.1273-2(f)(6). This change would allow financial institutions to aid debtors during the COVID-19 emergency while mitigating adverse tax consequences to debtors.

B. Increase Benchmark Rate for AHYDO Rules. The applicable high yield discount obligation (“AHYDO”) rules for certain debt-for-debt exchanges designate a rate greater than the applicable federal rate (“AFR”) to be used as the benchmark for determining whether a debt instrument is an AHYDO. Generally speaking, if a debt instrument is an AHYDO, deductions for original issue discount (“OID”) on the instrument are deferred or, in some cases, completely denied. Volatility in the debt markets – like that seen in recent weeks – can trigger the AHYDO rules in circumstances in which they were never meant to apply. An issuer that exchanges outstanding debt for a new debt instrument (or is deemed to do so under Treas. Reg. § 1.1001-3) is particularly susceptible to the potential application of the AHYDO rules. If the trading price of the new instrument is artificially depressed because of market conditions, the instrument could be considered an AHYDO and the issuer could be denied OID deductions notwithstanding the cancellation-of-debt income resulting from the exchange. Congress recognized that market volatility could lead to uneconomic outcomes under the AHYDO rules and authorized the Secretary to suspend the AHYDO rules, or permit taxpayers to use a benchmark greater than the AFR, “in light of distressed conditions in the debt capital markets.”\footnote{I.R.C. § 163(e)(5)(F)(iii). See, e.g., Notice 2010-11 (extending the temporary suspension of AHYDO rules).} We recommend the Secretary utilize this authority as the COVID-19 emergency has created such conditions, which are likely to persist in the coming months.

C. Section 382(h) Proposed Regulations. We recommend that the Service consider pausing the finalization process of the proposed section 382(h) regulations during the COVID-19 emergency to increase the ability of distressed taxpayers to utilize net operating losses and other tax attributes.
VI. Tax Accounting

A. Section 481(a) Adjustments. We recommend that guidance provide for a four-year spread of unfavorable section 481(a) adjustments under Revenue Procedure 2015-13\(^{21}\) arising out of accounting method changes requested by all taxpayers for taxable years ending in 2019, 2020, or 2021, regardless of whether the taxpayer is under exam at the time of the filing of the Form 3115 (Application for Change in Accounting Method).

B. Waive Certain Restrictions in Revenue Procedure 2015-13. We respectfully request that guidance waive the prior five-year item and final-year trade or business restrictions under Revenue Procedure 2015-13\(^{22}\) for all accounting method changes requested in taxable years ending in 2019, 2020, or 2021.

C. Automatic Relief Regarding Form 3115 Elections. We recommend that automatic relief be provided under Treas. Reg. § 301.9100 authority with respect to any elections, including the filing of a non-automatic or an automatic Form 3115 (Application for Change in Accounting Method), related to tax years ending in 2017, 2018, 2019, 2020, and 2021.

D. Relief for Revoking Certain Elections. We recommend that the Service provide for automatic relief related to taxpayers wanting to revoke elections, such as the election to capitalize repairs for financial reporting purposes, related to tax years ending in 2017, 2018, and 2019.

VII. Low-Income Taxpayers

A. Expand Access to Free Tax Preparation Assistance. The extended due dates announced in Notice 2020-18, Notice 2020-20, and Notice 2020-23 to file tax returns is very helpful. However, most free tax preparation sites do not have remote capabilities, and it is unknown whether Volunteer Income Tax Assistance (“VITA”) sites will have the financial resources to prepare returns for the extended deadline in person. For this reason, we recommend that the Service continue its work with VITA representatives, such as the Taxpayer Opportunity Network, to facilitate maximum access to free tax preparation and extension filings for sites interested in operating remotely. We appreciate recent guidance from the Service allowing Low-Income Taxpayer Clinics (“LITC”) to prepare returns on a limited basis and encourage the Service to continue to relax the general prohibitions around return preparation for LITC practitioners and volunteers during this time.

\(^{21}\) 2015-5 I.R.B. 419.

\(^{22}\) Id.
B. **Grant Offset-Bypass Relief.**\(^{23}\) We recommend that the Service refrain from offsetting refunds in 2020 for the 2019 tax years for low-income taxpayers whose offers in compromise were accepted in 2019 and work with other agencies to provide relief for certain Treasury Offset Program debts such as federal student loans.

C. **Make Temporary Changes to the Service’s Enforcement Activities with Respect to Low-Income Taxpayers to Ease Economic Strain.** In this regard, we recommend that the Service:

1. Temporarily suspend the denial of credits (and associated refunds) under sections 32(k) (earned income tax credit (“EITC”)), 24(g) (child tax credit), and 25A(b)(4) (American Opportunity Tax Credit) for tax returns processed until the Service returns to its normal level of operations. At present, it would be very difficult (and perhaps nearly impossible) for a low-income taxpayer to respond efficiently to a request for documentation to substantiate a claim for a refundable credit, thus denying many taxpayers economic support they may be counting on to meet basic expenses, especially if they have lost a job or are still working but without childcare.

2. Release refunds that have been already been frozen due to an examination related to the EITC or pending a response to a wage verification request for low-income taxpayers. Given the limitations in access to mail, fax machines, and free legal assistance, it will likely be months before low-income taxpayers can effectively support these claims.

3. Suspend certain Automated Underreporter and math error assessments in consultation with Taxpayer Advocate Service and practitioner groups.

4. Consider automatically placing defaulted accounts in Currently Not Collectible status if information available to the Service shows income under 250% of the federal poverty level or current receipt of unemployment compensation.

D. **Extend certain deadlines related to the Low-Income Housing Tax Credit (“LIHTC”).** During the COVID-19 emergency, we believe that many taxpayers will be unable to meet certain LIHTC requirements. For this reason, we recommend that the Service consider extending the deadlines with respect to rehabilitation expenditures,\(^{24}\) placed in service dates,\(^{25}\) and the 10% for carryover

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\(^{23}\) This is in addition to the offset relief recommendations outlined in the Section’s letter dated April 6, 2020. ABA Tax Section, *Comments on Tax Collection-Related Relief in Response to the COVID-19*, available at https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2020/040620comments.pdf.

\(^{24}\) I.R.C. §§ 42(e)(3) and (e)(4).

allocation\textsuperscript{26} during the duration of shelter-in-place orders or any other state or local order that can reasonably be expected to prevent a taxpayer from meeting these deadlines. For example, if a shelter-in-place order lasts three months, we recommend that the Service extend the relevant deadline by three months. Treasury and the Service have the authority to postpone these deadlines under sections 7805A and 7508A(a)(1)(K).

VIII. Miscellaneous Provisions

A. Confirm Section 482 Evaluation Procedures. We recommend that the Service provide confirmation that, in applying section 482 and the applicable Treasury Regulations and in evaluating taxpayers’ compliance with Advance Pricing Agreements with the Service, the Service will take into account the extraordinary effects of COVID-19 travel and similar restrictions on both: (i) the presence or absence of taxpayers’ employees in the United States and other jurisdictions, including as such presence or absence relates to the Service’s analysis of taxpayers’ functions performed and risks assumed; and (ii) the financial results of controlled taxpayers and uncontrolled parties, including for purposes of comparability analyses and benchmarking.

B. Consider Extending the January 1, 2021 Beginning of Construction Deadline for Applicable 2020 Energy Tax Credit Allocations. We recommend that the Service consider modifying the continuity safe harbors in the guidance implementing the beginning of construction requirement for purposes of sections 45 and 48 to (a) toll the continuity safe harbor and (b) confirm that delays in construction due to COVID-19 are excusable disruptions and do not violate continuous efforts or continuous construction requirements.

C. REIT and RIC Distribution Requirements. We recommend that the Service relax the 80% stock and 20% cash component rule for real estate investment trusts and regulated investment companies making stock dividends to satisfy their distribution obligations. In this regard, we recommend the Service consider issuing guidance similar to Revenue Procedure 2008-68\textsuperscript{27} and Revenue Procedure 2009-15.\textsuperscript{28}

D. RIC Net Asset Valve Guidance. We recommend that that Service re-issue Revenue Procedure 2009-10,\textsuperscript{29} without a sunset provision, applicable to all regulated investment companies, to assist them in maintaining their net asset value (“NAV”) through top-up/excess payments from advisers to the funds. In

\textsuperscript{26} I.R.C. § 42(h)(1)(E)(ii); Treas. Reg. § 1.42-6.
\textsuperscript{27} 2008-52 I.R.B. 1372.
\textsuperscript{29} 2009-2 I.R.B. 267.
the alternative, we recommend that the Service, re-issue Revenue Procedure 2009-15 for money market funds (without a sunset provision).30

E. Various “Hour Based” Requirements. We recommend that that Service consider waiving or suspending hour requirements as it may be difficult for people to meet the requirements as during the COVID-19 emergency (e.g., contemporaneous records required for the 250-hour qualified business income qualified business safe harbor for rental real estate;31 750-hour services requirement for real estate professionals).32

30 We also recommend the Service consider allowing temporary relief for special tax regimes (like REITs, RICs, and passive foreign investment companies) that look to asset values, as asset values have plummeted due to the COVID-19 emergency.


32 I.R.C. § 469(c)(7).