Partnership Tax:
The Latest From Washington

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1. § 168(k)—100% Depreciation (Full Expensing)

2. § 163(j)—Issues and Impact on Planning

3. §§ 1446(f) and 864(c)(8)—Notices and Questions

4. § 1061

5. § 199A

6. BBA Regulations

7. Leveraged Partnership Regulations

8. PLR 201820013—§197 Anti-Churning

9. Qualified Opportunity Zone Regulations

10. Delaware Division Statute
§ 168(k): 100% Depreciation (Full Expensing)
§ 168(k)—General Rules

• **Basic Rule**
  – Allows 100% expensing of the cost of “qualified property” placed into service in the next 5 years.
  – 20% annual phase-down in later years (generally to begin in 2023 for most qualified property).

• **Qualified property**
  – Generally includes computer software and tangible property with a recovery period of 20 years or less.
  – Available for both property newly placed in service and previously used property acquired from unrelated seller.
§ 168(k)—Related Party Rule

• Property must satisfy the requirements of § 179(d)(2):
  – not acquired from certain related parties;
  – not acquired from a member of the same controlled group; and
  – basis not determined by reference to basis in hands of seller or under § 1014(a)).

• Prop. Reg. § 1.168(k)-2(b)(3)(iii)(A)(2) and (3) elaborate on these requirements by citing to Reg. §§ 1.179-4(c)(1)(ii)-(iv) and 1.179-4(c)(2), which provide some additional color.
§ 168(k)—What About Partnerships?

• Code is silent

• Application to partnerships in Prop. Reg. § 1.168(k)-2(b)(3)(iv)
  – § 704(c) – remedial allocations do not satisfy requirements
  – § 732(d) – basis of distributed property determined under § 732 does not satisfy requirements
  – § 734(b) – increase in basis of depreciable property does not satisfy requirements
  – § 743(b) – generally does satisfy requirement (special rules apply) requirements

• Special rule for Rev. Rul. 99-5 (Situation 1)
§ 168(k) and Transfers of Partnership Interests

Beginning Structure

```
A  B
  ↓
 LLC
  ↓
Qualified and Non-Qualified Property
```

Transaction

```
A  B  C
  ↓
 LLC
  ↓
Qualified and Non-Qualified Property
```

Final Structure

```
A  C
  ↓
 LLC
  ↓
Qualified and Non-Qualified Property
```

- B and C related?
What are the consequences? Does it matter if the contribution was planned when C acquired its interest from B?


Are partnership interests different from other property? Should they be?
§ 168(k) and Rev. Rul. 99-5 (Situation 1)

<table>
<thead>
<tr>
<th>Beginning Structure</th>
<th>Transaction</th>
<th>Final Structure</th>
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</thead>
<tbody>
<tr>
<td>A</td>
<td>A</td>
<td>A</td>
</tr>
<tr>
<td>LLC</td>
<td>LLC</td>
<td>LLC</td>
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<tr>
<td>Qualified and Non-Qualified Property</td>
<td>Qualified and Non-Qualified Property</td>
<td>Qualified and Non-Qualified Property</td>
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- Rev. Rul. 99-5 Treatment - “B’s purchase of 50% of A’s ownership interest in the LLC is treated as the purchase of a 50% interest in each of the LLC’s assets, which are treated as held directly by A for federal tax purposes. Immediately thereafter, A and B are treated as contributing their respective interests in those assets to a partnership in exchange for ownership interests in the partnership.”
- Meaning of “placed in service.”
- What if immediate expensing were allowed for § 704(c) allocations?
- Other issues?
§ 168(k) and Rev. Rul. 99-5 (Situation 2)

**Beginning Structure**

- A
  - LLC
    - Qualified and Non-Qualified Property

**Transaction**

- A
  - B
    - 50%
    - $10,000
  - LLC
    - Qualified and Non-Qualified Property

**Final Structure**

- A
  - B
    - LLC
      - Qualified and Non-Qualified Property + $10k

- Rev. Rul. 99-5 Treatment - “B’s contribution is treated as a contribution to a partnership in exchange for an ownership interest in the partnership. A is treated as contributing all of the assets of the LLC to the partnership in exchange for a partnership interest.”
§ 168(k) and Rev. Rul. 99-5 ("Missing Situation 3")

- Tax community generally believes this is treated as a Situation 2 followed, possibly, by a DSP.
- Does A’s level of ownership matter?

### Beginning Structure

- A
- LLC
- Qualified and Non-Qualified Property

### Transaction

- A
- B
- $5000
- 50%
- $10,000

### Final Structure

- A
- B
- 33.3%
- 66.7%
- LLC
- Qualified and Non-Qualified Property +$5k
§ 168(k)—Open Issues

• De-linkage of § 743(b) adjustments
  – Why linked to neither partnership nor partner
  – Remedial allocation “glitch”

• Should expensing be allowed for § 734(b) adjustments?
  – Difference between § 734(b)(1)(A) and § 734(b)(1)(B)?
  – Value limit?
  – Treatment of comparable transactions.
  – Is it worth the candle?

• § 704(c) – if allowed, should there be linkage?

• Why is § 708(b)(1)(B) mentioned in the proposed regs?
§ 163(j): Limitation on Deduction for Business Interest
§ 163(j) Overview

- Generally cannot deduct business interest expense for a taxable year to the extent that interest exceeds the sum of (a) the taxpayer’s business interest income, and (b) 30% of the taxpayer’s adjusted taxable income (ATI) for the taxable year.

- Business interest expense means any interest paid or accrued on indebtedness properly allocable to a trade or business
§ 163(j) Overview (cont’d)

• Business interest income means any interest includible in the gross income of the taxpayer that is properly allocable to a trade or business.

• ATI means the taxable income of the taxpayer computed without regard to:
  – any item of income, gain, deduction, or loss not properly allocable to a trade or business
  – any business interest expense or business interest income
  – any NOL deduction under § 172
  – any deduction allowable under § 199A
  – for taxable years beginning before 1/1/22, any deduction allowable for depreciation, amortization, or depletion.
Exceptions

• any activities that are not attributable to a trade or business;
• performing services as an employee;
• any electing farming business;
• certain utility businesses;
• floor plan financing interest; and
• any electing real property trade of business (of course).
### § 163(j) Overview (cont’d)

#### Comparison of “Old” § 163(j) vs. “New” § 163(j)

<table>
<thead>
<tr>
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<th>Old § 163(j)</th>
<th>New § 163(j)</th>
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<tr>
<td>Application</td>
<td>only corporate taxpayers</td>
<td>all taxpayers</td>
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<tr>
<td>Debt-to-Equity Ratio</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Interest Paid to Related Persons</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>One Taxpayer Rule</td>
<td>Super-Affiliated Group</td>
<td>Consolidated Group</td>
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<td>Applies @ the Partnership Level</td>
<td>No</td>
<td>Yes</td>
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<td>Exempt Businesses</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Carry forward of disallowed interest expense</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Carry forward of excess limitation</td>
<td>Yes (3 years)</td>
<td>No</td>
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</table>
Definition of Interest

- No statutory definition of interest.
- Conference Report:
  - any amount treated as interest for purposes of the Code is treated as interest for purposes of § 163(j).
- What’s In?
  - OID, acquisition discount, stripped bonds under § 1286, market discount (in excess of de minimis), amounts treated as interest under §§ 483, 467, 163(c), 988, 7872 and Reg. § 1.446-3T (NPCs with nonperiodic payments)
- What’s Out?
  - Substitute payments under securities loans (see Reg. § 1.163(j)-2(e)(6)), non-integrated hedges.
  - Guaranteed payments?
- Scope of Reg. Authority on Interest Equivalents
  - Not clear.
Partnerships: General Goal - Parity with a C Corporation

- Partnership rules appear to be intended generally to achieve parallel results to the rules for a C corporation.

- “The Committee believes that it is necessary to apply the limitation on the deductibility of interest to businesses regardless of the form in which such businesses are organized so as not to create distortions in the choice of entity.” H.R. Rep. 115-409 at 247.

- What does this mean, really?
Partnerships: General Goal - Parity with a C Corporation

• § 163(j)(4):

  - **Partnership computes its own § 163(j) limit** for its business interest expense, based on the partnership’s ATI and business interest income.

  - **No additional limit at the partner level**, to the extent a partnership’s business interest expense is deductible under § 163(j) at the partnership level. § 163(j)(4)(A)(i).

  - **No double-counting of ATI** – partnership’s ATI cannot be included in partner’s ATI (except to the extent the partnership has “excess” ATI beyond what the partnership needs to support a deduction of the full amount of its business interest expense incurred in the taxable year). § 163(j)(4)(A)(ii).
Partnerships: General Goal - Parity with a C Corporation

- § 163(j)(4):
  - **No double counting of business interest income** – recent Notice confirms that a rule similar to § 163(j)(4)(A)(ii) applies to a partnership’s business interest income. Notice 2018-28, § 7.

  - **Carryforward of partnership’s excess business interest expense** – generally deductible if/when the partnership generates sufficient ATI and business interest income in future years. Similar to carryforward by a C corporation.

  - **Uncertainty** – Statute not clear as to usability of partner’s income against excess business interest allocable to partner.
Partnerships: Carryforward of Excess Business Interest

- Example:
  - Partnership has 1,000 of excess business interest in Year 1, and allocates 10% (100) to Partner A. In Year 2, Partnership has 1,000 of ATI and 0 of business interest expense, resulting in 1,000 of ETI. Partnership allocates 10% (100) of this ETI to Partner A.

  - Under § 163(j)(4), in Year 2, how much of Partner’s 100 of excess business interest carryforward from Year 1 is Partner A entitled to deduct?
A. 100?

§ 163(j)(4)(B)(ii)(I) provides that the carryforward “shall be treated as business interest expense paid or accrued by the partner in the next succeeding taxable year in which the partner is allocated excess taxable income from such partnership, but only to the extent of such excess taxable income.”

B. 30?

This would be the same result, as if the Partnership had incurred all the relevant income and expense in a single year. Conference Report suggests this result. (“The partner may deduct its share of the partnership’s excess business interest in any future year, but only against excess taxable income attributed to the partner by the partnership the activities of which gave rise to the excess business interest carryforward.” H. R. Rep. 115-466 at 391.)

C. Answer may depend on Partner A’s ATI in Year 2?

Statutory language can be read to say that Partner A’s 100 carryforward is freed up from being tied solely to Partner A’s allocation of the Partnership’s income in Year 2. The ATI of Partner A in Year 2 from other sources would be available to support the deduction of the 70 of business interest expense not covered by Partner A’s 100 allocable share of ETI.
§§ 864(c)(8) and 1446(f): Existing Notices and Future Questions
§§ 864(c)(8) and 1446(f)

• § 864(c)(8) provides that gain or loss of a foreign person from the disposition of a partnership interest ("PI") generally is treated as ECI to the extent that such gain or loss does not exceed the gain or loss such person would have recognized as effectively connected gain or loss had the partnership sold all of its assets at FMV as of the date of the transfer
  – Intended to overrule Grecian Magnesite

• § 1446(f) provides that a transferee of such a PI generally must withhold tax equal to 10% of the amount realized upon the disposition of a PI if any gain on the transfer of such interest would be treated as effectively connected with the conduct of a USTB under § 864(c)(8)
Notice 2018-8: the PTP Exception

- Notice 2018-8 (Jan. 2, 2018) suspended withholding in connection with the sale or other disposition of PTP interests under § 1446(f) pending guidance
Notice 2018-29

• Notice provided interim guidance upon which taxpayers may rely pending the issuance of regulations
• Transferees required to withhold under § 1446(f)(1) must use the rules under § 1445 for purposes of reporting and paying the tax
• Treasury to issue regulations providing that
  – Transferee may rely on certification provided by transferor stating that transfer of PI will not result in realized gain
  – No withholding required under § 1446(f)(1) on the transfer of a PI if the transferee receives from transferor a certification that for the transferor’s 3 preceding taxable years, (i) transferor was a partner for the entirety of those 3 years and (ii) the transferor’s allocable share of ECI for each of those years was less than 25% of transferor’s total distributive share of income for that year
  – No withholding required under § 1446(f)(1) on transfer of a PI if the transferee is provided a certification that if the partnership had sold all of its assets at FMV, the amount of gain that would have been ECI would be less than 25% of total gain
No withholding required under § 1446(f)(1) on transfer of a PI if the transferee receives from transferor a notice that satisfies Reg. § 1.1445-2(d)(2)

Transferee may rely on certification in determining amount of liabilities of partnership included in the amount realized on a transfer for § 1446(f) purposes

On distributions to partners, a partnership may rely on its books and records or on certification from the distributee partner to determine whether the distribution exceeds the partner’s basis in its PI

Notice 2018-29 requested comment on:

- rules for determining the amount realized, including when the required withholding may exceed the proceeds of a sale of a PI;
- procedures for reducing the amount required to be withheld, such as limiting the withholding to the tax on the gain recognized;
- rules requiring partnership to withhold under § 1446(f)(4) on distributions to transferee that fails to withhold under § 1446(f)(1);
- rules that should apply under §§ 864(c)(8), 897, 1445, and 1446(f) when a partner disposes of a PI that holds both U.S. real property interests and other property used in conduct of a USTB
§ 1061
§ 1061—General

• Basic Rule
  – Gain with respect to an “applicable partnership interest” (or API) treated as short-term capital gain unless the gain would qualify as long-term capital gain if “3 years” was substituted for “1 year” in § 1222(3) and (4).
  – Focus on relevant holding period (partnership interest vs. underlying assets)

• Unclear flush language. What does the flush language of § 1061(a) mean (“notwithstanding section 83 or any election in effect under section 83(b”)?)
Carried Interest—API

- **Applicable partnership interest**
  - Generally means any interest in a partnership that (directly or indirectly) is transferred to (or held by) the taxpayer in connection with the performance of substantial services by the taxpayer (or any related person) in any applicable trade or business.
  - Exception for a partnership directly or indirectly held by a corporation
    - What about S corporations?
    - PFICs?
  - What is the meaning of second sentence of § 1061(c)(1) (“The previous sentence shall not apply to an interest held by a person who is employed by another entity that is conducting a trade or business (other than an applicable trade or business) and only provides services to such other entity.”)?
Carried Interest—Applicable Trade or Business

- Generally means any activity conducted on a regular, continuous and substantial basis which consists (in whole or in part) of:
  - Raising or returning capital, and
  - Investing, disposing, identifying or developing specified assets.

- **Specified assets include:**
  - Stock
  - PTP or widely held partnership or trust interests
  - Evidence of indebtedness, notional principal contracts
  - Derivatives or interests in the above
  - Hedges with respect to the above
  - Real estate
  - Partnership interests, to the extent the partnership holds the above.

- **Specified assets apparently do not include:**
  - § 1231 gain
  - § 1256 long-term contracts
  - Partnership interests (unless picked up above)
  - REIT capital gain dividends
Carried Interest—What is § 1061(d) About?

- **Related Party Sale.** § 1061(d) generally provides that if a taxpayer transfers any applicable partnership interest to a related person, the taxpayer shall include in gross income (as short-term capital gain) the excess (if any) of:
  - The taxpayer’s long-term capital gains with respect to the interest for the taxable year attributable to the sale or exchange of assets held for not more than three years, over
  - Any amount treated as short-term capital gain under § 1061(a) with respect to the transferred interest.

- What is this ruled aimed at?

- **Not a mandatory gain recognition rule**
  - Some say they worry that it might be

- **Drafting glitch?**
  - § 751(a) approach intended?
  - Were words left on the cutting room floor?
• **Contributed Capital Exception**
  
  – If you make an in-kind contribution, is exception based on value or tax basis
    
    o § 1061(c)(4)(B)(i) provides for “amount of contribution” (not “amount of cash or value of property”).
    
    o Compare to § 1061(c)(4)(B)(ii) (focusing on “value”)
  
  – What if based on share of income?
    
    o § 704(b) book income or taxable income?
§ 199A:
20 Percent Deduction for Non-Corporate and REIT Income
• Deduction for noncorporate taxpayers
• Equal to 20 percent of the taxpayer’s:
  − Qualified Income from a Qualified Trade or Business ("QTB"),
    o For taxpayers with income above a threshold, certain types of businesses are excluded and certain caps apply based on the “W-2 wages” and “qualified property” of the business.
  − Qualified REIT income, and
  − Qualified publicly traded partnership income.
Proposed Regulations Published on August 16, 2018

- Important anti-abuse provisions are proposed to be effective to taxable years beginning after December 2017

Address four elements of § 199A:

- Computations (Including W-2 and Qualified Property guidance)
- Aggregation of trades or businesses
- Specified Service Trades or Businesses
- Reporting
§ 199A—Qualified Trade or Business

• **QTB defined**
  - Any trade or business other than (i) a Specified Service Trade or Business or (ii) the performance of services as an employee.
  - Exclusion for specified service trade or business not applicable if taxpayer’s income is below a threshold.

• **Specified Service Trade or Business**
  - Trade or business described in § 1202(e)(3)(A)—
    o any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or
    o any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or owners, or
    o any trade or business that involves the performance of services that consist of investing and investment management, trading or dealing in securities (§ 475(c)(2)), partnership interests, or commodities (§ 475(e)(2)).
§ 199A—Limits on QBI

- **Qualified business income ("QBI") does not include:**
  - Reasonable compensation paid to the taxpayer by a QTB for services rendered,
  - Guaranteed payments paid to a partner for services rendered with respect to a QTB, and
  - Prop. Reg. § 1.199A-3(b)(2)(ii)(J) provides that QBI does not include any payment described in § 707(a) to a partner for services rendered with respect to the trade or business, regardless of whether the partner is an individual or an RPE. Comments requested on whether there are situations in which it is appropriate to include §707(a) payments in QBI.
§ 199A—Certain Limitations

• **W-2 Wage and Qualified Property Cap**
  - Deduction in respect of qualified income from a QTB capped at greater of:
    - 50 percent of individual’s share of W-2 wages from the QTB and
    - the sum of 25 percent of such W-2 wages and 2.5 percent of individual’s share of the unadjusted tax basis of the QTB’s “qualified property.”
  - Issues with:
    - W-2 Wage Cap
    - Qualified Property calculation and share

• **Qualified Income limited to ECI**
§ 199A—Impact of Losses

• **QBIA.** The § 199A deduction generally equals the “qualified business income amount,” which generally equals:
  
  − The sum of the amounts determined under § 199A(b)(2) for each QTB, and
  
  − 20 percent of qualified REIT dividends and 20 percent of qualified PTP income.

• **§ 199A(b)(2) Amounts.** The amount determined under § 199A(b)(2) with respect to any QTB is the lesser of:
  
  − 20 percent of the “qualified business income” (“QBI”), and
  
  − The wage and qualified property cap.

• **QBI.** QBI means the “net amount of qualified items of income, gain, deduction and loss” with respect to any QTB but excluding any qualified REIT dividends and qualified PTP income.

• **Carryforward.** If the net amount of qualified income, gain, deduction and loss with respect to QTBS is less than zero, such amount is treated as a loss from a QTB in the next year.
§ 199A—Impact of Losses

• Example 1—Loss from one QTB Reduces the § 199A Deduction on Another QTB
  − Taxpayer has $100 of QBI from QTB A and a $20 qualified business loss from QTB B.
  − Assuming no other limitations are implicated, QBI is $80, and the § 199A deduction equals $16 (computed $20 (20 percent of $100 of QBI) - $4 (20 percent of $20) of net QTB loss).

• Example 2—Income from QTB Offset by Loss from non-QTB
  − Taxpayer has $100 of QBI from QTB A and a $100 loss from Business B (which is not a QTB). Taxpayer uses the $100 loss from Business B to offset the $100 of income from Business A. (Taxpayer also has unrelated income.)
  − Assuming no other limitations are implicated, QBI is $100 and the § 199A deduction equals $20 (20 percent of $100).
§ 199A—Impact of Losses

• Example 3—Does a Net Loss from QTBs Reduce Deduction for REIT/PTP Income?
  − Taxpayer has $100 of qualified PTP income and a $20 qualified business loss from Business A.
  − Either:
    o Taxpayer’s 199A deduction is $20 (20 percent of the PTP income) and taxpayer has a $20 § 199A loss carryover, or
    o Taxpayer’s 199A deduction is $16 (computed $20 (20 percent of $100 of PTP income) - $4 (20 percent of $20) of net QTB loss) with no § 199A loss carryover.

• Example 4—QBI with No Wages Still Offsets QBL for Purposes of QBL Carryover Rule
  − Taxpayers have $100 of QBI from QTB A (but no wages and no qualified property) and $100 QBL from QTB B.
  − No § 199A (which would be true even without the QBL from QTB B) and no § 199A loss carryover (which would not be true without the QBI from QTB A)
§ 199A—Some Nitty Gritty

- **Cap based on W-2 Wages**
  - Treatment of service provider by an employer as something other than employee for tax purposes irrelevant; IRS to look at commonlaw and statutory rules
  - Special allocations okay

- **Cap based on Qualified Property**
  - Determined without regard to adjustments made under § 1016 or for § 179 or for adjustments made to the basis of assets under either §§ 734 or 743

- **Reduced threshold for understatements if taxpayer takes deduction (5% instead of 10%)**
§ 199A—Some Nitty Gritty (cont’d)

• **Qualified Income**
  - Income under § 751(a) upon a sale of partnership other than a PTP is attributable to the trades or businesses conducted by the partnership, and is still qualified income
  - No application to qualified REIT income

• **Impact of Ordering**
  - Better to have QBI in taxable year and then qualified business loss in later year.
BBA Regulations
How Did We Get Here? Where Are We?

• Challenging to audit partnerships, even under TEFRA.
• New audit procedures introduced in Bipartisan Budget Act of 2015.

“Sec. 6221. Determination at partnership level.
“Sec. 6222. Partner’s return must be consistent with partnership return.
“Sec. 6223. Designation of partnership representative.

“SEC. 6221. DETERMINATION AT PARTNERSHIP LEVEL.

“(a) IN GENERAL.—Any adjustment to items of income, gain, loss, deduction, or credit of a partnership for a partnership taxable year (and any partner’s distributive share thereof) shall be determined, any tax attributable thereto shall be assessed and collected, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to any such item or share shall be determined, at the partnership level pursuant to this subchapter.

26 USC prec. 6621.
The Regulations’ Winding Path

• **277-page Notice of Proposed Rulemaking**
  - **January 18, 2017**—Delivered to Federal Register
  - **Friday, January 20, 2017**—Victim of President Trump’s “Regulatory Freeze” Executive Order
  - **June 13, 2017**—Re-proposed with two changes (preamble and example)

• **July 20, 2017**—ABA writes to government requesting a one-year delay.

• **January 2, 2018**—Portions of the proposed regulations regarding the election out of the New Rules were finalized as of January 2, 2018.

• **February 2, 2018**—Proposed rules on how partnerships and partners adjust tax attributes to tax partnership adjustments into account

• **August 9, 2018**—Partnership Representative rules finalized

• **August 17, 2018**—Withdrew and re-proposed certain regulations to reflect Tax Technical Corrections Act of 2016
Big Topics

- No more “dead man walking”.
- Other?
Leveraged Partnership Regulations
Leveraged Partnership Regulation—2016 Reg Package

• § 707(a)(2)(B)—Code and regulatory scheme

• Proposed regs under §§ 707 and 752 issued in 2014

• NYSBA report submitted in 2015

• Final, temporary, and proposed regulations issued in October 2016
  - major changes to the types of guarantee that can cause a partner to bear the economic risk of loss with respect to a partnership liability (primarily eliminating the “bottom-dollar” guarantee)
  - other major changes to the allocation of partnership liabilities among the partners
  - the creation of a new qualified liability
  - the deletion of the “DRE rule” in Treas. Reg. § 1.752-2(k)

• NYSBA letter in December 2016
On April 21, 2017, the President issued Executive Order No. 13789, which instructed Treasury to review all significant regulations issued after December 31, 2015, to determine whether those regulations impose an undue financial burden on taxpayers or add undue complexity to the federal tax laws.

On July 7, 2017, the IRS issued Notice 2017-38, which announced that the temporary regulations under § 752 included in the 2016 Package were being considered in accordance with the Executive Order.

On October 2, 2017, Treasury published a report identifying eight regulations that it had identified as burdensome or unduly complicated. Treasury and the IRS considered whether the proposed and temporary regulations relating to disguised sales should be revoked and the prior regulations reinstated.” By contrast, Treasury noted that the portions relating to the elimination of bottom-dollar guarantees were needed to prevent abuse and, stated they “will continue to study the technical issues and consider comments, [though] they do not plan to propose substantial changes to the temporary regulations on bottom-dollar guarantees.”
On June 18, 2018, Treasury released proposed regulations that would largely reinstate the pre-2016 regulations and withdraw the temporary regulations. Taxpayers are permitted to rely on the new proposed regulations prior to finalization.
§ 197 Anti-Churning

- § 197 permits amortization of intangibles including goodwill and going concern value

- § 197(f)(9) prohibits amortization of certain pre-1993 intangibles, including goodwill and going concern value, if acquired from a related person
  - For purposes of § 197, related person generally refers to greater than 20% shared ownership

- Reg. § 1.197-2(h)(6)(ii): time for testing relationships
Pre-Transaction Structure (Simplified)
Steps

1. Each subsidiary of Target that is a qualified subchapter S subsidiary converts from a corporation to a limited liability company under Delaware law. (This step is not depicted.)
2. Target Holdco is formed and elects to be classified as a corporation for U.S. federal income tax purposes, effective as of the date of its formation.
3. Target shareholders contribute all of their Target stock to Target Holdco.
Steps

4. Target makes a QSub election.
   • Is a Qsub election necessary? See Rev. Rul. 2008-18, but see cf. PLR 201314003
5. Target converts into an LLC under state law.
Target Holdco Sells Interest in Target to Buyer

Step

6. Target Holdco sells interest in Target to the Buyer.
Post-Purchase Structure

Target Holdco

>20%

Target LLC

<80%

Target Subsidiaries

Buyer
Buyer Purchases Additional Target Interests

Step

7. Under the Target LLC agreement, Buyer is obligated to purchase from Target Holdco a portion of Target Holdco’s interest in Target.
   - The PLR mentions a three-year gap between the initial purchase and this purchase. After this step, Target Holdco’s interest in Target would be not greater than 20%.
Post-Transaction Structure (Simplified)

Target Holdco

<20%

Target LLC

Target Subsidiaries

>80%

Buyer
• PLR holds that the tax basis created in the Purchase (a transaction described in Rev. Rul. 99-5) would be amortizable by the LLC
  
  – IRS notes as a “material representation” that the Buyout will occur pursuant to a binding commitment

• PLR further holds that the amortization period begins immediately after the Purchase, even though Target Holdco will own more than 20 percent of Target until the Buyout
Qualified Opportunity Zones
Investments in Qualified Opportunity Zones can qualify from three principal tax benefits:
- Temporary deferral of capital gains that are reinvested in a qualified opportunity fund
- Partial exclusion of those reinvested capital gains on a sliding scale
- Permanent exclusion of all gains realized on an investment in a qualified opportunity fund that is held for a 10-year period

Qualified opportunity fund is a corporation or partnership that invests at least 90% of its assets in “qualified opportunity zone property,” which is defined as
- “qualified opportunity zone business property,“
- “qualified opportunity zone stock,“ and
- “qualified opportunity zone partnership interests”
Qualified Opportunity Zones – Proposed Regulations

• Taxpayers permitted to rely

• Only capital gains (and not ordinary income) qualify for deferral

• Partnership may elect to defer capital gains
  – 180-day period for investing capital gains in qualified opportunity fund begins on last of partnership’s taxable year, or if partner elects, the date partnership recognized the gain
  – Rules analogous to partnership rules apply to other passthrough entities, such as S corporations

• 10-year benefit rule applies to investments disposed of before 1/1/48

• Qualified opportunity fund required to be classified as a corporation or partnership organized in the 50 states, D.C., or some U.S. possessions
• For qualified opportunity funds classified as partnerships for tax purposes, debt incurred by the fund will not impact the portion of a partner’s investment in the qualified opportunity fund that qualifies for the 10-year benefit
  − What happens if a partnership disposes of one or more (but not all) of its investments, for purposes of the 10-year benefit?

• Cash and other working capital assets held for up to 31 months will count as qualified opportunity zone business property, so long as:
  − Cash and other working capital assets are held for acquisition, construction, or substantial improvement of tangible property
  − There is a written plan
  − Cash and other working capital assets expended consistently with the plan
Delaware Division Statute
Delaware Division Statute

- 2018 amendments to Delaware law add a new § 28-217 authorizing LLCs to divide into one or more newly formed LLCs, effective on August 1, 2018
  - The dividing LLC may either continue in existence or terminate its existence in connection with the division

- Requirements:
  - LLC must adopt a plan of division and file a certificate of division with the DE Secretary of State
  - Certificate of formation for each division company being created in connection with the division must also be filed

- Division amendments analogous to those in the merger provision of the DLLCA, including those relating to the conversion or exchange of rights, securities, or interests in the dividing LLC