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July 1, 2011

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The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
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Washington, D.C. 20224

Re: Recommendations for 2011-2012 Tax Guidance Priority List

Dear Ms. McMahon, Mr. Shulman and Mr. Wilkins:

In response to Notice 2011-39, the Tax Section of the New York State Bar Association submits the following request for guidance from the Internal Revenue Service and the Treasury Department on the issues listed below during the 2011-2012 guidance plan year.¹ We request that items that are marked by asterisks be treated as higher priority items.

The Tax Section has previously addressed several of the items on this list in its reports. In order to facilitate the government's review of these items, the list includes a reference to a Tax Section report where relevant. The referenced reports are listed in an annex. Reports submitted from 2000 on can be accessed at our website at www.nysba.org (Sections/Tax Section/Tax Section Reports).

¹ This letter may be cited as New York State Bar Association Tax Section, *Recommendations for 2011-2012 Tax Guidance Priority List* (Report No. 1243, July 1, 2011). This letter reflects solely the views of the Tax Section of the New York State Bar Association and not those of the New York State Bar Association Executive Committee or the House of Delegates.

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I. Consolidated Returns

Technical issues regarding the treatment of upstream and sideways restructurings of insolvent subsidiaries, including (i) potential application and implications of successor concepts in applying the rules of Treas. Reg. §§ 1.1502-13 and 1.1502-80(c); (ii) potential application of look-through rules under the gross receipts test of section 165(g)(3) with respect to intercompany dividends, intercompany interest, and other intercompany transactions; and (iii) the interaction of Treas. Reg. § 1.1502-13(g) and the net positive adjustments factor under Treas. Reg. § 1.1502-36(c) (Report No. 1230)

Guidance regarding the application of section 108(b), including (i) the effect of intercompany reorganizations on the application of the section 1017(b)(2) liability floor and the excess loss account recapture rules. (Treas. Reg. § 1.1502-28(b)(9)); (ii) modifying the ordering rules for attribute reduction attributable to look-through and direct cancellation-of-indebtedness income (Treas. Reg. § 1.1502-28(b)(1)(ii)); and (iii) clarification of the application of Treas. Reg. § 1.1502-11(c), particularly in the context of multiple dispositions

Guidance involving section 382 in consolidation, including (i) modification of the grouping rules for subsidiaries which joined the group (or subgroup) within 5 years and had a NUBIG upon joining the group (Treas. Reg. § 1.1502-91(g)(2)(ii) and (iv)); (ii) consolidated rules for qualification under, and the application of, section 382(l)(5) when not every member of the group is in bankruptcy; and (iii) consolidated rules for qualification, and determinations of the section 382 limitation, under section 382(l)(6) when not every member of the group is in bankruptcy

Guidance regarding the application of the intercompany transaction rules to an intercompany sale of property subject to mark-to-market under section 475 (Report No. 1150)

Guidance on group continuation issues under section 1502 after a corporate transaction

II. Corporations

**Guidance under section 382, including (i) the treatment of stock held by multiple funds managed by a common investment advisor, (ii) issues arising under sections 382(l)(5) and 382(l)(6) and (iii) the circumstances under which debt will be treated as stock for section 382 purposes or otherwise in a restructuring (Report Nos. 1163 and 1238)

**Guidance on the application of section 597 to government assistance provided in connection with failed financial institutions, including FDIC-provided seller financing and loss guarantees (Report No. 1210)

Guidance on investment company issues under sections 351(e) and 368(a)(2)(F) (Report to be submitted)

Finalization of the proposed section 336(e) regulations (Report No. 1174)

Finalization of proposed regulations under section 368(a)(1)(F) (Report No. 1229)

Guidance regarding distributions in connection with acquisitions (Report No. 1158)

Guidance providing ordering rules for characterizing tax-free transactions that qualify under multiple provisions (Report No. 1229)

Guidance addressing issues related to triangular reorganizations (Report Nos. 1164 and 1229)

Guidance on whether a redemption is an acquisition for section 355(e) purposes (Report No. 1046)

Guidance that provides exceptions to the rules of Treas. Reg. § 1.355-6(d)(2)(v) that stock received in a liquidation of a partner's interest in a partnership distribution is a "purchase" for purposes of section 355(d)

Guidance on the capitalization and amortization of acquisition expenses (Report No. 1059)

Guidance on the capitalization and amortization of bankruptcy/reorganization expenses

Reconsideration of the no-net-value regulations (Report No. 1102)

Guidance as to the continuing scope, if any, of Rev. Rul. 59-222 (Report No. 1102)

Guidance to allow elections out of section 368(a)(1)(G)

Guidance related to treatment of liabilities of a disregarded entity, including (i) whether such liabilities are treated as assumed for purposes of section 304 when a disregarded entity is transferred at the same time as a corporation, (ii) whether such liabilities should be treated as non-recourse debt of the owner of a disregarded entity under Treas. Reg. § 1.1001-2, and (iii) the application of Treas. Reg. § 1.1001-3 to transactions involving disregarded entities

Guidance on the application of section 305, including (i) its application to dividends with caps on the amount of cash available for distribution, (ii) the required nexus between cash and stock distributions, (iii) under section 305(b)(2), whether withholding tax on "preferred OID" to a foreign shareholder should be due at the same time as withholding tax on accrued OID on a debt instrument, and (iv) reconsideration of the prohibition on taking a conversion feature into account in determining whether stock is preferred

Guidance on issues regarding the reliance on 13Ds and 13Gs for section 382 purposes

Final regulations regarding the hot stock rules under section 355(a)(3)(B) (Report No. 1192)

III. Employee Benefits

Clarification of the rule (which is currently effective if there is compliance with the full set of proposed regulations) in the income inclusion segment of the proposed section 409A regulations permitting correction with respect to unvested amounts

Further guidance on section 409A(b) (off-shore funding)

IV. Exempt Organizations

What constitutes a "functionally related business" under section 4943

Guidance on private foundation issues for investors in Ponzi schemes (Report No. 1183)

Guidance concerning whether a disregarded entity owned by a charity is disregarded for all exempt organization purposes (e.g., is a donation to a domestic or foreign DE subsidiary of a US charity tax deductible?)

Guidance on what constitutes a “jeopardizing investment” under section 4944

V. Financial Product and Financial Transactions

** Guidance on the treatment of notional principal contracts under section 871(m), including (i) guidance as to what types of contracts do not have the “potential for tax avoidance” within the meaning of section 871(m)(3)(B), and (ii) guidance on the imposition of withholding taxes on dividend equivalent amounts under section 871(m) (Report No. 1234)

** Guidance concerning cross-border securities lending (Notice 2010-46)

**Guidance on the treatment of debt-for-debt exchanges, including (i) how to calculate the issue price of newly issued debt and (ii) how to account for cancellation-of-indebtedness income (Report No. 1209)

**Guidance on the allocation of payments between principal and interest when debt is not paid in full (Report No. 1163)

**Guidance on the accrual of interest and market discount where there is no reasonable expectation of payment, on character mismatches with respect to accrued interest, OID and market discount, and on other market discount issues (Report Nos. 1163 and 1209)

**Guidance under the AHYDO rules (sections 163(e)(5) and 163(i)), including whether the AHYDO rate should be modified in light of the current economic situation (Report No. 1196)

**Finalization of proposed regulations under section 1273 determining when a debt instrument is treated as publicly traded (Report Nos. 1066, 1163, 1209 and 1237)

**Guidance regarding the characterization of commitment and letter of credit fees by non-bank foreign investors in revolving credit facilities of U.S. borrowers, particularly for withholding tax purposes

**Generalization and publication of guidance regarding the characterization of fees for consenting to waivers or modifications of bonds or loans, including for withholding tax purposes

**Guidance on the application of the taxable mortgage pool rules to TALF and legacy securities funds

**Finalization of proposed regulations under section 1058 (Report No. 1239)

**Guidance on the interpretation of section 1256(b)(2)(B) with respect to which instruments are not section 1256 contracts

Guidance on credit default swaps, particularly with respect to upfront payments (Report No.1095)

Guidance under section 1272(a)(6) on the yield that an investor that makes the election to accrue market discount on the basis of a constant interest rate may use, in particular whether an investor may use the yield (including current prepayment and default assumptions) that it used in making its investment decision

Revenue Ruling or other published guidance affirming or rejecting the result in AM 2007-0014, relating to an issuer of convertible debt hedging the debt with options

Finalization of proposed regulations under section 446 relating to notional principal contracts with contingent nonperiodic payments (Report No. 1062)

Finalization of proposed regulations under section 263(g) (Report No. 997)

Guidance on various ambiguities and uncertainties in the OID rules (Report Nos. 1212 and 1226)

Guidance following up on Notice 2008-2, concerning the treatment of prepaid forward contracts (Report Nos. 990 and 1159)

VI. General

**Guidance regarding scope and administration of section 7701(o) and 6662(i), including a review process for imposition of the penalty (Report No. 1228)

**Guidance regarding estimated tax consequences of a Roth IRA (Report No. 1204)

Guidance on the zero basis doctrine as applied to debt instruments, in both the corporate and partnership context (Report No. 1120)

Guidance on the anti-churning rules of section 197(f)(9) in light of the passage of time

Clarification on proposed Treas. Reg. § 301.6402-2(a)(2) regarding where to file a refund claim under section 6402

Reorganization and simplification of the civil penalty structure in the Internal Revenue Code (to the extent possible through regulatory action)

Guidance on when mortgage or real estate mezzanine debt issued by a single-purpose or limited-purpose entity is treated as recourse or nonrecourse debt for purposes of section 108 and 1001

VII. Gifts, Estates and Trusts

Guidance on requirements of draft Form 8939 and the reporting of generation-skipping transfers made in 2010 (Report No. 1241)

Guidance as to whether an interest in a partnership is intangible personal property in the case of a gift made by a nonresident not a citizen of the United States or in the estate of a nonresident not a citizen of the United States, and, if a partnership interest is intangible personal property, how to determine the situs of such property for estate tax purposes

Guidance regarding the gift tax consequences to Roth IRA beneficiaries who consent to a recharacterization of the Roth IRA back to a traditional IRA

Guidance regarding the determination of gross income for purposes of section 642(c) when distributions are made to a trust from a partnership or a trust receives "phantom" income from a partnership

Final regulations under section 67 regarding miscellaneous itemized deductions of a trust or estate (Report No. 1160)

Revenue ruling regarding the consequences under various income, estate, gift and GST tax provisions of using a family owned company as a trustee of a trust (Report Nos. 1111 and 1168)

Guidance under section 2801 regarding the tax imposed on U.S. citizens and residents who receive gifts or bequests from certain expatriates

Guidance in light of responses to IR-2007-127 regarding certain trust distribution committees and general powers of appointment (Report No. 1134)

Guidance on the gift and generation-skipping transfer tax consequences of the distribution of property by a trustee from one irrevocable trust to another irrevocable trust resulting in a change in beneficial interests (i.e., a “decanting”)

Guidance on the applicability of the Foreign Bank and Financial Account Reports (“FBARs”) filing requirements to trust beneficiaries and attorneys in fact and related issues including (i) how to quantify the beneficial interest of a trust beneficiary for purposes of determining whether that interest exceeds 50% of trust assets and (ii) guidance on trustee reporting requirements (including what constitutes a “financial interest” in a foreign account) and potential issues of duplicative filings

VIII. International

**Guidance regarding the FATCA provisions of the HIRE Act relating to withholding tax and reporting on certain payments made to non-U.S. financial institutions, including guidance relating to the grandfathering of obligations outstanding as of March 18, 2012, particularly as to whether the grandfathering applies with respect to not only the imposition of the withholding under the FATCA but also the information reporting relating to such obligations (in so far as they constitute “accounts”) (Report Nos. 1199 and 1224)

**Guidance regarding the treatment of notional principal contracts under section 871(m) (Report No. 1234) (see part V above)

**Guidance regarding cross-border securities lending (Notice 2010-46) (see part V above)

**Guidance under the trading safe harbor of section 864(b)(2) regarding the extent to which the safe harbor applies to debt workouts, including acquisitions of distressed debt by a foreign investor for the purpose of participating in the recapitalization of the debtor (Report No. 1163)

**Guidance addressing (i) the amount of a section 956 inclusion, including where multiple CFCs guarantee the same loan, or where the value of CFC stock or assets pledged is less than the amount of the loan, and (ii) the effect (if any) of a pledge of the stock of a “US holdco” that owns solely stock of CFCs or a loan to a CFC

**Guidance on the application of withholding tax rules to certain fees referred to under part V above, Financial Products and Financial Transactions

**Guidance on the application and mechanics of creditable foreign income taxes subject to the new rules imposed by section 909 relating to foreign tax credit splitting events; and finalization of foreign tax credit regulations relating to technical taxpayer rules and compulsory payments (proposed Treas. Reg. § 1.901-2(e)(5)) (Report Nos. 1135 and 1223)

**Guidance on when loan origination and related activities should be considered an investment activity rather than a trade or business (Report No. 1163)

**Guidance on the disallowance of foreign tax credits generated from businesses subject to the covered asset acquisition rules imposed by section 901(m) (Report No. 1231)

**Guidance on section 960(c)

Guidance on the penalties to be imposed as part of the Offshore Voluntary Disclosure Initiative (Report to be submitted)

Guidance confirming the scope of, and exceptions to, reporting obligations under section 6038D (*e.g.*, the extent to which these obligations apply to nonresident aliens and beneficiaries of foreign trusts)

Guidance on the application of withholding tax rules to guarantee fees and letter of credit fees in light of *Container Corporation* and the new source rule under section 861(a)(9) for guarantee fees (see part V above)

Guidance regarding the characterization of commitment and letter of credit fees by non-bank foreign investors in revolving credit facilities of U.S. borrowers, particularly for withholding tax purposes (see part V above)

Guidance on the application of section 988(d) to hedges of debt instruments that do not satisfy the requirements for integration under Treas. Reg. § 1.988-5(a)

Guidance under sections 367(d) and 721(c) and (d) (Report No. 1222)

Finalize proposed regulations under section 959

Guidance on the source and withholding of cancellation of indebtedness income of foreign persons (Report No. 1170)

Finalize or re-propose the proposed section 163(j) regulations on earnings stripping (1991 Report)

Update the regulations under section 892 (Report No. 1157)

Finalize or re-propose the proposed PFIC regulations, including guidance on banking and securities businesses, look-through rules, tiered entities and options (Report Nos. 994, 1207)

Finalize proposed regulations on the source of service income (proposed Treas. Reg. § 1.861-4(b)(2)(ii)(G))

Finalize or repropose the proposed regulations under section 987 (Report No. 1140)

Finalize or repropose the proposed global dealing regulations (proposed Treas. Reg. § 1.482-8) (Report No. 926)

Guidance on the treatment of government licenses under FIRPTA (Announcement 2008-115) (Report No. 1195)

Guidance under section 7874 (Report No. 1211)

Guidance under U.S. income tax treaties (Report Nos. 1096, 1127 and 1214)

Finalize proposed regulation concerning application of conduit regulations to disregarded entity (Report No. 1188)

IX. Partnerships

Guidance on partnership distributions under section 751(b), including (i) **guidance on measurement issues, and (ii) guidance on the consequences of a shift in shares of hot assets (Report No. 1122)

Reconsideration of Rev. Rul. 99-6 and guidance on the treatment of the fact patterns covered by that ruling, including the application of Situation 1 to (i) nonrecognition transactions and (ii) situations in which the terminating partnership has liabilities, section 751 property or section 704(c) property (Report No. 1240)

Finalize proposed regulations under sections 108(e)(8) and 721 on debt-for-equity exchanges by partnerships (proposed Treas. Reg. §§ 1.108-8 and 1.721-1(d)) (Report No. 1184)

Guidance on targeted allocations under section 704(b) (Report No. 1219)

Finalize proposed (or re-proposed) regulations under section 721 on noncompensatory options issued by a partnership (proposed Treas. Reg. § 1.721-2) (Report No. 1048)

Guidance regarding section 704(c) layers relating to partnership mergers and tiered partnerships (Report Nos. 1202 and 1220)

Guidance regarding issues for securities partnerships under sections 704(c), 734(b) and 743(b) (Report No. 1220)

Finalize proposed regulations under section 706 on allocations of income and loss among partners with varying interests during the taxable year (proposed Treas. Reg. § 1.706-4) (Report No. 1201)

Guidance on the extent to which corporate partners are entitled to an 80 percent dividends received deduction with respect to dividends received through a partnership

Guidance on whether subpart F inclusions and qualified electing fund inclusions are qualifying income for purposes of section 7704

Guidance on cancellation of indebtedness income of publicly traded partnerships

Guidance on the application of the “single basis in a partnership” rule of Rev. Rul. 84-53, for owners of interests in publicly traded partnerships, to transfers of partial interests

Guidance regarding the application of Rev. Rul. 99-5 to partnerships with liabilities and transfers that are not described in Rev. Rul. 99-5 Situations 1 and 2

Guidance on the application of Treas. Reg. § 1.267(b)-1(b) in light of the addition of section 267(b)(10) to the Code and the 1986 amendment of section 707(b)(1)

Finalize or eliminate proposed Treas. Reg. § 1.337(d)-3 (1993 Report)

Guidance in light of *IPO II, et al. v. Comm’r*, 122 T.C. No. 17 (2004), on the allocation of partnership liabilities under Treas. Reg. § 1.752-4(b)(2)(iii)

Guidance regarding Treas. Reg. § 1.704-2(f)(6) and cancellation of indebtedness income

X. REITs and RICs (Domestic)

Revision of Rev. Proc. 2003-65, relating to mezzanine loans held by a REIT (Report No. 1155)

Consideration of a REIT bankruptcy exception for distributions

Guidance providing relief for inadvertent violations of the preferential dividend rules (unless and until the rules as applied to RICs and REITs are repealed or reformed) (Report No. 1153)

Respectfully submitted,



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Chair

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List of NYSBA Tax Section Reports on Requested Guidance Plan Issues

Report of Ad Hoc Subcommittee on U.S. Activities of Foreign Taxpayers on Regulations Proposed under Section 163(j) (Oct. 24, 1991) (“1991 Report”)

Report of Committee on Corporations on Proposed Regulations Implementing Notice 89-37 (March 3, 1993) (“1993 Report”)

Report No. 926, Letter on Proposed Regulations Relating to Global Dealing Operations (Apr. 20, 1998)

Report No. 990, Report on Timing and Character Rules for Prepaid Forwards and Options (Mar. 26, 2001)

Report No. 994, Report on Proposals for Guidance with Respect to Passive Foreign Investment Companies (May 22, 2001)

Report No. 997, Report on Proposed “Straddle” Regulations (Sept. 5, 2001)

Report No. 1046, *Report on “Non-Plan Issues”* (Jan. 13, 2004)

Report No. 1048, Report on the Proposed Regulations relating to Partnership Options and Convertible Securities (Jan. 23, 2004)

Report No. 1059, Report on Capitalization of Expenses to Repair, Improve or Rehabilitate Tangible Property and Certain Transaction Costs (May 7, 2004)

Report No. 1062, Report on Proposed Notional Principal Contract Regulations (June 4, 2004)

Report No. 1066, Report on Definition of “Traded on an Established Market” Within the Meaning of Section 1273 (Aug. 12, 2004)

Report No. 1070, Report on Source, “Effective Connection” of COD Income in Cross-Border Financings (Nov. 5, 2004)

Report No. 1095, Report on Credit Default Swaps (Sept. 9, 2005)

Report No. 1096, *Letter on Notice 2005-93* (Sept. 22, 2005)

Report No. 1098, Report on the Proposed Regulations and Revenue Procedure Relating to Partnership Equity Transferred in Connection with the Performance of Services (October 26, 2005)

Report No. 1102, Report on Proposed Regulations Regarding Organizations, Reorganizations, and Liquidations Involving Insolvent Corporations (Jan. 20, 2006)

Report No. 1120, *Report on “Zero Basis”* (Oct. 16, 2006)

Report No. 1122, Report Responding to Notice 2006-14 Relating to the Treatment of Partnership Distributions under Section 751(b) (Nov. 28, 2006)

Report No. 1127, Model Income Tax Convention Released by the Treasury on November 15, 2006 (April 11, 2007)

Report No. 1135, Report on Proposed Section 901 Regulations Relating to Compulsory Payments of Foreign Taxes (Oct. 25, 2007)

Report No. 1140, Report on Proposed Regulations Under Section 987 (Jan. 3, 2008)

Report No. 1150, Report on Proposed Treasury Regulation Section 1.15012-13(g) Relating to Intercompany Obligations (Mar. 6, 2008)

Report No. 1153, Report on the Application of Code Section 562(c) to Regulated Investment Companies and Real Estate Investment Trusts (Apr. 7, 2008)

Report No. 1155, Report on Revenue Procedure 2003-65 (May 6, 2008)

Report No. 1157, Report on the Tax Exemption for Foreign Sovereigns Under Section 892 of the Internal Revenue Code (June 13, 2008)

Report No. 1163, Letter to the Honorable Eric Solomon and the Honorable Douglas H. Shulman re: Guidance on Economic Downturn Issues (Aug. 19, 2008)

Report No. 1174, Report on Proposed Regulations Implementing Section 336(e) (Dec. 31, 2008)

Report No. 1180, Report on a Program to Remedy Documentary Noncompliance by Section 409A Plans in Response to Notice 2008-113 (March 25, 2009)

Report No. 1183, Report on Private Foundation Investors in Ponzi Schemes (May 7, 2009)

Report No. 1188, Report on the Application of Anti-Conduit Regulations to Hybrid Entities and Instruments (Aug. 27, 2009)

Report No. 1192, Report on Temporary Regulations Regarding the Hot Stock Rules Under Section 355(a)(3)(B) Tax Report and Letter 1191 (Oct. 2, 2009)

Report No. 1195, Report on IRS Announcement 2008-115 on FIRPTA Treatment of Rights Granted by a Government (Nov. 16, 2009)

Report No. 1199, Comments on the Foreign Account Tax Compliance Legislation (Jan. 11, 2010)

Report No. 1201, Report on Proposed Regulations on Varying Partnership Interests Under Section 706 (Jan. 19, 2010)

Report No. 1202, Report on the Request for Comments on Section 704(c) Layers Relating to Partnerships Mergers and Tiered Partnerships (Jan. 22, 2010)

Report No. 1204, Estimated Tax Consequences of Roth IRA (Feb. 19, 2010)

Report No. 1207, Report Commenting on Select Issues with Respect to the Passive Foreign Investment Companies (March 8, 2010)

Report No. 1209, Report on Definition of “Traded on an Established Market” within the Meaning of Section 1273 (March 30, 2010)

Report No. 1210, Report on FDIC-Assisted Taxable Acquisitions (April 30, 2010)

Report No. 1212, Report on Ambiguities and Uncertainties in the Original Issue Discount Regulations (May 5, 2010)

Report No. 1211, Report on Certain Issues Under Section 7874 (May 3, 2010)

Report No. 1214, Report on Guidance Under U.S. Income Tax Treaties (May 28, 2010)

Report No. 1219, Report on Partnership Target Allocations (September 23, 2010)

Report No. 1220, Aggregation Issues Facing Securities Partnerships Under Subchapter K (September 29, 2010)

Report No. 1222, *Report on Section 367(d)* (October 12, 2010)

Report No. 1223, Report on Issues Under Section 909 of the Code (November 8, 2010)

Report No. 1224, *Report on Notice 2010-60* (November 16, 2010)

Report No. 1226, Effect of de Minimis OID under Reg. § 1.1001-3(e)(2) (December 22, 2010)

Report No. 1228, Report on Codification of the Economic Substance Doctrine (January 5, 2011)

Report No. 1229, Report on Characterizing “Overlap” Transactions under Subchapter C (January 6, 2011)

Report No. 1230, Report on Claiming Worthlessness for a Failed Subsidiary Within a Consolidated Group (January 28, 2011)

Report No. 1231, *Report on Section 901(m)* (January 28, 2011)

Report No. 1234, *Report on Section 871(m)* (March 8, 2011)

Report No. 1237, Report on Proposed Regulations on the Definition of Public Trading (April 6, 2011)

Report No. 1238, *Report on Notice 2010-49* (March 18, 2011)

Report No. 1239, Report on Certain Aspects of the Taxation of Securities Loans and the Operation of Section 1058 (June 9, 2011)

Report No. 1240, *Report on Revenue Ruling 99-6* (June 13, 2011)

Report No. 1241, Draft Form 8939, Allocation of Increases in Basis for Property Acquired From a Decedent; Reporting of Certain 2010 Generation-Skipping Transfers (June 22, 2011)