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July 1, 2011

The Honorable Emily McMahon
Acting Assistant Secretary
(Tax Policy)
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The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
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The Honorable William J. Wilkins
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Dear Ms. McMahon, Mr. Wilkins and Mr. Shulman:

Re: Treasury Request for Public Comments Regarding Executive Order 13563

This letter responds to Treasury's March 30, 2011, request for public comments regarding a review by Treasury of its existing regulations (pursuant to the mandate of Executive Order 13563) in an effort to make the regulations more effective, less burdensome, or both. Subsequently, on May 18, 2011, Treasury released its preliminary plan for conducting this review, entitled *Preliminary Plan for Retrospective Analysis of Existing Rules*¹ (the "Preliminary Plan").

¹ DEP'T OF THE TREASURY, PRELIMINARY PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES (2011), available at <http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentoftheTreasuryPreliminaryRegulatoryReformPlan.pdf> [hereinafter PRELIMINARY PLAN]. This letter reflects solely the views of the Tax Section of the NYSBA and not those of the NYSBA Executive Committee or the House of Delegates. This letter may be cited as New York State Bar Association Tax Section, *Treasury Request for Public Comments Regarding Executive Order 13563* (Report No. 1244, July 1, 2011).

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We commend Treasury for its responses to the Executive Order and support the Preliminary Plan. We have some additional recommendations for Treasury to consider, which are set forth in more detail below.

Part I of this letter provides background. Part II addresses the importance of administrative guidance under the tax laws and comments on the benefits of additional guidance as compared to the benefits of removing outdated guidance. Finally, Part III responds directly to Treasury's requests for specific suggestions as to categories of regulations the Treasury and the IRS should target for revision and/or withdrawal.

I. Background

On January 18, 2011, President Obama signed Executive Order 13563 relating to the U.S. Federal regulatory system.² Executive Order 13563 sets out certain guiding principles that administrative agencies should follow in promulgating regulations, including that the:

- agency allow for public participation and an open exchange of ideas;
- regulatory system promote predictability and reduce uncertainty;
- regulatory system take into account benefits and costs, both quantitative and qualitative, and use the least burdensome tools for achieving regulatory ends;
- regulations be accessible, consistent, written in plain language, and easy to understand.

In this respect, Executive Order 13563 reaffirms the principles of regulation established by President Clinton in Executive Order 12866.³

² Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

³ See Exec. Order No. 12,866, 3 C.F.R. 1925 (1993). A recent Treasury Decision described the two Executive Orders as follows:

Executive Order 12866, as supplemented by Executive Order 13563, provides that regulations must promote predictability and reduce uncertainty, and in developing regulations, agencies must take into account benefits and costs, both quantitative and qualitative. Specifically, agencies are directed, to the extent permitted by law, to propose or adopt regulations only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits.

T.D. 9527, 76 Fed. Reg. 32,286, 32,293 (June 3, 2011).

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Executive Order 13563, however, also requires each agency to develop a preliminary plan under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or withdrawn so as to make the agency's regulatory program more effective or less burdensome.⁴

A subsequent Memorandum from the Office of Information and Regulatory Affairs requested agencies to release their preliminary plans to the public within two weeks after May 18, 2011; and, after receiving public input, to revise and finalize their plans no later than 80 days after releasing their preliminary plans.⁵

On March 30, 2011, Treasury issued a proposed rule inviting the public to submit comments on the development of its preliminary plan.⁶ Treasury requested public comments regarding which of its regulations should be modified, expanded, streamlined, or withdrawn in order to make Treasury's regulations more effective, less burdensome, or both. Specifically, Treasury requested responses to the following substantive questions:⁷

1. What factors should Treasury consider in selecting and prioritizing existing rules for retrospective review?

⁴ Section 6 of Executive Order 13563 reads as follows:

Retrospective Analyses of Existing Rules. (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

76 Fed. Reg. at 3822.

⁵ Memorandum from Cass R. Sunstein, Adm'r, Office of Information and Regulatory Affairs, to Heads of Executive Dep'ts and Agencies (Apr. 25, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf>.

⁶ Reducing Regulatory Burden; Retrospective Review Under E.O. 13563, 76 Fed. Reg. 17,572 (proposed Mar. 30, 2011).

⁷ *Id.* at 17,572-73.

2. Which regulatory programs are working well and should serve as a model for other Treasury programs?
3. Are there Treasury rules that are outdated or contrary to recently enacted statutes, or otherwise in need of updating?
4. In which Treasury regulations are there opportunities to use new information technologies to improve or ease burdens?
5. How often should Treasury review its existing regulations?
6. Are there any Treasury rules that duplicate requirements or contain conflicting requirements, either with another Treasury bureau or another Federal agency? If so, please identify and explain how these duplicative or conflicting requirements could be modified.

Treasury and the IRS's recent request for suggestions for their next priority guidance plan also solicited comments on these items.⁸

On May 18, 2011, Treasury released its Preliminary Plan.⁹ The Preliminary Plan states that, among other things, members of the public will be provided with an opportunity annually to suggest to the Treasury the specific regulations that should be updated or amended as part of a targeted review. These suggestions will be evaluated based on a weighted analysis of several factors, and the Treasury will select and publicly announce on its website the new priority regulatory projects that will be reviewed. The list of factors to be weighed includes the economic impact of the regulatory project on the public or industry; the level of complexity and prescriptive nature of the regulation; and updating outmoded or obsolete regulations or guidance. If possible, priority regulatory projects will be slated for "fast track" review. As stated above, we support the Preliminary Plan and request Treasury to consider our additional suggestions below.

II. The Importance of Administrative Guidance Under the Tax Laws

It is a vast simplification to say that the U.S Federal income tax laws are complex and at times difficult to understand. The Internal Revenue Code, as long as it is, leaves many questions open. It is widely acknowledged that many taxpayers face significant uncertainties regarding how the tax laws apply to their specific facts and that these uncertainties are bad for taxpayers, the IRS, and the public

⁸ See I.R.S. Notice 2011-39, 2011-20 I.R.B. 786.

⁹ PRELIMINARY PLAN, *supra* note 1.

fisc. Treasury Regulations and other administrative guidance elaborating on the words in the Code are crucial to the proper working of our tax system. Administrability, fairness, predictability, and many other tax policy goals depend upon there being robust administrative guidance.

Accordingly, while we support the goals of the mandated regulatory retrospective, we sympathize with a Treasury (and IRS) that is already overburdened and that is inundated daily with pleas to issue more administrative guidance. We anticipate that significant resources will be required to carry out the Preliminary Plan, and we feel it is worth stating that arguably those resources could accomplish more good by providing new guidance in areas of uncertainty, rather than reviewing and removing old, outdated guidance. It is of course also true that outdated guidance can contribute to complexity and uncertainty just as much as a lack of guidance. In that regard, we believe that obsolete regulations and regulations whose cross-references need updating are less of a source of confusion and uncertainty than proposed regulations that have been outstanding for too long.

III. Specific Proposals

(1) *Proposed Regulations.* Proposed regulations do not have the force of law, yet sometimes they are proposed to be effective retroactively to the date of the release of the proposed regulations commencing if and when they are finalized. Other times, they are proposed to be effective only prospectively after they are finalized. In addition, when such regulations are indeed finalized, the final regulations sometimes include an election to apply them retroactively from the date the proposed regulations were first released. A taxpayer who takes a position that is supported by a proposed regulation cannot rely upon that proposed regulation in a controversy with the IRS over the correct treatment, but the taxpayer may, in the event of such a controversy, rely upon that proposed regulation as all or part of a defense to penalties for having reported an incorrect position (but one that the proposed regulations supported).¹⁰

In some cases proposed regulations are on the books for so long, in proposed form, that they come to be treated in practice as though they are final regulations. Other proposed regulations seem to lose their respectability as they age. For a taxpayer or practitioner to be able to tell the difference (or convince the IRS or a court that the difference exists and matters) is a daunting task.

Some proposed regulations may represent years of work by Treasury and the IRS, while others may have been prepared in a shorter time frame and perhaps involved less extensive consideration. Some may be finalized within a year of their issuance, while others may lay untouched for decades.

We suggest that Treasury and the IRS consider ways to enhance the usefulness to taxpayers of proposed regulations. A great deal of work goes into them, and while they may not be perfect, they are often far better than nothing. We think it would be helpful for the IRS to periodically reconsider, in the case of a proposed regulation that has been outstanding for some time, whether the regulation should be finalized or withdrawn; whether taxpayers should be able to rely on the proposed regulation to support a substantive position; and/or, where the proposed regulation has a retroactive effective date, whether to eliminate the proposed retroactive effective date. To facilitate this exercise, one approach might be for Treasury and the IRS, in connection with the Business Plan process, to publish a list of proposed regulations that have not been finalized for a set period (e.g., five years), requesting comments regarding the prioritization of finalization or withdrawals.

¹⁰ See Treas. Reg. § 1.6662-4(d)(3)(iii).

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(2) *Temporary Regulations.* Temporary regulations issued after the promulgation of Section 7805 should be reviewed prior to their sunset under Section 7805; to date, Treasury and the IRS have been quite successful in finalizing temporary regulations before they expire. However, if there are temporary regulations that are due to expire before the promulgation of final regulations, we propose that such regulations be put on a priority list for finalization.

(3) *Regulations that Require Shareholder Notification.* Regulations that require notification to public shareholders, which seems unnecessary given widely available Internet access, should be withdrawn (or alternatively, the Treasury and the IRS could issue a revised regulation or Notice stating that all public shareholder notifications may now be communicated via the Internet).

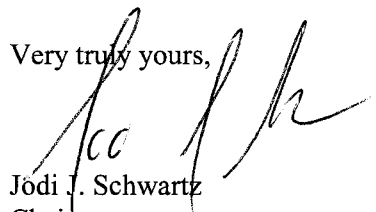
(4) *Regulations Superseded by Statute.* Regulations (or portions thereof) that are no longer relevant because they have been superseded by statute should be withdrawn.

(5) *Mismatched Regulations.* Regulatory citations should be updated to match their corresponding statutory provisions in the Internal Revenue Code.

* * *

We appreciate your consideration of our comments. Please let us know if you would like to discuss this letter further or if we can otherwise assist you.

Very truly yours,



Jodi J. Schwartz
Chair