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May 13, 2016

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Re: *Recommendations for 2016-2017 Priority Guidance Plan*

Dear Messrs. Mazur, Koskinen, and Wilkins:

In response to Notice 2016-26, the Tax Section of the New York State Bar Association submits the following recommendations for the 2016–2017 Priority Guidance Plan.¹ The Tax Section has submitted reports on many of those issues, and those reports are referenced below. All Tax Section reports submitted since 1986 can be accessed on our website at www.nysba.org (go to Sections/Tax Section/Tax Section Reports).

¹ This letter may be cited as New York State Bar Association Tax Section Report No. 1346, *Recommendations for 2016–2017 Priority Guidance Plan* (May 13, 2015). 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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We are particularly concerned about the significant implications and broad application of the recently proposed regulations under Section 385. Accordingly, our priority recommendation is:

Revise proposed regulations under section 385, including providing exceptions for cash pooling arrangements, other short-term intragroup financing, and additional ordinary-course transactions, and modifications to rules regarding partnerships controlled by related corporations. *Report to be submitted.*

I. CONSOLIDATED RETURNS

Finalize proposed regulations regarding allocation of income and deductions of corporations joining or leaving consolidated groups. *Report No. 1328.*

Finalize proposed regulations regarding elimination of circular basis adjustments.

Guidance on continuation of consolidated groups.

II. CORPORATIONS

Guidance on whether transfers to a distributing corporation in connection with a section 355 distribution of controlled corporation stock by the distributing corporation will be treated as an exchange of the transferred assets for the controlled corporation stock. *Report No. 1292.*

Guidance on the application of section 361(c)(3) where the distributing corporation debt is refinanced or incurred “in anticipation of” the stock distribution, or where the distributing debt is acquired by an intermediary to facilitate the exchange.

Guidance concerning the satisfaction of the control requirement of section 355(a)(1)(A) where section 368(c) is satisfied, including safe harbors in certain fact patterns while a broader study is in progress. *Report No. 1292.*

Clarifying guidance concerning certain aspects of the final regulations under section 368(a)(1)(F), including with respect to operation of the de minimis exceptions. *Report to be submitted.*

Guidance on investment company issues under sections 351(e) and 368(a)(2)(F). *Report No. 1252.*

Guidance addressing the allocation of earnings and profits in divisive transactions. *Report No. 1333.*

Guidance on the application of section 355 where the distributing or controlled corporation converts to a regulated investment company in connection with the distribution of controlled stock to distributing shareholders. *Report 1342*.

Guidance on permissible share repurchase techniques following a section 355 distribution or section 368 reorganization. *Report No. 1162*.

Guidance under section 382(h)(6) regarding the treatment of built-in items.

Additional guidance under section 382, including (i) the circumstances under which debt will be treated as stock for section 382 purposes or otherwise in a restructuring, (ii) issues regarding the right to rely on 13Ds and 13Gs for purposes of determining the identity and ownership of a “5-percent shareholder” under section 382, and (iii) formalizing the IRS ruling position with respect to the treatment under the section 382 regulations of certain coordinated acquisitions by less-than-5-percent shareholders as an acquisition by a constructive entity. *Reports Nos. 1238, 1255 and 1258*.

III. EMPLOYEE BENEFITS

Finalize the section 409A regulations on income inclusion.

Guidance updating the section 409A corrections program.

Guidance on the section 4985 inversion penalty, including (i) the definition of a Disqualified Individual (which relies on section 16(a) Exchange Act standards as applied to each member of the expatriate’s affiliated group), and (ii) the application of valuation rules to different types of stock compensation.

Guidance on definition of change in ownership under sections 280G and 4999(a).

IV. EXEMPT ORGANIZATIONS

Regulations under section 506. *Report No. 1341*.

Guidance on the new excise taxes on donor advised funds and fund management.

Regulations under section 514(c)(9).

Regulations streamlining the process of applying for recognition of tax-exempt status, without regard to size.

V. FINANCIAL INSTITUTIONS AND PRODUCTS

Guidance regarding the definition of a “qualified foreign pension fund” as defined in section 897(1) as enacted by the PATH Act. *Report to be submitted.*

Guidance regarding the application of section 897(k)(2), as enacted by the PATH Act, which revises the definition of USRPIs for certain foreign “qualified shareholders” in U.S. REITs.

Finalize proposed regulations defining “real property” for REIT purposes.

Clarify Treas. Reg. §1.1001-3, including the treatment of disregarded entities and changes to collateral and other credit enhancements for nonrecourse debt.

Guidance on the treatment of distressed debt, including the obligation of the holder to accrue stated interest, OID and/or market discount where there is no reasonable expectation of payment, mitigating or eliminating character mismatches with respect to accrued interest, OID and market discount that is never paid, and other market discount and AHYDO issues. *Reports Nos. 1163, 1209 and 1248.*

Finalize proposed regulations under section 305(c). *Report to be submitted.*

Finalize section 871(m) temporary regulations and modify final regulations. *Report No. 1340.*

Guidance on consent fees, including further considering and providing published guidance on PLR 201105016.

Guidance on the treatment of prepaid forward contracts, and repropose guidance on the treatment of significant nonperiodic payments under notional principal contracts. *Reports Nos. 990, 1001, 1054, 1062, 1159, and an additional report to be submitted.*

VI. GENERAL

Guidance on the impact of contingent liabilities in measuring insolvency under section 108 in light of *Merkel v. Commissioner*, 192 F.3d 844 (9th Cir. 1999) and related authorities. *Report No. 1278.*

Proposed regulations under sections 108 and 7701 concerning the bankruptcy and insolvency rules and disregarded entities, including the treatment of recourse debt of disregarded entities. *Report No. 1289.*

Guidance on treatment of recourse debt of disregarded entities for other tax purposes, such as for purposes of section 1001 gain or loss and the debt modification rules. *Report to be submitted.*

Guidance on the treatment of the buyer in an asset purchase when the assumed liabilities include deferred revenue (*i.e.*, prepaid income) of the seller. *Report No. 1281.*

Guidance under section 165(g)(3). *Report No. 1315.*

VI. GIFTS, ESTATES AND TRUSTS

Guidance on when estates and trusts are treated as materially participating in a trade or business for purpose of sections 469 and 1411. *Report No. 1326.*

Guidance on the income, gift, estate and generation-skipping transfer tax consequences of a transfer by a trustee of a portion or all of the principal of an irrevocable trust to another irrevocable trust, commonly referred to as “decanting.” *Report No. 1265.*

Guidance on basis of grantor trust assets at death under section 1014.

Guidance on the valuation of promissory notes for transfer tax purposes under sections 2031, 2033, 2512 and 7872.

Guidance on the gift tax effect of defined value formula clauses under sections 2512 and 2511.

VII. INTERNATIONAL

Provide a Technical Explanation to the new U.S. Model Treaty, including guidance concerning the “consistency principle” for a taxpayer’s election of treaty benefits and Code benefits. *Report No. 1325.*

Guidance concerning the application of equity recharacterization required by the proposed section 385 regulations under existing treaty commitments.

Guidance regarding the application of existing treaties to hybrid instruments and hybrid entities where the treaties have not been amended to incorporate provisions of the new U.S. Model Treaty.

Guidance on the application of section 894(c) to determinations regarding income effectively connected with a U.S. trade or business and the branch profits tax. *Report to be submitted.*

Finalize guidance under sections 367(a) and (d), regarding transfers of goodwill, going concern value and other intangible property to foreign corporations. *Report No. 1122 and Letter No. 1337.*

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 and 1207.*

Guidance on the disallowance of foreign tax credits under the covered asset acquisition rules of section 901(m). *Report No. 1231.*

Finalize or re-propose proposed regulations under section 163(j) related to earnings stripping. *Report No. 701.*

Guidance on section 864 implementing Rev. Rul. 91-32. *Report No. 1297.*

Finalize proposed section 892 regulations. *Report No. 1257.*

Guidance on workouts and section 864(b)(2). *Report No. 1163.*

Guidance regarding transfers of property to partnerships with related foreign partners and controlled transactions involving partnerships. *Report Nos. 1336 and 1345.*

VIII. PARTNERSHIPS

Finalize proposed regulations under section 707 regarding disguised payments for services, as well as any related changes to Rev. Proc. 93-27. *Report No. 1330.*

Finalize proposed regulations on the allocation of partnership liabilities under section 752 and disguised sales under section 707. *Report No. 1307.*

Finalize proposed regulations on the allocation of recourse partnership liabilities under section 752. *Report No. 1311.*

Finalize regulations under sections 704(c)(1)(C), 734(b) and 743(b) on partnership built-in losses. *Report No. 1314.*

Finalize proposed regulations on disproportionate distributions under section 751(b). *Report No. 1329.*

Finalize temporary and proposed regulations under Treas. Reg. § 1.337(d)-3. *Report No. 1270 and an additional report to be submitted.*

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

The Honorable Mark Mazur
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May 13, 2016

Guidance on the treatment of “dual status” partners as both partners and employees *Report to be submitted.*

Additional clarifying guidance regarding the allocation of creditable foreign tax expenditures under section 704(b). *Report No. 1069.*

IX. TAX ADMINISTRATION

Guidance on the many procedural issues raised by the new partnership audit and adjustment rules in sections 6221 through 6241. *Report to be submitted.*

Revise regulations under sections 6662 and 6664 relating to accuracy-related penalties.

* * *

We hope that our recommendations are helpful to you. We would be pleased to discuss with you preparing reports to address any issues on your 2016–2017 Guidance Plan on which we have not already commented.

Respectfully Submitted,



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Chair

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