



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

TAX SECTION

2017-2018 Executive Committee

MICHAEL S. FARBER

Chair
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017
212/450-4704

KAREN GILBREATH SOWELL

First Vice-Chair
202/327-8747

DEBORAH L. PAUL

Second Vice-Chair
212/403-1300

ANDREW H. BRAITERMAN

Secretary
212/837-6315

COMMITTEE CHAIRS:

Bankruptcy and Operating Losses

Stuart J. Goldring
David W. Mayo

Compliance, Practice & Procedure

Elliot Pisem

Bryan C. Skarlatos

Consolidated Returns

William Alexander
Richard M. Nugent

Corporations

Michael T. Mollerus
Gordon E. Warnke

Cross-Border Capital Markets

David M. Schizer
Andrew R. Walker

Cross-Border M&A

Yaron Z. Reich
Ansgar A. Simon

Employee Benefits

Robert C. Fleder
Jeffrey W. Ross

Estates and Trusts

Alan S. Halperin
Joseph Septimus

Financial Instruments

Lucy W. Farr
Jeffrey Maddrey

"Inbound" U.S. Activities of Foreign

Taxpayers

Peter J. Connors
Peter F. G. Schuur

Individuals

Megan L. Brackney
Steven A. Dean

Investment Funds

John C. Hart
Amanda H. Nussbaum

Multistate Taxation

Arthur R. Rosen
Jack Trachtenberg

New York City Taxes

Maria T. Jones
Irwin M. Slomka

New York State Taxes

Paul R. Comeau
Joshua E. Gewolb

"Outbound" Foreign Activities of U.S. Taxpayers

Andrew P. Solomon
Philip R. Wagman

Partnerships

Phillip Gall
Eric B. Sloan

Pass-Through Entities

James R. Brown
Edward E. Gonzalez

Real Property

Robert Cassanos
Marcy Geller

Reorganizations

Neil J. Barr
Peter A. Furci

Securitized and Structured

Finance

Daniel M. Dunn
John T. Lutz

Spin Offs

Lawrence M. Garrett
Joshua M. Holmes

Tax Exempt Entities

Stuart Rosow
Richard R. Upton

Treaties and Intergovernmental

Agreements

Lee E. Allison
David R. Hardy

Daniel Z. Altman
Pamela L. Endreney
Jason R. Factor
Kathleen L. Ferrell

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE:

Elizabeth T. Kessenides
Shane J. Kiggen
Sherry S. Kraus
William L. McRae
Joel Scharfstein
Stephen E. Shay
Eric Solomon
Linda Z. Swartz

Andrea K. Wahlquist
S. Eric Wang
Sara B. Zablotney

June 15, 2017

The Honorable Thomas C. West
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William M. Paul
Acting Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Notice 2017-28: Recommendations for 2017-2018 Priority Guidance Plan

Dear Messrs. West, Koskinen, and Paul:

In response to Notice 2017-28, the Tax Section of the New York State Bar Association submits the following recommendations for the 2017-2018 Priority Guidance Plan.¹ The Tax Section has submitted reports on many of these 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).

At the outset, we would like to emphasize the importance of Department of the Treasury and Internal Revenue Service guidance to taxpayers. That guidance very often serves to clarify the many areas where the Internal Revenue Code is unclear. Taxpayers seeking to comply voluntarily with the Internal Revenue Code seek certainty of application of

¹ This letter may be cited as New York State Bar Association Tax Section Report No. 1374, "Notice 2017-28: Recommendations for 2017-2018 Priority Guidance Plan" (June 15, 2017). 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.

FORMER CHAIRS OF SECTION:

Peter L. Faber
Alfred D. Youngwood
Gordon D. Henderson
David Sachs
J. Roger Mentz
Willard B. Taylor
Richard J. Hiegel

Herbert L. Camp
William L. Burke
Arthur A. Feder
James M. Peaslee
Peter C. Canellos
Michael L. Schler
Carolyn Joy Lee

Richard L. Reinhold
Steven C. Todrys
Harold R. Handler
Robert H. Scarborough
Robert A. Jacobs
Samuel J. Dimon
Andrew N. Berg

Lewis R. Steinberg
David P. Hariton
Kimberly S. Blanchard
Patrick C. Gallagher
David S. Miller
Erika W. Nijenhuis
Peter H. Blessing

Jodi J. Schwartz
Andrew W. Needham
Diana L. Wollman
David H. Schnabel
David R. Sicular
Stephen B. Land

the tax laws. Uncertainty resulting from lack of guidance can adversely affect normal business transactions, can result in unnecessarily expensive compliance costs for taxpayers and can result in different taxpayers taking different tax positions. We greatly value the work of the Department of the Treasury and the Internal Revenue Service in providing guidance.

As you will see, we have not attempted to prioritize among the items we mention below. We would be pleased to do so if you believe that that would be of assistance.

I. Consolidated Returns

Finalize regulations² regarding allocation of income and deductions of corporations joining or leaving consolidated groups (Report No. 1328). Finalize regulations regarding elimination of circular basis adjustments.

Guidance on continuation of consolidated groups.

Guidance regarding consolidated worthless stock deductions (Report No. 1315).

II. Corporations

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.

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 No. 1349).

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).

Finalize regulations under section 355 concerning the device prohibition and the active trade or business requirement (Report No. 1356).

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

² By “finalize” in this Letter, we mean “finalize” with appropriate input from the taxpayer community, including, where applicable, our Reports, and with appropriate administrative review. As well, in cases where finalizing regulations would not be viable, sub-regulatory guidance could be considered.

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 or other instruments will be treated as stock for section 382 purposes or otherwise in a restructuring, (ii) issues regarding the right to rely on Schedule 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).

Finalize regulations regarding predecessors and successors under section 355(e) (Report No. 1370).

Guidance regarding share repurchases under section 355(e).

III. Employee Benefits

Finalize regulations under section 409A on income inclusion.

Guidance updating the section 409A corrections program.

Guidance on the section 4985 inversion penalty, including (i) the definition of 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

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

Finalize regulations concerning the fractions rule under section 514(c)(9) (Report No. 1368).

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

V. Financial Institutions and Products

Clarify Treas. Reg. §1.1001-3, including the treatment of disregarded entities and changes to collateral and other credit enhancements for nonrecourse debt. See also second item under Section VI. (General) below.

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 (Reports Nos. 1163, 1209 and 1248).

Finalize regulations under section 305(c) (Report No. 1352).

Finalize regulations under section 871(m) (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 re-propose guidance on the treatment of significant nonperiodic payments under notional principal contracts (Reports Nos. 990, 1001, 1054, 1062, 1159, and 1348).

Guidance addressing modification of non-debt financial instruments.

Guidance addressing various questions arising under the AHYDO rules (Report No. 1366)

Guidance addressing the application of section 249 (Report No. 1372).

Guidance relating to the definition of registered form under sections 149(a) and 163(f).

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).

Guidance on treatment of recourse debt of disregarded entities for purposes of cancellation of debt income versus section 1001 gain and other relevant tax purposes. See also third item under Section V. (Financial Institutions and Products) above.

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).

VII. 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 (including in the context of split-dollar arrangements) 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.

Finalize regulations under section 2704 regarding restrictions on the liquidation of an interest in certain corporations and partnerships. (Report No. 1358).

Finalize regulations under section 2801 regarding the tax imposed on U.S. citizens and residents who receive gifts or bequests from certain expatriates. (Report No. 1364).

VIII. International

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

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 No. 1373).

Guidance on issues identified in T.D. 9803 (December 19, 2016) but not addressed in the regulations issued 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).

Finalize regulations on the disallowance of foreign tax credits under the covered asset acquisition rules of section 901(m) (Report to be submitted).

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 section 892 regulations (Report No. 1257).

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

Further guidance under section 367(b) concerning the issues addressed in Notice 2016-73, including regarding inclusion of "specified earnings" in income in certain corporate reorganizations.

Finalize regulations under Section 851(a) dealing with imputations from CFCs and PFICs (Report 1359).

Guidance regarding the definition of a "qualified foreign pension fund" as defined in section 897(l) as enacted by the PATH Act.

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.

IX. Partnerships

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

Finalize regulations on the allocation of partnership liabilities under section 752 and disguised sales under section 707 (Report No. 1307 and Letter No. 1361).

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

Finalize regulations under Treas. Reg. § 1.337(d)-3 (Report No. 1355).

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

Guidance on the treatment of "dual status" partners as both partners and employees .

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) (Report No. 1271).

Finalize regulations under section 721(c) on transfers of appreciated property to partnerships with related foreign partners (Report No. 1336).

X. Tax Administration

Guidance on the many procedural issues raised by the new partnership audit and adjustment rules in sections 6221 through 6241 (Report No. 1347 and additional Report to be submitted).

Streamline and simplify the regulations under sections 6662 and 6664 relating to accuracy-related penalties.

Guidance regarding section 7345 (revocation or denial of passport in case of certain delinquencies).

Guidance regarding section 6306 (permitting private debt collection through “qualified tax collection contracts”).

* * *

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 2017-2018 Guidance Plan on which we have not already commented.

Respectfully submitted,



Michael S. Farber
Chair

cc: Robert Neis
Benefits Tax Counsel
Department of the Treasury

Douglas Poms
Deputy International Tax Counsel
Department of the Treasury

Krishna Vallabhaneni
Deputy Tax Legislative Counsel
Department of the Treasury

Scott Dinwiddie
Associate Chief Counsel (Income Tax & Accounting)
Internal Revenue Service

Helen Hubbard
Associate Chief Counsel (Financial Institutions & Products)
Internal Revenue Service

Victoria Judson
Associate Chief Counsel (Tax Exempt & Government Entities)
Internal Revenue Service

Andrew J. Keyso, Jr.
Chief of Staff
Internal Revenue Service

Philip Lindenmuth
Health Care Counsel
Internal Revenue Service

John Moriarty
Acting Associate Chief Counsel (Passthroughs & Special Industries)
Internal Revenue Service

Douglas W. O'Donnell
Commissioner, Large Business & International Division
Internal Revenue Service

Marjorie Rollinson
Associate Chief Counsel (International)
Internal Revenue Service

Stephen B. Tackney
Deputy Associate Chief Counsel (Tax Exempt & Government Entities)
Internal Revenue Service

Drita Tonuzi
Deputy Chief Counsel (Operations)
Internal Revenue Service

The Honorable Thomas C. West
The Honorable John Koskinen
The Honorable William M. Paul

June 15, 2017

Robert Wellen
Associate Chief Counsel (Corporate)
Internal Revenue Service

Kathryn Zuba
Associate Chief Counsel (Procedure & Administration)
Internal Revenue Service