



# NEW YORK STATE BAR ASSOCIATION

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

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1285 Avenue of the Americas  
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June 2, 2015

The Honorable Mark Mazur  
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  
Washington, DC 20224

The Honorable William J. Wilkins  
Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

### Re: Recommendations for 2015-2016 Priority Guidance Plan

Dear Messrs. Mazur, Koskinen and Wilkins:

In response to Notice 2015-27, the Tax Section of the New York State Bar Association submits the following recommendations for the 2015-2016 Priority Guidance Plan.<sup>1</sup> The Tax Section has submitted reports on many of these issues, and those reports are referenced below.<sup>2</sup>

<sup>1</sup> This letter may be cited as New York State Bar Association Tax Section Report No. 1322, "Notice 2015-27: Recommendations for 2015-2016 Priority Guidance Plan" (June 1, 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. This letter contains fewer items than our letters in recent years, and in many cases the choice of items included reflects close judgment calls as to which reasonable minds could (and frequently did) differ.

<sup>2</sup> All Tax Section reports submitted from 2000 through 2014 can be accessed on our website at [www.nysba.org](http://www.nysba.org) (go to Sections/Tax Section/Tax Section Reports).

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## **I. Corporations**

Provide 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).

Provide 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.

Provide 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).

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

Provide 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).

## **II. Employee Benefits**

Clarify the rules under Section 409A regarding the treatment of stock rights and equity-based deferred compensation in the context of mergers and acquisitions and other corporate transactions.

Provide further guidance on the scope and application of Section 409A(b), relating to offshore and springing funding vehicles, in light of the expiration of the transition relief provided by Notice 2006-33.

Finalize the Section 409A regulations on income inclusion.

Provide guidance updating the Section 409A corrections program.

Provide 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.

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### **III. Exempt Organizations**

Provide guidance concerning political activities of Section 501(c) organizations, including Section 501(c)(4) organizations.

Finalize regulations under Section 4944 on program-related investments.

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

Issue regulations under Section 514(c)(9).

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

### **IV. Financial Products**

Provide 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).

Provide guidance on the treatment of debt-for-debt exchanges, including how to account for cancellation-of-indebtedness income (Report No. 1209).

Provide guidance on the applicability of Section 305(c) to convertible bonds, convertible preferred stock and warrants.

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

Provide 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).

### **V. General**

Provide 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).

Finalize proposed regulations under Sections 108 and 7701 concerning the bankruptcy and insolvency rules and disregarded entities (Report No. 1289).

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Provide 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).

Provide guidance under Section 165(g)(3) (Report No. 1315).

## **VI. Gifts, Estates and Trusts**

Provide guidance on when estates and trusts are treated as materially participating in a trade or business for purpose of Code Sections 469 and 1411.

Provide 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).

## **VII. International<sup>3</sup>**

Provide further guidance under section 7874, including regulations and other guidance contemplated by Notice 2014-52 (Reports Nos. 1211, 1279 and 1308; additional Report forthcoming).

Provide guidance under Section 367(d), regarding transfers of intangible property to foreign corporations (Report No. 1122).

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).

Provide 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 (1991 Report).

## **VIII. Partnerships**

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

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<sup>3</sup> In addition, we note that on May 20, 2015, the Department of the Treasury released proposed revisions to the U.S. Model Income Tax convention. While this is not technically "guidance," we believe it is an important project and recommend that resources be devoted to it.

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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 forthcoming).

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

**IX. Tax Administration**

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

Review and reorganize the TEFRA Regulations under Sections 6221-6234.

\* \* \*

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 2015-2016 Guidance Plan on which we have not already commented.

Respectfully submitted,

David R. Sicular  
Chair

cc: George H. Bostick  
Benefits Tax Counsel  
Department of the Treasury

Alison G. Burns  
Deputy Associate Chief Counsel (Corporate)  
Internal Revenue Service

Erik Corwin  
Deputy Chief Counsel – Technical  
Internal Revenue Service

The Honorable Mark Mazur  
The Honorable John Koskinen  
The Honorable William J. Wilkins  
June 2, 2015

Craig Gerson  
Attorney Advisor (Tax Legislative Counsel)  
Department of the Treasury

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

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

Andrew J. Keyso, Jr.  
Associate Chief Counsel (Income Tax & Accounting)  
Internal Revenue Service

Heather Maloy  
Commissioner, Large Business & International Division  
Internal Revenue Service  
Emily McMahan  
Deputy Assistant Secretary (Tax Policy)  
Department of the Treasury

John P. Moriarty  
Deputy Associate Chief Counsel (Income Tax & Accounting)  
Internal Revenue Service

Steven A. Musher  
Associate Chief Counsel (International)  
Internal Revenue Service

Douglas Poms  
Senior Counsel (Office of International Tax Counsel)  
Department of the Treasury

Danielle Rolfes  
International Tax Counsel  
Department of the Treasury

Marjorie Rollinson  
Deputy Associate Chief Counsel (International-Technical)  
Internal Revenue Service

The Honorable Mark Mazur  
The Honorable John Koskinen  
The Honorable William J. Wilkins  
June 2, 2015

Stephen B. Tackney  
Deputy Div. Counsel/Deputy Associate Chief Counsel (Employee Benefits)  
Internal Revenue Service

Karl Walli  
Senior Counsel – Financial Products  
Department of the Treasury

Robert Wellen  
Associate Chief Counsel (Corporate)  
Internal Revenue Service

Thomas West  
Tax Legislative Counsel  
Department of the Treasury

Curtis G. Wilson  
Associate Chief Counsel (Passthroughs and Special Industries)  
Internal Revenue Service

Donna Marie Young  
Deputy Associate Chief Counsel (Passthroughs & Special Industries)  
Internal Revenue Service