



August 02, 2017

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2017-38)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20224

Re: Notice 2017-38, Implementation of Executive Order 13789 (Identifying and Reducing Tax Regulatory Burdens)

Dear Sir/Madam:

On April 21, 2017, President Trump issued [Executive Order 13789](#) directing the Secretary of the Treasury to immediately review all significant tax regulations issued by the Department of the Treasury (Treasury) on or after January 1, 2016. On July 7, 2017, Treasury issued [Notice 2017-38](#) identifying eight specific regulations for further review and possible action under this Executive Order.

The American Institute of CPAs (AICPA) is pleased to submit our recommendations below for modification or repeal of four of the identified regulations. We have taken no position on the remaining regulations listed in Notice 2017-38 and our silence on them does not indicate our support or opposition to their modification or repeal.

1. [**REG-163113-02: Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest**](#)

On August 4, 2016, Treasury and the Internal Revenue Service (IRS) issued proposed regulations under section¹ 2704 regarding restrictions on liquidation of an interest and the valuation of interests in corporations and partnerships for estate, gift, and generation-skipping transfer tax purposes.

The AICPA recommends that the Secretary withdraw the proposed regulations in their entirety. The AICPA [testified](#) at the December 1, 2016 hearing on the regulations and submitted a [comment letter](#) on January 13, 2017 to urge Treasury and the IRS to formally withdraw the proposed regulations. The regulations are overly broad and expand the breadth of section 2704 in a manner not contemplated by Congress. The proposed regulations would place an undue financial burden on certain family businesses and treat family-owned businesses differently than similarly situated businesses without family ownership. In addition, they would add undue complexity to the Federal tax laws.

¹ All references herein to “section” or “§” are to the Internal Revenue Code of 1986, as amended, or the Treasury Regulations promulgated thereunder.

In the event that Treasury thinks that additional regulatory guidance is necessary under section 2704, we urge Treasury and IRS to issue new proposed regulations after fully considering the detailed recommendations presented in our [comment letter](#) dated January 13, 2017.

2. [TD 9790: Treatment of Certain Interests in Corporations as Stock or Indebtedness](#)

On April 8, 2016, Treasury and the IRS issued proposed regulations under section 385 addressing the potential recharacterization of certain debt instruments issued between related corporations, as equity for United States (U.S.) federal income tax purposes. The AICPA, in July 2016, provided detailed [comments](#) addressing our concern that if finalized in substantially the same format, the regulations would have a significant and disruptive impact on normal and critical operations of a large number of U.S. businesses. On October 21, 2016, Treasury and the IRS issued final and temporary regulations which significantly narrowed the scope of the regulations, however, they retained the onerous documentation requirements.

The AICPA recommends that Treasury withdraw the regulations. At a minimum, we recommend that Treasury drastically reduce the extent of the documentation requirements, limit application of the documentation requirements to specific types of transactions, and remove the 72 month per-se period.

The main purpose of the regulations is to decrease the incidence of corporate inversions. However, the regulations are highly complex, and impose significant documentation and analysis requirements on U.S. corporations for routine and ordinary intercompany transactions, including in cases where these transactions have no tax avoidance impact or motive. The regulations provide that as a prerequisite to treatment as debt, taxpayers must create detailed documentation and analysis for every intercompany transaction. Without this detailed documentation and analysis, intercompany transactions are automatically recharacterized as intercompany equity for federal income tax purposes, regardless of legal form, adding complexity for taxpayers and tax administration. In order to comply with the documentation rules affected U.S. companies would also incur significant costs to re-engineer existing processes, systems, and internal controls.

Another area of concern is the 72-month per-se period. This section of the regulations provides that any debt instrument issued within 36 months before or after a taxpayer's implementation of a "tainted" transaction (generally, a distribution to shareholders; acquiring an expanded group (EG) member in an asset reorganization with "boot"; and acquiring stock of another EG member in exchange for property) is automatically recharacterized from debt to equity to the full extent of the amount of the transaction. The 36-month before-and-after per-se period is non-rebuttable and permits no exception to the funding rule's application, including in cases where there is clearly no abuse. This 72-month period could capture transactions that at the time of the transaction were not abusive, but are now arbitrarily recast as abusive years later. Further, there is no statutory basis for this arbitrary red-line period.

The scope of the regulations imposes a significant administrative burden on U.S. taxpayers engaged in ordinary course of business transactions with no tax avoidance impact or intent. The complexity of the regulations, coupled with the potential for draconian outcomes in terms of tax

liability and complexity, dramatically increases the financial and administrative burdens placed on taxpayer resources. It is for these reasons that the AICPA recommends that the regulations are withdrawn or at a minimum, revised.

3. **[TD 9794: Income and Currency Gain or Loss with Respect to a Section 987 Qualified Business Units](#)**

On December 7, 2016, Treasury and the IRS issued final, temporary and proposed regulations under section 987 (the “987 regulations”). There are several aspects of the final and temporary regulations under Section 987 that are onerous and administratively challenging for taxpayers. The 987 regulations require certain taxpayers to gather detailed information for each of their qualified business units (QBU). In some cases, compliance with these computations may require retention of superfluous sets of books and records. For example, in addition to the depreciation records maintained for U.S. book purposes (under generally accepted accounting principles), U.S. tax purposes (under a modified accelerated cost recovery system), and to meet statutory needs, taxpayers may also need to maintain depreciation records for purposes of section 987. Furthermore, for many taxpayers, the 987 regulations eliminate transition rules resulting in a permanent forfeiture of economic losses.

The AICPA recommends that Treasury withdraw the 987 regulations and reissue a substantially modified set of regulations that relieves the burdens and hardships imposed on taxpayers by the proposal. Certain portions of the 987 regulations are helpful and we recommend their retention in any modified guidance issued. In particular, we support the retention of the annual deemed termination election and the yearly average exchange rate election (often collectively referred to as the “hybrid approach”), as well as the election for a controlled foreign corporation to apply the 987 regulations rather than the section 988 regulations to a dollar QBU.

4. **[TD 9803: Treatment of Certain Transfers of Property to Foreign Corporations](#)**

On December 16, 2016, Treasury and the IRS issued final regulations under section 367(d) that eliminate the exception under Treas. Reg. § 1.367(d)-1T(b) for outbound transfers of foreign goodwill and going concern value, and limited the application of the active foreign trade or business exception under section 367(a)(3). These regulations may result in immediate gain recognition or annual inclusions over the useful life of the transferred property. These final regulations are broad-reaching and burdensome on taxpayers, due to their complexity. In addition, they apply on a retroactive basis to September 14, 2015, requiring taxpayers to determine the tax and potential financial statement impact on transactions reported in a prior tax return. The regulations create an onerous and uncertain situation by requiring taxpayers to measure the use of the transferred property in the development and exploitation of other intangible property (i.e., derivative works), which may result in an increase to the useful life of the property that was transferred and any potential income inclusions under section 367(d).

The AICPA recommends that Treasury withdraw these regulations, as they impose an undue financial burden on U.S. taxpayers and add undue complexity to the Federal tax laws. Furthermore, the final regulations appear contrary to congressional intent related to recognition of

gain on the transfer of goodwill or going concern value. Both the House² and Senate³ committee reports issued in connection to the enactment of this code section stated that:

*The committee contemplates that, ordinarily, **no gain will be recognized** on the transfer of goodwill or going concern value for use in an active trade or business.*

In addition, Senate Finance Committee and the House Committee on Ways and Means each noted that their committee:

does not anticipate that the transfer of goodwill or going concern value developed by a foreign branch to a newly organized foreign corporation will result in abuse of the U.S. tax system.

Treasury's decision in the final regulations to require full gain recognition in all cases involving the transfer of foreign goodwill or going concern value is in response to a limited number of perceived abusive transactions. Stricter application of existing anti-abuse rules and/or clearer definitions of what constitutes foreign goodwill or going concern value is a less burdensome and more equitable response.

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. Please feel free to contact me at (408) 924-3508 or Annette.Nellen@sjsu.edu; or Jonathan Horn, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9204 or Jonathan.Horn@aicpa-cima.com.

Respectfully submitted,



Annette Nellen, CPA, CGMA, Esq.
Chair, AICPA Tax Executive Committee

cc: The Honorable Steven T. Mnuchin, Secretary of the Treasury, Department of the Treasury
The Honorable John Koskinen, Commissioner, Internal Revenue Service

² H. Rep't No. 432, 98th Cong., 2d Sess.

³ S. Rep't No. 169, 98th Cong., 2d Sess.