



May 24, 2022

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2021-28)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

RE: Recommendations for the 2022-2023 Guidance Priority List ([Notice 2022-21](#))

Dear Sir/Madam:

The American Institute of CPAs (AICPA) is pleased to offer our suggestions regarding the 2022-2023 Guidance Priority List, which was prepared by the AICPA Tax Policy & Advocacy Division's committees and technical resource panels and approved by our Tax Executive Committee.

The suggestions are listed under the AICPA group that developed them, and we have indicated the priority order for our comments under each category of the attached document. For your convenience, contact information for each group's chair and AICPA staff liaison is listed. Please feel free to contact these individuals directly with your specific questions or concerns.

In addition, the AICPA again encourages the Department of the Treasury and the Internal Revenue Service to continue pursuing tax simplification. Although we recognize you must balance competing interests and concerns when drafting guidance, we urge you to consider the following as part of the process:

- Use the simplest approach to accomplish a policy goal;
- Provide safe harbor alternatives;
- Offer clear and consistent definitions;
- Use horizontal drafting (a rule placed in one Internal Revenue Code ("Code") section should apply in all other Code sections) to the greatest extent possible;
- Build on existing business and industry-standard record-keeping practices;
- Provide a balance between simple general rules and more complex detailed rules; and
- Match a rule's complexity to the sophistication of the targeted taxpayers.

The AICPA is the world's largest member association representing the accounting profession, with more than 428,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and

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prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact me at me at (601) 326-7119 or [JanLewis@HaddoxReid.com](mailto:JanLewis@HaddoxReid.com); or Eileen Sherr, AICPA Director, Tax Policy & Advocacy at (202) 434-9256, or [Eileen.Sherr@aicpa-cima.com](mailto:Eileen.Sherr@aicpa-cima.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Lewis". The signature is fluid and cursive, with a large initial "J" and "L".

Jan Lewis, CPA

Chair, AICPA Tax Executive Committee

Encl.

**AICPA Tax Division**  
**Comments on the**  
**2022 - 2023 Guidance Priority List ([Notice 2022-21](#))**  
**May 24, 2022**

**Corporations and Shareholders Taxation Technical Resource Panel** (Julie Allen, Chair, (202) 414-1393, [Julie.Allen@us.pwc.com](mailto:Julie.Allen@us.pwc.com); or Elizabeth Young, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9247, [Elizabeth.Young@aicpa-cima.com](mailto:Elizabeth.Young@aicpa-cima.com).)

**Tax Cuts and Jobs Act Related<sup>1</sup>**

1. Provide guidance related to the interaction between section 163(j) and section 108.
2. Provide guidance on the interaction of limitation regimes (e.g., section 383 and a separate return limitation year) with the refundable credit mechanism adopted in section 53(e).<sup>2</sup>
3. Provide guidance on section 247 related to contributions by Alaskan Native Corporations to Settlement Trusts:
  - Coordination of taxable income limitations under section 247 with sections 172, 250 and 163(j).
  - Clarify ambiguity created by reference to the Settlement Trust recognizing income in the year the contribution is received equal to the amount of the deduction allowed, when the deduction may not be allowed in the year the contribution is received. Specifically, clarify if the income should match the deduction or if the income arises in the year it is received.

**General Issues**

4. Provide guidance regarding the treatment of intercompany transactions in determining satisfaction of the gross receipts test for purposes of section 165(g)(3)(B).
5. Provide further guidance on the application of Treas. Reg. § 1.1502-13 and clarification on the scope of the anti-abuse rule.
6. Provide guidance under section 382 with regards to Subchapter S.
7. Provide further guidance on the interaction of section 382 with respect to controlled foreign corporations (CFCs) following an ownership change.
8. Provide further guidance under section 1202 regarding Qualified Small Business Stock, specifically:

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<sup>1</sup> [Pub. L. No. 115-97](#), commonly referred to as the Tax Cuts and Jobs Act (TCJA).

<sup>2</sup> AICPA letter, "[Request for Guidance Related to Alternative Minimum Tax \(AMT\) Issues under the Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#)," March 3, 2021.

- Clarifying the active business requirement under section 1202(e).
  - What constitutes a qualified trade or business under section 1202(e)(3)(B), e.g., whether Financial Technology companies are a qualified trade or business thereunder and guidance defining an insurance business.
  - Guidance with respect to ordering rules and computing the applicable percentage exclusion and limitations when the taxpayer has multiple investments in the corporation.
  - The interaction of section 1202 in the case of a qualified stock sale and a subsequent qualifying reinvestment under section 1045.
  - Whether a partner with a carried interest subject to section 1061 that invests in a partnership fund (“fund of funds”) that acquires qualified section 1202 stock is deemed to acquire an interest in those qualified section 1202 shares for purposes of section 704(b).
  - Clarification of the definition of “substantially all” under the section 1202(c)(2)(A) holding period.
  - Guidance to clarify the extent that section 1202(d)(1)(C) requires a corporation to provide information to shareholders “to carry out the purposes” of section 1202.
9. Provide guidance concerning the application of Rev. Rul. 99-6 involving members of a consolidated group.
10. Provide guidance on uncertain tax position (UTP) reporting of an acquiring corporation on its Schedule UTP, *Uncertain Tax Position Statement*:
- Whether an acquiring corporation needs to report a tax position taken on a selling consolidated group’s pre-closing consolidated return for which the selling group did not record a reserve.
  - Whether an acquiring corporation needs to report on its Schedule UTP on the acquiring consolidated group’s post-closing return, tax positions already taken on a selling consolidated group’s return (where the “only once rule” applies).
11. Provide guidance under section 382 on identifying 5% shareholders of public companies, specifically with respect to:
- Incorporating specific private letter rulings (PLRs) into a revenue ruling to provide comprehensive authoritative guidance as a safe harbor method.<sup>3</sup>
  - Coordinated acquisitions.
  - Proper application of “Non-Stock Treated as Stock” to debt of a distressed loss corporation.
  - The 10% threshold for the small issuance limitation and small redemption limitation (i.e., based on actual value or calculated under section 382(l)(3)(C)).

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<sup>3</sup> See, e.g., [PLR 201902022](#); [PLR 201403007](#); [PLR 201110006](#); [PLR 201024037](#); [PLR 200713015](#); PLR 9533024.

12. Provide guidance under section 382(l)(5) regarding the uncertainties whether a corporation's parent or subsidiary is "under the jurisdiction of the court"<sup>4</sup> or "in bankruptcy."<sup>5</sup>
13. Provide guidance regarding shareholder overlap and the scope of section 304, as applied to public merger and acquisition transactions.
14. Provide guidance clarifying the tax characterization of Simple Agreement for Future Equity as a prepaid forward contract, a warrant, or equity.
15. Provide guidance with respect to cancellation of debt owed by a corporation to its shareholder, specifically:
  - Confirm that generally form over substance governs (i.e., when stock is issued, section 108(e)(8) applies; when no stock is issued, section 108(e)(6) applies) in a meaningless gesture situation.
  - Confirm that section 108(e)(6) generally applies to transactions under section 367(c)(2).
  - Address extent to which contribution of debt to capital can qualify under section 108(e)(6) even when subsidiary remains insolvent after the contribution.
  - Address treatment of a reduction in the adjusted issue price of the debt owed by an insolvent subsidiary (i.e., is the reduction treated entirely as a contribution to capital under section 108(e)(6) or is there a deemed value-for-value debt exchange).
16. Provide guidance concerning the proper application of the payment-ordering-rule in troubled companies context.
17. Provide guidance for determining when the continuity of business enterprise requirement is satisfied following a section 382 ownership change.
18. Provide guidance to clarify whether stock meets sections 1504(a)(4)(B) and (C) including safe-harbors, factors to consider, and/or circumstances when stock does not meet the tests described in sections 1504(a)(4)(B) and (C).

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<sup>4</sup> Section 382(l)(5)(A)(i).

<sup>5</sup> Section 382(l)(5)(A)(ii).

**Employee Benefits Taxation Technical Resource Panel** (Deborah Walker, Chair, (202) 257-5609, [dwalker@cbh.com](mailto:dwalker@cbh.com); or Kristin Esposito, Director – AICPA Tax Policy & Advocacy, (202) 434-9241, [Kristin.Esposito@aicpa-cima.com](mailto:Kristin.Esposito@aicpa-cima.com).)

### **SECURE Act Related**<sup>6</sup>

1. Provide guidance related to the following items:
  - Changes to 401(k) plans.
  - Adopting a 401(a) plan after year end.
  - Changes to distribution rules for birth or adoption of a child.

### **General Issues**

2. Provide guidance on aggregation under section 414(m).
3. Provide guidance on student loans and section 401(k) and section 403(b) plans.
4. Provide a Revenue Procedure detailing closing agreement procedures for retirement plan items that cannot be settled in the Internal Revenue Service (IRS) Voluntary Correction Program as related to Employee Plans News Issue 2013-10, December 19, 2013.
5. Provide guidance related to remote and hybrid working environments, addressing issues such as deductible business expenses and tax home for determining travel away from home.
6. Provide guidance to eliminate section 4975(a) excise taxes related to qualified plans if the total tax is \$50 or less with the estimated tax contributed to the plan.

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<sup>6</sup> [Pub. L. No. 116-94](#), commonly referred to as the SECURE Act.

**Exempt Organizations Taxation Technical Resource Panel** (Jennifer Becker Harris, Chair, (425) 454-4919, [jharris@clarknuber.com](mailto:jharris@clarknuber.com); or Arlene Schwartz, Senior Manager – AICPA Tax Policy & Advocacy, (973) 698-5633, [Arlene.Schwartz@aicpa-cima.com](mailto:Arlene.Schwartz@aicpa-cima.com).)

### **Tax Cuts and Jobs Act Related**

1. Provide further guidance regarding the allocation of indirect expenses between an exempt activity and unrelated trade or business or between more than one trade or business, as indicated in [TD 9933](#).

### **CARES Act Related**

2. Provide further guidance on the section 172 changes of net operating loss (NOL) deduction under the CARES Act and how it interplays with section 512(a)(6), as indicated in [TD 9933](#).

### **General Issues**

3. Provide an update on the potential revisions to [Rev. Proc. 80-27](#) regarding group exemption letters as described in [Notice 2020-36](#), published on May 18, 2020.
4. Issue proposed regulations under section 4966 and section 4967 in response to guidance in [Notice 2017-73](#) regarding excise taxes on donor advised funds.
5. Issue final regulations on section 509(a)(3) supporting organizations. Proposed regulations were published on February 19, 2016.
6. Provide guidance under section 4941 regarding a private foundation's investment in a partnership in which disqualified persons are also partners.
7. Issue final regulations under section 6104(c) (publication to state officials). Proposed regulations were published on March 15, 2011.
8. Issue final regulations designating an appropriate high-level United States (U.S.) Department of the Treasury ("Treasury") official under section 7611. Proposed regulations were published on August 5, 2009.
9. Issue guidance on section 4943(g)(4) independent operation matters.
10. Provide guidance on circumstances under which an LLC can qualify for recognition under section 501(c)(3), following [Notice 2021-56](#).

**Individual and Self-Employed Tax Technical Resource Panel** (Darren Neuschwander, Chair, (203) 456-1520, [dneuschwander@gnmtradertax.com](mailto:dneuschwander@gnmtradertax.com); or Robert Amarante, Senior Manager – AICPA Tax Policy & Advocacy, (919) 402-4582, [Robert.Amarante@aicpa-cima.com](mailto:Robert.Amarante@aicpa-cima.com).)

### **Tax Cuts and Jobs Act Related**

1. Provide guidance on section 199A corrected final regulations ([REG-107892-18](#)) and [Rev. Proc. 2019-11](#) including:<sup>7</sup>
  - Provide guidance related to the definition of compensation in section 415 as it relates to section 199A.
  - Clarify that the deductible portion of self-employment tax under section 164(f), the deduction for self-employed health insurance under section 162(l), and the deduction for contributions to qualified retirement plans under section 404, do not automatically reduce Qualified Business Income (QBI).<sup>8</sup>
  - Modify Treas. Reg. § 1.199A-3(b)(1)(vi) to provide that taxpayers may allocate the various deductions, which are not direct deductions of the trade or business, proportionately to the businesses based upon relative positive QBI, not based on gross receipts.
  - Update Treas. Reg. § 1.199A-6(d)(3)(i) to specifically provide that the calculation of QBI for trusts and estates should not include indirect expenses as a reduction of QBI. Additionally, update the QBI calculation example in Treas. Reg. § 1.199A-6(d)(3)(viii) to provide that the state and local taxes and trustee fees discussed therein are solely indirect expenses and, thus, not allocated to QBI.
  - Provide that an excess section 734(b) adjustment generates unadjusted basis immediately before acquisition in the same manner as an excess section 743(b) adjustment.
2. Provide guidance on whether the annual election under section 266 to capitalize taxes and carrying charges of investment property (previously a 2% miscellaneous itemized deduction), in lieu of deducting the expense, remains available for taxpayers owning real estate – noting that section 266 requires an otherwise deductible expense.
3. Provide guidance that the revised section 163(h) language “qualified residence interest” is interpreted as no longer including home equity debt. Therefore, tracing rules are applied to determine the category of interest this debt produces without the need to make the Treas. Reg. § 1.163-10T(o)(5) election to treat the debt as not secured by the home. Additionally, provide clarification that treating the interest on the home equity debt as described above does not affect the categorization of any acquisition debt that is part of a single loan or home equity debt.

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<sup>7</sup> AICPA letter, “[Guidance on the Qualified Business Income Deduction Under Section 199A](#),” March 4, 2020.

<sup>8</sup> See IRS website: “[Tax Cuts and Jobs Act, Provision 11011 Section 199A - Qualified Business Income Deduction FAQs](#),” Question #32.



4. Provide guidance on the meaning of “cash” under sections 170(b)(1)(G) and 170(f)(17). Specifically, provide clarity on whether the term “cash” for these two provisions has the same definition.
5. Provide guidance on the section 461(l) excess business loss limitation.<sup>9</sup>

### **SECURE Act Related**<sup>10</sup>

6. Provide guidance on the use of section 529 plans to pay student debt. Treasury and the IRS should clarify priorities as this provision applies to both the plan beneficiary and siblings.

### **General Issues**

7. Provide guidance on the taxation of virtual currency.<sup>11</sup>
8. Provide guidance on the term “reports” under section 1202(d)(1)(C) in regards to partial exclusion for gain from certain small business stock.

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<sup>9</sup> AICPA letter, “[Request for Guidance Related to Section 461\(l\) – Limitations on Excess Business Losses of Noncorporate Taxpayers](#),” February 28, 2019.

<sup>10</sup> [Pub. L. No. 116-94](#), commonly referred to as the SECURE Act.

<sup>11</sup> AICPA letter, “[Comments on Revenue Ruling 2019-24, the New Question on Schedule 1 \(Form 1040\), and the Internal Revenue Service’s Frequently Asked Questions on Virtual Currency Transactions](#),” February 28, 2020.

**International Taxation Technical Resource Panel** (Robert Russell, Chair, (202) 790-6996, [RRussell@kflaw.com](mailto:RRussell@kflaw.com); or Arlene Schwartz, Senior Manager – AICPA Tax Policy & Advocacy, (973) 698-5633, [Arlene.Schwartz@aicpa-cima.com](mailto:Arlene.Schwartz@aicpa-cima.com).)

## **General Issues**

1. Issue regulations on section 245A, including its application to foreign corporations.
2. Issue proposed regulations addressing certain issues arising from the Tax Cuts and Jobs Act (TCJA) with respect to foreign corporations with previously taxed earnings and profits (E&P) as described in [Notice 2019-01](#), including the application of sections 959 and 961 to passthrough entities.
3. Allow any reasonable method, including simultaneous equations, for purposes of determining deductions that are limited by taxable income (*e.g.*, deductions under sections 163(j), 170, 246(b)(1), and 250(a)(2)). Taxpayers need guidance regarding the coordination of deductions limited by taxable income.
4. Provide more complete and definitive guidance under the passive foreign investment company (PFIC) regulations as follows:
  - Provide guidance and explanatory examples under section 1297(c) regarding the 25% ownership look-through rule and its interaction with the section 1297(b)(2)(C) related party income rules.
  - Expand guidance under Treas. Reg. § 1.1298-1(b)(2)(i) to allow disclosure of multiple PFICs on the same [Form 8621](#), *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*.
  - Provide guidance on a standardized format for PFIC reporting by flow-through entities to their owners.
  - Provide further and definitive guidance under the PFIC regulations by reviewing and potentially increasing the *de minimis* reporting exception from the current \$25,000 threshold, such as an increase to mirror the [Form 8938](#), *Statement of Specified Foreign Financial Assets*, reporting thresholds.<sup>12</sup>
5. Provide guidance when finalizing Prop. Reg. § 1.1291-3(e) regarding indirect dispositions of section 1291 when access to books and records necessary to determine the amount of excess distribution is denied by the holder of the PFIC's books and records.
6. Finalize the proposed section 898 regulations on conforming year-ends of certain foreign corporations to the year-ends of their U.S. shareholders.
7. Provide a regulatory exception under section 6038 for down-stream attribution requiring partnerships, S-corporations, and trusts to file [Form 5471](#), *Information Return of U.S.*

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<sup>12</sup> AICPA letter, "[AICPA International Tax Legislative Proposals – Simplification and Technical Proposals](#)," May 5, 2021.

*Persons with Respect to Certain Foreign Corporations*, or [Form 8865](#), *Return of U.S. Persons With Respect to Certain Foreign Partnerships*, for constructive ownership of a foreign corporation (or partnership) created solely by attribution from its partners, shareholders or beneficiaries.<sup>13</sup>

8. Finalize proposed regulations under Treas. Reg. §§ 1.861-18 and -19 regarding the taxation of software as a service, platform as a service and other cloud computing platforms (particularly in situations where the provider does not own the servers on which the solution is hosted). Guidance is needed in determining both the character and source of income.
9. Provide guidance under section 986(c) on how to compute foreign exchange gain and loss when taxpayers have tiered CFCs with different functional currencies, including in the section 964(e) context.
10. Review current international information return requirements and consider additional exemptions similar to [Rev. Proc. 2020-17](#). The following are some potential increased thresholds and exemptions to consider:
  - Expansion of foreign trusts eligible for the exemption from [Form 3520](#), *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*, and [Form 3520-A](#), *Annual Information Return of Foreign Trust With a U.S. Owner (Under Section 6048(b))*, reporting pursuant to [Rev. Proc. 2020-17](#).
  - Increase of Form 3520 reporting threshold, or at a minimum, threshold for automatic penalty assessment, for foreign gifts and inheritances.
11. Issue guidance under section 367 as described in [Notice 2016-73](#).

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<sup>13</sup> *Id.*

**IRS Advocacy & Relations Committee** (Rochelle Hodes, Chair, (202) 552-8033, [Rochelle.Hodes@crowe.com](mailto:Rochelle.Hodes@crowe.com); or Sarah Adkisson, Senior Manager – AICPA Tax Policy & Advocacy, (202) 336) 416-1259, [Sarah.Adkisson@aicpa-cima.com](mailto:Sarah.Adkisson@aicpa-cima.com).)

## **General Issues**

1. Issue regulations under sections 6662A, 6662, and 6664 regarding the accuracy-related penalty and reasonable cause. Specifically, issue regulations under section 6662A that address (among other matters): (a) the definition of a “reportable transaction understatement”; (b) coordination of the reportable transaction understatement penalty with the substantial understatement penalty, particularly when multiple years and both penalties are involved; (c) coordination of the reportable transaction understatement penalty with the accuracy-related penalty on underpayments; and (d) application of the penalty (if any) to NOL carryback and carryover years. Additionally, update the sections 6662 and 6664 regulations to reflect numerous statutory changes, such as changes made by the [American Jobs Creation Act of 2004](#) (Pub.L. 108–357).
2. Update section 301.9100-2 to provide that either filing an Administrative Adjustment Request (AAR) counts for corrective action or that [Bipartisan Budget Act \(BBA\) of 2015](#) (Pub.L. 114-74) partnerships should be filing an amended return to obtain automatic relief under that provision. Section 301.9100-2 provides automatic extension of time to file certain late elections provided corrective action is taken within 12 months of filing the return. Corrective action is generally filing an amended return and attaching the late election statement. In the case of missed elections that are eligible for this relief by BBA partnerships, such as section 754 elections, an amended return is not currently permitted – BBA partnerships must file an AAR to make adjustments to an already-filed return.
3. Provide additional guidance under section 6662(d)(1), regarding the special rule for taxpayers claiming section 199A deduction, which lowers the penalty threshold from 10% to 5% for those taxpayers. Specifically, guidance is needed on the application of the penalty and available alternatives to avoid the penalty (such as disclosures, safe harbors or reasonable cause exceptions).
4. Issue proposed regulations for section 6751(b), regarding the requirement for written supervisor approval before imposition of a non-automatic penalty. Currently, there are no regulations under this provision. [IRM 20.1.2.3.1](#) was updated on October 19, 2020, to provide rules on timing of supervisory approval, providing that written supervisory approval is required prior to issuing any written communication of penalties to the taxpayer that offers the taxpayer an opportunity to sign an agreement or consent to assessment or proposal of the penalty. However, many questions and factual scenarios are not covered by the IRM provision. There is substantial case law around this provision, but these cases do not provide clear guidance for the IRS or taxpayers.
5. Issue regulations on codified economic substance and the application of the economic substance penalty under section 7701(o). The criteria in section 7701(o) for determining

whether a transaction satisfies the codified economic substance doctrine and whether economic substance is relevant to a transaction are not well-defined. Taxpayers and practitioners have relied on two notices ([Notice 2010-62](#) and [Notice 2014-58](#)) and two Large Business and International directives for guidance. The directive generally required Director of Field Operations (DFO) review and approval to propose the codified economic substance doctrine and penalty. The IRS modified the IRM on April 22, 2022, to significantly alter the process of determining when the doctrine should be imposed, which included removing the DFO review and approval requirement. Due to the lack of clarity of section 7701(o), the fact that the associated penalty is so high (potentially 40%) and is not eligible for reasonable cause, and the increased likelihood of section 7701(o) being raised during examination resulting in section 6662(b)(6) penalties, the IRS should issue proposed regulations under section 7701(o) and section 6662(b)(6).

6. Provide for the ability to electronically sign and e-file all forms and the ability to electronically pay all taxes.
7. Utilize an online system to communicate with taxpayers and practitioners to answer questions, share documents and resolve notices.

**Partnership Taxation Technical Resource Panel** (Jose Ramon Carrasco, Chair, (202) 521-1552, [jose.carrasco@us.gt.com](mailto:jose.carrasco@us.gt.com); or Ed Karl, Vice President – AICPA Tax Policy & Advocacy, (202) 434-9228, [Edward.Karl@aicpa-cima.com](mailto:Edward.Karl@aicpa-cima.com).)

### **Tax Cuts and Jobs Act Related**

1. Provide further guidance and revise the current final regulations, and finalize regulations under section 163(j) pertaining to subchapter K.<sup>14</sup>
2. Issue proposed regulations on section 461(l), including rules related to sales of partnership interests and guaranteed payments and rules for suspending losses from multiple trades or businesses.
3. Issue proposed regulations pursuant to [Notice 2020-75](#) and clarify definition of “specified income tax payments.”

### **Centralized Partnership Audit Regime Related**

4. Provide final regulations addressing adjustments to basis and tax attribute rules under Prop. Reg. § 301.6225-4 and Prop. Reg. § 301.6226-4.
5. Update guidance and procedures to reflect the Administrative Adjustment Request (AAR) process, as most guidance and regulations reference “amended return.”
6. Provide a procedure for correcting informational items on a [Form 1065](#), *U.S. Return of Partnership Income*, and/or Schedule K-1 outside of the AAR process.<sup>15</sup>
7. Provide an automatic procedure for a superseding partnership return before the extended due date in cases where an extension has not been filed.<sup>16</sup>

### **General Issues**

8. Provide guidance for taxpayers to rely on final copies of the forms and instructions even if those same forms and instructions are later updated in the tax year.<sup>17</sup>
9. Provide comprehensive guidance on application of section 465, specifically the aggregation rules under section 465(c)(3)(C) and the application to partnerships.

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<sup>14</sup> AICPA letter, “[Notice of Proposed Rulemaking \[REG-107911-18\] and Notice of Final Regulations \[T.D. 9905\] Regarding the Limitation on Deduction for Business Interest Expense under Section 163\(j\)](#),” December 21, 2020.

<sup>15</sup> AICPA letter, “[Changes to Simplify and Improve the AAR Process Under the Centralized Partnership Audit Regime and Proposed ‘AAR-EZ’ Process Framework](#),” May 25, 2021.

<sup>16</sup> AICPA letter, “[Changes to Simplify and Improve the AAR Process Under the Centralized Partnership Audit Regime and Proposed ‘AAR-EZ’ Process Framework](#),” May 25, 2021.

<sup>17</sup> AICPA letter, “[Penalty Relief for 2019 Tax Year Filing Season](#),” November 5, 2020.

10. Provide guidance on the meaning of partners' interest in the partnership in connection with the use of targeted allocations under section 704(b), including under what circumstances the targeted allocations would qualify under the economic effect equivalence test under the regulations.<sup>18</sup>
11. Provide further guidance on the application of [Notice 2009-70](#) to section 704(c) layers.
12. Provide guidance under section 6063 defining the circumstances in which an originally filed partnership tax return is considered validly signed by a partner within the meaning of the statute. In addition, guidance is needed regarding the circumstances under which the partnership representative's signature is considered valid on an original return, an amended return or a POA for the partnership (e.g., if the partnership representative is not a partner).
13. Provide guidance on the application of GILTI and Subpart F to partnerships.<sup>19</sup>
14. Provide updated guidance concerning the interaction of section 1245 and section 743. The regulations under Treas. Reg. § 1.1245-1(e)(3) have not been amended to take into account changes to subchapter K, including the regulations under section 751.

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<sup>18</sup> AICPA letter, "[Draft Revenue Ruling on Partnership Targeted Allocations](#)," February 11, 2014.

<sup>19</sup> AICPA letter, "[Global Intangible Low-Taxed Income \(GILTI\) Applied to Domestic Passthrough Entities under Subchapter K and Subchapter S](#)," March 11, 2021.

**S Corporation Taxation Technical Resource Panel** (Bryan Keith, Chair, (202) 419-1417, [bryan.keith@andersen.com](mailto:bryan.keith@andersen.com); or Elizabeth Young, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9247, [Elizabeth.Young@aicpa-cima.com](mailto:Elizabeth.Young@aicpa-cima.com).)

## **General Issues**

1. Provide guidance regarding the IRS’s no-rule policy over certain matters and provide clarity to ultimately reduce a potential burden on both taxpayers and IRS. Specifically, we request for the IRS to:<sup>20</sup>
  - Define formally and publish the parameters of the no-rule policy; and
  - Issue a revenue ruling or other authoritative pronouncement to provide clarity for certain S corporation matters on which the IRS will no longer rule. Until the revenue ruling or pronouncement is released, we request that the IRS issue PLRs concerning disproportionate distributions.
2. Provide guidance under section 163(j) with respect to self-charged lending transactions involving S corporations.<sup>21</sup>
3. Provide guidance on the application of GILTI and Subpart F to S corporations and their shareholders.<sup>22</sup>
4. Issue proposed regulations pursuant to [Notice 2020-75](#) and clarify definition of “specified income tax payments.”
5. Provide regulatory guidance on section 465 aggregation and revisit and finalize existing proposed section 465 regulations.
6. Provide guidance regarding the computation of the period of limitations when a subsidiary of a corporation is improperly treated as a qualified subchapter S subsidiary (QSub) and all of its income, deductions, and credits are included in an S corporation return filed by the parent corporation.
7. Provide guidance as to whether the ability to decant a trust precludes the trust from qualifying as a Qualified Subchapter S Trust (QSST) within the meaning of section 1361(d).
8. Provide guidance under section 1367 regarding basis ordering rules of certain suspended losses.
9. Provide additional guidance regarding the ordering rule for adjustments to the accumulated adjustments account (AAA) when ordinary and redemption distributions are made in the

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<sup>20</sup> AICPA letter, “[IRS Informal ‘No-Rule’ Policy on Certain S Corporation Matters](#),” May 02, 2018.

<sup>21</sup> AICPA letter, “[Notice of Proposed Rulemaking \[REG-107911-18\] and Notice of Final Regulations \[T.D. 9905\] Regarding the Limitation on Deduction for Business Interest Expense under Section 163\(j\)](#),” December 21, 2020.

<sup>22</sup> AICPA letter, “[Global Intangible Low-Taxed Income \(GILTI\) Applied to Domestic Passthrough Entities under Subchapter K and Subchapter S](#),” March 11, 2021.



same year and an ordinary distribution occurs after the redemption distribution.<sup>23</sup> Consider also the possibility of a closing-of-the-books election for AAA purposes as of the date of the redemption.

10. Provide guidance on the application of section 904(f) rules, relating to the recapture of overall foreign loss, to terminations of S corporations and the corresponding basis adjustments that are required.
11. Provide guidance regarding the application of section 302(b)(4) to distributions by an S corporation. Specifically, guidance is needed on whether the shareholders can use an aggregate basis approach in a partial liquidation.
12. Provide additional guidance regarding the inability to utilize certain suspended passive activity losses upon redemption when the sale of S corporation stock is to a related party described in sections 267(b) and 707(b)(1).
13. Provide additional guidance on tax attributes of an Electing Small Business Trust (ESBT). Specifically, the guidance should address tax attributes such as NOLs, foreign tax credits (FTCs), charitable contributions, and state tax refunds, and the tax treatment of such items upon termination of the S corporation.
14. Update Treas. Reg. § 1.1361-5 to reflect the addition of clause (ii) (relating to termination of a QSub by reason of the sale of the QSub stock) to section 1361(b)(3)(C) made by section 8234 of [Pub.L. 110-28](#). We offer the following to accomplish this change:
  - Delete the obsolete portion of existing regulation;
  - Add a sentence to indicate that the old rules apply only for years before the effective date of the changes; or
  - Revise and expand the regulations to indicate that the old rules apply to years before the effective date of the changes and also set forth new rules that apply for years after the effective date of the changes.

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<sup>23</sup> AICPA letter, "[Ordinary and Redemption Distributions by S Corporations under Section 1368](#)," October 16, 2014.

**Tax Methods and Periods Technical Resource Panel** (Connie Cunningham, Chair, (310) 951-1694, [cccunningham@bdo.com](mailto:cccunningham@bdo.com); or Elizabeth Young, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9247, [Elizabeth.Young@aicpa-cima.com](mailto:Elizabeth.Young@aicpa-cima.com).)

### **Tax Cuts and Jobs Act Related**

1. Provide guidance under section 179 for the specific types of assets that qualify as “qualified real property” under section 179.
2. Provide guidance under section 461(i)(3)(B) and (4) regarding the definition of a syndicate.<sup>24</sup>
3. Provide guidance permitting the use of a book percentage of completion method for tax purposes to comply with section 451(b) and section 451(c).
4. Provide guidance clarifying the federal income tax treatment of customer advance payments associated with the live events, shows or other productions that were canceled or deferred due to COVID-19.<sup>25</sup>
5. Update [Rev. Proc. 2015-13](#) to disregard the 150% rule in Section 8.02(5).<sup>26</sup>
6. Provide guidance on TCJA changes to section 174, specifically in the context of contract research arrangements and types of expenditures subject to the provision.

### **General Issues**

7. Provide regulatory and/or procedural guidance under section 263A(f) that provide rules to: (1) apply section 263A(f) to related parties; (2) modify Treas. Reg. § 1.263A-9 to permit taxpayers to use reasonable methods to allocate capitalizable interest to units of designated property; (3) modify Treas. Reg. § 1.263A-9(d)(1) with respect to the election to trace debt; (4) modify Treas. Reg. § 1.263A-8(b)(4) to make elective application of the *de minimis* rule for determining designated property; and (5) include routine interest capitalization changes in the list of automatic method changes, as well as other modifications and clarifications to the present regulations, notices, and other procedural guidance.

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<sup>24</sup> AICPA letters, “[Notice of Proposed Rulemaking Regarding Small Business Taxpayer Exceptions under Sections 263A, 448, 460 and 471 – \[REG – 132766-18\]](#),” December 21, 2020; and “[Small Business Relief from Definition of Tax Shelter](#),” February 13, 2019.

<sup>25</sup> AICPA letter, “[Deferral of Live Event Advance Payments Affected by the Coronavirus Pandemic](#),” February 7, 2022.

<sup>26</sup> AICPA letters, “[Audit Protection for Controlled Foreign Corporations under Section 8.02\(5\) of Revenue Procedure 2015-13](#),” December 17, 2018; and “[Audit Protection for Controlled Foreign Corporations under Section 8.02\(5\) of Revenue Procedure 2015-13](#),” August 30, 2018.

8. Provide additional guidance pertaining to negative additional section 263A costs and the regulations thereunder.<sup>27</sup>
9. Provide guidance on the tax treatment and characterization of software and e-content transactions.
10. Modify and clarify [Rev. Proc. 2022-14](#) and [Rev. Proc. 2015-13](#) to, among other things, reinstate the 90-day window, and include additional method changes in the List of Automatic Method Changes.<sup>28</sup>
11. Provide guidance under section 263(a) regarding the capitalization of natural gas transmission and distribution property.
12. Provide guidance regarding changes in method of accounting for section 174 research and experimental expenses, including guidance for taxpayers making accounting method changes to comply with Treas. Reg. § 1.174-2.
13. Issue final regulations under section 460 regarding the definition of a home construction contract, including the treatment of condominiums, for purposes of the completed contract method, and rules for certain changes in method of accounting for long-term contracts.
14. Issue final regulations under section 267(a)(3)(B) addressing transactions entered into in the ordinary course of a trade or business in which the payment of the accrued amounts occurs within 8½ months after year-end and transactions in which an amount accrued is includible in the E&P of a CFC.
15. Add back to the 2022-2023 Priority Guidance Plan guidance under section 170(e)(3) regarding charitable contributions of inventory. In addition, modify the regulations under section 170(e)(3) to provide that, for qualified contributions of inventory, the basis of the contributed inventory is included in cost of goods sold, and only the incremental “enhanced deduction” is treated as a charitable contribution subject to the 10% taxable income limitation for corporations (15% for contributions of food inventory by any taxpayer) under section 170(b)(2).<sup>29</sup>
16. Provide guidance for installment sales:
  - Issue proposed regulations under section 453A regarding contingent payment sales.
  - Issue final regulations under section 453B regarding non-recognition of gain or loss on the disposition of certain installment obligations.
  - Provide authoritative guidance clarifying and describing under what circumstances a related party sale of depreciable property will qualify for the installment method.

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<sup>27</sup> See T.D. 9843.

<sup>28</sup> AICPA letter, “[Comments on Rev. Proc. 2018-31](#),” May 8, 2019. Revenue Proc. 2019-43 supersedes Rev. Proc. 2018-31.

<sup>29</sup> The CARES Act increase this amount to 25% of taxable income for 2020. Donations in excess of 25% may be deducted in the following five years.

17. Issue proposed regulations under section 472 regarding the carryover of LIFO layers following a section 351 or section 721 transaction.
18. Provide guidance on the treatment of advance payments and deemed payments for assumed cost of performance obligations<sup>30</sup> with respect to both the seller and the acquirer in asset and partnership interest sales, including treatment under sections 704(c), 734, 743, and 751.
19. Provide guidance on the treatment of section 481(a) adjustments in partnership transactions with respect to sections 704(c), 734, and 743.
20. Issue proposed regulations under section 472 to provide rules relating to internal management reports.
21. Provide guidance under Treas. Reg. § 1.263(a)-5(g) regarding treatment of capitalized transaction costs.

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<sup>30</sup> See *James M. Pierce Corporation v. Commissioner*, 326 F.2d 67 (8<sup>th</sup> Cir. 1964); AICPA letter, “[Recommendations on the Tax Treatment of Deferred Revenue in Taxable Asset Acquisitions](#),” April 23, 2015.

**Tax Practice Responsibilities Committee** (David Holets, Chair, (317) 706- 2683, [david.holets@crowe.com](mailto:david.holets@crowe.com); or Henry J. Grzes, Lead Manager – AICPA Tax Practice & Ethics, (919) 402-4889, [Henry.Grzes@aicpa-cima.com](mailto:Henry.Grzes@aicpa-cima.com).)

### **General Issues**

1. Provide guidance related to certain core principles (including “significant” and “avoidance”) for defining “tax shelter” under section 6662(d).
2. Provide guidance under section 6676(a) as to the level of authority needed to establish reasonable cause. There is uncertainty whether a penalty is imposed for a claim for refund or credit that was supported by reasonable basis.
3. Provide guidance regarding criteria the IRS will use in determining whether to:
  - Assert a section 6694 preparer penalty;
  - Refer a matter to the Office of Professional Responsibility, particularly in the case of alleged violations under the section 6694 preparer penalty provisions; and
  - Impose a sanction or otherwise limit a practitioner in providing tax practice services.
4. Provide guidance in connection with changes made under the [Protecting Americans from Tax Hikes \(PATH\) Act of 2015](#) (Pub.L. 114-113), related to the prevention of retroactive claims for various credits (section 32(m) - earned income credit, section 24(e) – child tax credit and section 25A(i) – American Opportunity Tax Credit).<sup>31</sup>
5. Provide additional clarification on [Notice 2009-5](#) as well as incorporate such guidance as appropriate in sections 6662, 6664 and/or 6694 regulations and correcting the sections 6662 and 6664 regulations for the 2004 changes to section 6662(d)(2)(C).

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<sup>31</sup> For additional information, see Sections 204, 205 and 206 DivQ of [Pub.L. No. 114-113](#) and General Explanation of Tax Legislation Enacted in 2015 - Joint Committee on Taxation ([JCS-1-16](#), page 225 et seq.).

**Trust, Estate and Gift Tax Technical Resource Panel** (Irene Estrada, Chair, (703) 628-5243, [Irene.C.Estrada@pwc.com](mailto:Irene.C.Estrada@pwc.com); or Eileen Sherr, Director – AICPA Tax Policy & Advocacy, (202) 434-9256, [Eileen.Sherr@aicpa-cima.com](mailto:Eileen.Sherr@aicpa-cima.com).)

### **Tax Cuts and Jobs Act Related**

1. Provide regulations referenced in [Notice 2018-37](#) (issued April 13, 2018) regarding trust income payable to a former spouse who was divorced or legally separated under a divorce or separation instrument executed on or before December 31, 2018.
2. Provide additional guidance regarding section 965 and trusts and estates.<sup>32</sup>
3. Provide additional guidance relating to section 199A and trusts and estates, including indirect expenses and loss allocation of trusts and estates.<sup>33</sup> Update Treas. Reg. § 1.199A-6(d)(3)(i) to specifically provide that the calculation of QBI for trusts and estates should not include indirect expenses as a reduction of QBI. Additionally, update the QBI calculation example in Treas. Reg. § 1.199A-6(d)(3)(viii) to provide that the state and local taxes and trustee fees discussed therein are solely indirect expenses and, thus, not allocated to QBI.
4. Provide additional guidance relating to S corporations and trusts and estates.<sup>34</sup>
5. Provide additional guidance relating to section 461(l) excess business losses for trusts and estates.<sup>35</sup>
6. Provide additional guidance regarding GILTI and trusts and estates.<sup>36</sup>

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<sup>32</sup> AICPA letters, “[Application of 2017 Estimated Tax Payments to Section 965\(h\) Installment Obligations](#),” September 17, 2018; and “[Proposed Guidance Regarding the Transition Tax Under Section 965 and Related Provisions \(REG-104226-18\)](#),” October 31, 2018.

<sup>33</sup> AICPA letters, “[Guidance Concerning the Deduction for Qualified Business Income Under Section 199A of the Internal Revenue Code](#),” October 1, 2018; “[Guidance Concerning the Deduction for Qualified Business Income Under Section 199A of the Internal Revenue Code](#),” April 9, 2019; “[Guidance on the Qualified Business Income Deduction Under Section 199A](#),” March 4, 2020; “[Guidance Concerning the Proposed Section 199A Treasury Regulations for Cooperatives and Their Patrons](#),” September 5, 2019; and “[Guidance Concerning the Deduction for Qualified Business Income Under Section 199A and Indirect Expenses and Loss Allocation of Trusts and Estates](#),” May 8, 2020.

<sup>34</sup> AICPA letter, “[Request for Immediate Guidance Regarding S Corporation Items Included in Pub. L. No. 115-97](#),” August 13, 2018.

<sup>35</sup> AICPA letters, “[Request for Guidance Related to Section 461\(l\) – Limitations on Excess Business Losses of Noncorporate Taxpayers](#),” February 28, 2019; and “[Recommendation for the 2018 Instructions for Form 461 – Limitation on Business Losses](#),” April 3, 2019.

<sup>36</sup> AICPA letter, “[Proposed Guidance Related to Section 951A \(Global Intangible Low-Taxed Income\) \(REG-104390-18\)](#),” January 10, 2019.

## **SECURE Act Related**

7. Provide final regulations and implementation guidance regarding the SECURE Act and individual retirement accounts and trust issues, including guidance on the 10-year rule, other trust issues, age of majority, and reporting requirements.<sup>37</sup>
8. Provide final regulations and guidance to distinguish the 10-year rule from the 5-year rule as to the first and final payment timing. Additionally, clarification is needed whether the 10-year period ends on the anniversary of the death or the end of the tenth anniversary year.

## **Domestic Issues**

9. Update Internal Revenue Manual (IRM) [20.1.12.7.4](#) for section 6695A penalty case reviews to provide that the review process include at least two qualified knowledgeable IRS appraisers.<sup>38</sup>
10. Issue final regulations on compliance with consistent basis reporting between an estate and persons acquiring property from decedents.<sup>39</sup>
11. Revise [Form 8971](#), *Information Regarding Beneficiaries Acquiring Property from a Decedent*, and instructions.<sup>40</sup>
12. Revise and clarify [Form 4768](#), *Application of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Tax*, and instructions for taxable terminations and taxable distributions from GST trusts. Revise [Form 4768](#) and [Form 7004](#), *Application of Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns*, and instructions to provide that [Form 4768](#) can be utilized to extend [Form 706-GS\(T\)](#), *Generation-Skipping Transfer Tax Return for Terminations*, [Form 706-GS\(D\)](#), *Generation-Skipping Transfer Tax Return for Distributions*, and [Form 706-GS\(D-1\)](#), *Notification of Distribution From a Generation-Skipping Trust*.

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<sup>37</sup> AICPA letter, "[Implementation Guidance Needed on Individual Retirement Account \(IRA\) and Trust Issues](#)," June 16, 2020.

<sup>38</sup> AICPA letter, "[IRS Memorandum on Interim Guidance on Internal Revenue Code Section 6695A Penalty Case Reviews \(Control Number: LB&I-20-0120-001, January 22, 2020\)](#)," June 16, 2020.

<sup>39</sup> AICPA letters, "[IRS Proposed Regulations Regarding Consistent Basis Reporting Between Estates and Beneficiaries \(CC:PA:LPD:PR\) \(REG-127923015, Docket ID IRS-2016-0010-0002\)](#)," June 1, 2016; "[Draft Form 8971, Information Regarding Beneficiaries Acquiring Property from a Decedent, and Draft Instructions](#)," January 29, 2016; "[Request for Legislation Modifying the Deadline for Estate Basis Reporting](#)," August 31, 2016; "[Request for Further Extension of 60 Days to May 31 of the March 31 Filing Deadline for Consistent Basis Reporting Between Estates and Beneficiaries as noted in IRS Notice 2016-19 and IRS Proposed and Temporary Regulations \(REG-127923-15, TD 9757\)](#)," March 4, 2016; and "[IRS Notice 2015-57 and Request for Immediate Guidance on Section 2004 of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 Regarding Consistent Basis Reporting Between Estates and Beneficiaries \(CC:PA:LPD:PR\)](#)," January 29, 2016.

<sup>40</sup> *Id.*

13. Revise and clarify [Form 706-GS\(T\)](#) and instructions for qualified severances.
14. Revise [Form 706](#), *United States Estate (and Generation-Skipping Transfer) Tax Return* and [Form 706-NA](#), *United States Estate (and Generation-Skipping Transfer) Tax Return Estate of nonresident not a citizen of the United States* to include a box to check for the executor to request the closing letter together with submitting the user fee at the time of filing the [Form 706](#) or [Form 706-NA](#). Until a box can be added to [Form 706](#) and [Form 706-NA](#), we suggest that the IRS allow executors to request a closing letter either by a hand-written request on the top of the first page of Form 706 or [Form 706-NA](#) or by attaching a request statement to [Form 706](#) or [Form 706-NA](#) when it is filed accompanied by the payment of the user fee, hopefully via an updated pay.gov interface.<sup>41</sup>
15. Provide for the ability to e-file [Form 706](#), *U.S. Estate (and Generation-Skipping Transfer) Tax Return*, [Form 706-NA](#), *U.S. Estate (and Generation-Skipping Transfer) Tax Return – Estate of Nonresident Not a Citizen of the U.S.*, and [Form 709](#), *U.S. Gift (and Generation-Skipping Transfer) Tax Return*, (and related, separately filed forms, such as [Form 3520](#), *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, [Form 3520-A](#), *Annual Information Return of Foreign Trust With a U.S. Owner*, [Form 4768](#), *Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes*, [Form 5227](#), *Split-Interest Trust Information Return*, [Form 1041-A](#), *U.S. Information Return Trust Accumulation of Charitable Amounts*, [Form 1041-T](#), *Allocation of Estimated Tax Payments to Beneficiaries*, [Form 8971](#), *Information Regarding Beneficiaries Acquiring Property From a Decedent*, and [Form 8892](#), *Application for Automatic Extension of Time To File Form 709 and/or Payment of Gift/Generation-Skipping Transfer Tax*). In addition, Treasury and the IRS should provide taxpayers with the ability to electronically pay estate, gift and generation-skipping transfer taxes.<sup>42</sup>
16. Issue final regulations, including examples, on the simplified method for computing net investment income under section 1411 for distributions from charitable remainder trusts.<sup>43</sup>
17. Provide guidance regarding transfers by a trustee of an irrevocable trust to another irrevocable trust (often referred to as “decanting”).<sup>44</sup>

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<sup>41</sup> AICPA letter, “[Comments on Closing Letters for Forms 706 and 706-NA \(Proposed Regulations REG-114615-16\)](#),” February 25, 2021.

<sup>42</sup> AICPA letter, “[Comments on Electronic Filing \(e-filing\) of Forms 706, 706-NA, and 709](#),” December 4, 2020.

<sup>43</sup> AICPA letter, “[Comments on REG-130843-13 relating to guidance under section 1411, as added by the Health Care and Education Reconciliation Act of 2010, regarding net investment income tax as relevant to estates and trusts \(12/16/2013\)](#),” March 31, 2014.

<sup>44</sup> AICPA letter, “[Comments on Notice 2011-101 regarding Transfers by a Trustee From an Irrevocable Trust to Another Irrevocable Trust \(“Decanting”\); Requests for Comments \(12/27/2011\)](#),” June 26, 2012.



18. Provide a final ruling on the consequences under various estate, gift, and generation-skipping trust (GST) tax provisions of using a family-owned company (private trust company) as the trustee of a trust.<sup>45</sup>
19. Provide guidance on section 2652(a) and the ability to split gifts under section 2513 in *Crummey* or similar situations, where the donee spouse has an interest in the trust and others have the ability to withdraw the contributed assets but trust beneficiaries may withdraw all the transfers made to the trust during the year.<sup>46</sup> In addition, if only withdrawal powers for children can be split on a trust created for the benefit of a spouse and children, clarification is needed that the entire gift is split for GST purposes based on the regulations even though not all of the gifts are split for gift tax purposes.
20. Expand regulations under section 6034 to add an administrative exception to the [Form 1041-A](#) filing requirement for complex trusts that claim charitable deductions under section 642(c) solely for contributions flowed through to them from partnerships.<sup>47</sup>
21. Provide clarification in the instructions to [Form 709](#) with regard to Column C in Part 3 of Schedule A, *Computation of Taxable Gifts*, as to the election made under section 2632(c) (electing “in and out” of a deemed allocation). The instructions state that checking the box in Column C applies only for transfers reported on the return. Confusion can result as the instructions provide that, if a prior election has been made with respect to future transfers, the taxpayer should not check the box in Column C and should not file an explanatory statement with the applicable [Form 709](#). There is also confusion because taxpayers currently need to check a box for both making an election and electing out.<sup>48</sup>
22. Provide clarification in the instructions to [Form 709](#) to provide that if a Grantor Retained Annuity Trust (GRAT) is involved, complete Part 3 in order to consider making an election or electing out instead of the current instructions stating to complete Part 1.

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<sup>45</sup> AICPA letters, “[Pre-Release Comments on IRS Business Plan Project to Provide Guidance Regarding the Consequences Under Various Estate, Gift, and Generation-Skipping Transfer \(GST\) Tax Provisions of Using a Private Trust Company \(PTC\) as the Trustee of a Trust](#),” March, 29, 2006; and “[IRS Notice \(Notice 2008-63\) Regarding Proposed Guidance on Transfers with Retained Life Estate and the Creation of a Private Trust Company](#),” November 12, 2008.

<sup>46</sup> AICPA letter, “[AICPA Request for Guidance on the Ability to Split Gifts under Section 2513 when the Donee Spouse has an Interest in the Trust but All the Transfers made to the Trust during the Year may be Withdrawn by Trust Beneficiaries](#),” June 26, 2007.

<sup>47</sup> AICPA letters, “[Form 1041-A Filing Exception for Trusts with Charitable Deductions Only From S Corporation or Partnership Contributions](#),” September 14, 2010; and “[Request for Legislation to Exempt from the Filing Requirement of Section 6034\(a\) Trusts with Charitable Deductions only from Flow-through Entities](#),” October 19, 2012.

<sup>48</sup> One suggestion is to have an additional column to check if an election was made in a prior year that affects the GST exemption for a transfer made in the current year. Another suggestion is to have codes to indicate a current or prior, or permanent election was made or election out.

23. Provide a simplified procedure to obtain an extension of time to elect out of the automatic allocation of the GST exemption to indirect skips and at the end of the estate tax inclusion period, similar to [Rev. Proc. 2004-46](#).<sup>49</sup>
24. Provide guidance regarding the appropriate means and timing of GST allocations to pour over trusts from a termination of a GRAT. Guidance and examples are also needed under section 2632(c)(5)(A)(i) addressing the application of the GST exemption automatic allocation rules for indirect skips in a situation in which a trust subject to an estate tax inclusion period (ETIP) terminates upon the expiration of the ETIP, at which time the trust assets are distributed to other trusts that are possibly GST trusts.<sup>50</sup> In addition, clarification is needed as to whether the Treas. Reg. § 26.2632-1(c)(2)(ii)(A) exception to the ETIP rules for the possibility of inclusion in the gross estate being so remote as to be negligible eliminates the ETIP for almost all GRATs that are short term. Clarification is needed regarding this remoteness exception, including situations when there is no ETIP and whether a GST automatic allocation is equal to the property contributed to the GRAT or equal to the amount treated as a gift to the GRAT.
25. Provide final regulations under section 2642(g) regarding extensions of time to make allocations of GST exemption. Specifically, regarding section 2642(g)(1), taxpayers need guidance related to relief if the taxpayer opted out but wants to do a late allocation.
26. Provide guidance under section 2632(c), regarding the deemed allocation of GST exemption to certain lifetime transfers to GST trusts. In particular, clarification is requested with regard to the exceptions to the definition of a GST trust contained in section 2632(c)(3)(B)(i)-(vi) as well as the exception in the flush language of this section dealing with gift tax annual exclusions. In addition, further guidance is needed under section 2632(c)(3)(B)(i)(III) as per regulations, including examples regarding all the exceptions for a GST trust and on the following issues.
  - Definition of GST trust nuances with respect to survival period of a person at least 10 years older where there is a waiting period, and whether the taxpayer can survive only one person and does the waiting period disqualify.
  - Contingent general powers of appointment and impact on GST trust treatment.
  - A fix for hanging Crummey powers and the complexity where no election was made.
  - Clarification if the trust is a GST trust in the situation with a life insurance trust in which assets are distributed to children either when the parent who is the insured dies or when the children turn 40, whichever is later.
27. Provide guidance on how the taxpayer can allocate additional GST exemption (as a result of the inflation adjustment each year) to a transfer made in the prior year. In particular, guidance should include whether an allocation on the gift tax return timely filed for the

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<sup>49</sup> AICPA letter, "[AICPA Request for Guidance on the Allocation of GST Exemption to a Trust at the End of the Estate Tax Inclusion Period \(ETIP\) or Electing Out of the Automatic Allocation Rules at the End of the ETIP](#)," June 26, 2007.

<sup>50</sup> *Id.*

prior year is effective as of January 1 and what valuation date is used for purposes of determining the new inclusion ratio.

28. Provide guidance on the automatic allocation rules at death where the estate tax return reflected GST exemption in excess of available GST exemption.
29. Provide guidance on substantial compliance under section 2642(g)(2).
30. Provide guidance for treatment for which only a loan was made to a trust and no gift tax return has been filed, but the trust document reflected a contribution of \$10 and a gift of a receivable.
31. Provide clarifying guidance on section 2632(d). Guidance is needed regarding how the rule operates if other events occurred before the death of the beneficiary and on how the interim events are treated, and if the original trust was divided after the original transfer into 0 and 1 inclusion ratios, whether the retroactive allocation applicable is only as to the 1 inclusion ratio trust.
32. Provide guidance as to whether a life estate tenant who holds S corporation stock qualifies as an eligible shareholder for S corporation purposes under section 1361, similar to regulations proposed in 1986 that would have permitted a life estate tenant to be an eligible shareholder if certain conditions were met. The proposed regulations were omitted from final regulations issued in 1995 with an indication that the issue would be addressed in other published guidance.
33. Provide guidance for marital trusts under section 2056(b)(7) similar to [Rev. Rul. 2006-26](#), regarding plans other than individual retirement accounts and defined contribution plans (i.e., defined benefit plans and deferred compensation plans).
34. Provide a harmonization of what is necessary to satisfy the adequate disclosure requirements of Treas. Reg. §§ 301.6501(c)-1(e) and -1(f). At a minimum, Treas. Reg. § 301.6501(c)-1(e) should contain a safe harbor for appraisal reports as exists in Treas. Reg. § 301.6501(c)-1(f).
35. Amend the regulations under sections 6042 and 6049 to require payors to provide charitable remainder trusts information about interest and dividends paid to them in order for the charitable remainder trusts to comply with the ordering rules of section 664(b).

### **Foreign Issues**

36. Expand the types of non-U.S. trusts eligible for relief and exemption from information reporting requirements and penalty abatement procedures in [Rev. Proc. 2020-17](#). The expansion should exempt from [Form 3520](#) and [Form 3520-A](#) reporting requirements common foreign plans that are largely standardized governmentally-sanctioned savings plans, such as Canadian Registered Education Savings Plans, Canadian Tax-Free Savings

Accounts, United Kingdom Self-Invested Personal Pensions and Employer-type Australian Superannuation plans, which currently are not provided filing relief.<sup>51</sup> Additionally, provide a *de minimis* filing exception for foreign trusts with year-end assets or actual plan value in a year under a specified monetary threshold, such as \$50,000. In addition, increase [Form 3520](#) reporting threshold, or at a minimum, threshold for automatic penalty assessment, for foreign gifts and inheritances.<sup>52</sup>

37. Provide regulations under section 6677 regarding the failure to file information returns with respect to certain foreign trusts.<sup>53</sup> In administering the penalty for foreign trust reporting under section 6677, issue definitive guidance whereby deference is granted when the year at issue is the taxpayer's first year for which the foreign trust information form(s) are required. For example, add the penalty under section 6677 to the penalties for which administrative relief is granted under First Time Abatement.<sup>54</sup>
38. Provide guidance on the application of section 1411 to accumulation distributions from foreign trusts to U.S. beneficiaries, including the method to determine the portion of the distribution, if any, attributable to income accumulated in years prior to the effective date of section 1411.
39. Provide guidance on issues relating to foreign trusts and the [Hiring Incentives to Restore Employment Act of 2010](#) (HIRE Act) (Pub.L. 111-147), including guidance on the section 679(d) presumption that a foreign trust has U.S. beneficiaries.<sup>55</sup>
40. Provide further guidance on issues relating to reporting of foreign accounts by U.S. beneficiaries of foreign trusts on the Foreign Bank and Financial Accounts, and U.S. beneficiary reporting of foreign accounts and foreign financial assets owned by foreign trusts, as required by section 6038D.<sup>56</sup>
41. Change the due date of [Form 3520-A](#) from March 15 to April 15, to coincide with the due date for calendar year filers of related returns.<sup>57</sup>

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<sup>51</sup> These accounts are tax-advantaged and are not typically thought of as foreign trusts by their owners. Most taxpayers do not realize that they create Form 3520 and Form 3520-A filing requirements that are often costly.

<sup>52</sup> AICPA letters, "[AICPA Comments on Foreign Gift Reporting Threshold – AICPA requests that the IRS further consider the issue of indexing for inflation the \\$100,000 threshold for gifts to be reported on the Form 3520](#)," March 3, 2008; and "[Comments on Foreign Trust Reporting Issues](#)," January 31, 2007.

<sup>53</sup> The foreign trust information reporting system is quite complex and almost always requires professional advice to identify and fulfill all related reporting obligations. Accordingly, many taxpayers are unaware of the full extent of their obligations to file Forms 3520-A and/or 3520. This situation is especially true in the case of taxpayers who are new to the U.S. income tax system (*e.g.*, an individual taxpayer who moves to the U.S. from a foreign country and is the beneficiary of a foreign pension that is classified as a foreign trust for U.S. income tax purposes).

<sup>54</sup> See IRM 20.1.1.3.3.2.1. Currently, FTA does not apply to returns with an event-based filing requirement.

<sup>55</sup> AICPA letter, "[Request for Guidance on Foreign Trusts as Part of the HIRE Act](#)," March 28, 2011.

<sup>56</sup> AICPA letters, "[Additional Comments on Notice of Proposed Rulemaking \(RIN-1506-AB08\) regarding Amendment to the Bank Secrecy Act Regulations – Pertaining to Foreign Trusts](#)," November 19, 2010; and "[Request for Guidance on Foreign Trusts as Part of the HIRE Act](#)," March 28, 2011.

<sup>57</sup> AICPA letters, "[Comments on Form 3520-A and Form 3520](#)," June 17, 2003; "[AICPA Foreign Trust Task Force Comments Regarding Foreign Trust Reporting](#)," January 31, 2007; "[AICPA response to May 25, 2007 IRS follow-](#)

42. Provide guidance on whether a foreign grantor trust with a U.S. grantor is required to file [Form 1041](#), *U.S. Income Tax Return for Estates and Trusts*, or [Form 1040-NR](#), *U.S. Income Tax Return for Foreign Estates and Trusts*, and whether a foreign grantor trust with a foreign grantor and some U.S. income is required to file [Form 1041](#) or [Form 1040-NR](#).
43. Provide a [Form 1041-NR](#) and instructions for foreign non-grantor trusts instead of the [Form 1040-NR](#).<sup>58</sup>
44. Consider two tiers of penalty assessments for [Form 3520](#) and [Form 3520-A](#) filings, similar to the prior voluntary disclosure penalty relief, providing one tier for de minimis filing issues, such as cases where a taxpayer reported and paid tax on all the income, but the taxpayer is new to the U.S. and was not aware of the need to file [Form 3520](#) or [Form 3520-A](#), or missed a [Form 4868](#) extension filing, or incorrectly completed [Form 3520](#) or [Form 3520-A](#), etc.
  - There are many situations that may result in U.S. taxpayers transacting with foreign trusts, such as individuals moving to the U.S. with existing estate planning structures in place, individuals moving to the U.S. after accruing benefits in a non-U.S. deferred compensation plan that is treated as a trust for U.S. tax purposes, etc.
  - A second tier of the (regular/current) penalties could be reserved for taxpayers who did not exercise due care in reporting income and assets, cannot demonstrate reasonable cause etc.
45. Provide guidance on the reporting and recognition of gain under the expatriation mark-to-market rules in section 877A, including guidance on the interplay of sections 877A and 684, relating to a transfer or deemed transfer to a foreign estate or trust as a result of an individual's expatriation.
46. Provide guidance on how the GST tax applies to grandfathered domestic trusts that become foreign trusts.
47. Provide further guidance in addition to the proposed regulations ([REG-112997-10](#)) regarding several aspects of section 2801.<sup>59</sup>
48. Provide guidance (including safe harbor guidelines) as to what qualifies as a "reasonable period of time" for a U.S. grantor or beneficiary of a foreign trust to pay the trust the fair

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[up oral comments regarding Jan. 31, 2007, AICPA submission to IRS on foreign trust reporting](#)," March 3, 2008; and "[AICPA response to May 12, 2008 IRS follow-up oral comments regarding March 3, 2008, AICPA follow-up submission to IRS on foreign trust reporting](#)," June 12, 2008.

<sup>58</sup> AICPA letter, "[AICPA Draft Form 1041NR, U.S. Income Tax Return for Foreign Estates and Trusts, and Relevant Schedules, for Consideration by the IRS.](#)" September 22, 2008. See [AICPA Letter](#) and AICPA proposed: [Draft Form 1041NR \(pages 1-5\)](#), [Draft Form 1041NR- page 6](#), [Draft Form 1041NR- page 7](#), [Draft Form 1041NR-T](#), [Draft Schedule D](#), [Draft Schedule K-1](#), [Draft Schedule K-1 – page 9](#), [Draft Form 4970FT](#), and [Draft Schedule J](#).

<sup>59</sup> AICPA letter, "[IRS Proposed Regulations on Guidance under Section 2801 Regarding the Imposition of Tax on Certain Gifts and Bequests from Covered Expatriates \(REG-112997-10\)](#)," May 17, 2016.

market value (FMV) for the personal use of trust property under section 643(i)(2). This guidance should also include information regarding the determination of the proper FMV measurement and an exception for reporting *de minimis* amounts, as accounting for *de minimis* amounts is administratively impractical.<sup>60</sup>

49. Provide regulations to enhance guidance in [Notice 2009-85](#) regarding the reporting of tax withholding and payment of these taxes by trustees to the IRS. This guidance should also define “adequate security” for a “tax deferred agreement” for the covered expatriate’s return under section 877A(b).
50. Modify [Form 1042](#), *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*, and [Form 1042S](#), *Foreign Person’s U.S. Source Income Subject to Withholding*, to assist in tracking U.S. withholding credit to which a U.S. beneficiary is entitled due to withholding flowing through a foreign non-grantor trust.

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<sup>60</sup> AICPA letter, “[Request for Guidance on Foreign Trusts as Part of the HIRE Act](#),” March 28, 2011.