May 30, 2017

Internal Revenue Service
Attn: CC:PA:LPD:PR (NOTICE 2017-28)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Recommendations for 2017-2018 Guidance Priority List (Notice 2017-28)

Dear Sir/Madam:

The American Institute of CPAs (AICPA) is pleased to offer our suggestions regarding the 2017-2018 Guidance Priority List, which were 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 working 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 working 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;

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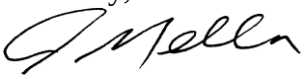
- Provide a balance between simple general rules and more complex detailed rules; and
- Match a rule's complexity to the sophistication of the targeted taxpayers.

The AICPA is the world's largest member association representing the accounting profession, with more than 418,000 members in 143 countries and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and 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 (408) 924-3508 or Annette.Nellen@sjsu.edu; or Melissa Labant, AICPA Director of Tax Policy & Advocacy at (202) 434-9234, or Melissa.Labant@aicpa-cima.com.

Sincerely,



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

Encl.

AICPA Tax Division
Comments on the
2017 - 2018 Guidance Priority List (Notice 2017-28)
June 1, 2017

Corporations and Shareholders Taxation Technical Resource Panel (Gregory Featherman, Chair, (202) 533-5045, gfeatherman@kpmg.com; or Kristin Esposito, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9241, Kristin.Esposito@aicpa-cima.com.) NOTE: Comments are listed in priority order.

Consolidated Returns

1. Provide guidance regarding the treatment of intercompany transactions in determining satisfaction of the gross receipts test for purposes of section 165(g)(3)(B).[1]

2. Provide additional guidance as to the application of section 382(h)(6) in conjunction with Notice 2003-65, 2003-2 C.B. 747, within consolidation.

3. Provide guidance for determining when the Continuity of Business Enterprise (COBE) requirement is satisfied following a section 382 ownership change.

4. Provide additional guidance under Treas. Reg. § 1.1502-36:

   - Provide guidance that would permit a reattribution of losses where a worthless stock deduction is taken on subsidiary stock and the subsidiary is no longer a member of the group but does not have a separate return year.

   - Regarding the interaction of Treas. Reg. §§ 1.1502-11(c) and 1.1502-28 (i.e., how does Treas. Reg. § 1.1502-36 apply in a year in which there is a disposition at a loss in the same year as a cancellation of debt event subject to Treas. Reg. §§ 1.1502-28 and 1.1502-11(c)).

5. Provide guidance that would permit a worthless stock deduction with respect to a class of subsidiary stock notwithstanding that there is a section 381 transaction with respect to other classes of subsidiary stock.

6. Provide guidance with respect to group continuation and the application of Rev. Rul. 82-152. Specifically, reevaluate the existing group continuation rules under Treas. Reg. § 1.1502-75(d) to eliminate the uncertainty that exists as a result of the expanded application of Rev. Rul. 82-152.

[1] All references to "section" or "§" are to the Internal Revenue Code of 1986, as amended, and all references to "Treas. Reg. §" and "regulations" are to U.S. Treasury regulations promulgated thereunder.

7. 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 on its Schedule UTP, 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).

8. Provide guidance that excludes the application of section 351(g) to redemption transactions between members of a consolidated group where a member redeems its stock through the issuance of non-qualified preferred stock as defined under section 351(g).

9. Provide guidance concerning the application of Rev. Rul. 99-6 involving members of a consolidated group.

10. Finalize the regulations under section 1502.

Corporations and Their Shareholders

11. Section 382:

   - Provide guidance on identifying five percent shareholders of public companies.

   - Provide guidance under sections 382 and 384, including regulations regarding built-in items under section 382(h)(6).

12. Section 108:

   - Provide guidance concerning how an election under section 108(i) affects the determination of recognized built-in gain or loss under section 382(h)(6).

   - Provide guidance as to the application of section 108(e)(6) if the subsidiary is insolvent before the contribution of the debt.

13. Provide updated guidance regarding transactions involving receipt of no net equity value.

14. Provide guidance as to what represents a "characterization" for purposes of section 385(c)(1) regarding a characterization of an interest as stock or indebtedness.

15. Consider releasing a list(s) of specific common organizational actions that require (or do not require) reporting on Form 8937, *Report of Organizational Actions Affecting Basis of Securities*, to help taxpayers understand the filing requirement, without the administrative burden and cost that a taxpayer may need to incur to verify if reporting is necessary.

16. Provide guidance on the application of the solely for voting stock requirement, meaningless gesture doctrine and deemed issuances under section 368(a)(1)(C) in the event of an upstream reorganization where no actual shares are issued and the transferee corporation has multiple voting and non-voting classes of stock.

17. Provide additional guidance on the following areas:

- Whether a distributing corporation's distribution of the stock of a controlled corporation meets the requirements of section 355(a)(1)(A) where, in anticipation of the distribution, the distributing corporation acquires control of the controlled corporation through a recapitalization or issuance of new stock resulting in a "high vote/low vote" structure; and

- Whether either section 355 or section 361 applies to a distribution of a controlled corporation's stock or securities in exchange for, and in retirement of, any debt of the distributing corporation if such debt was issued in anticipation of the distribution.

18. Provide more comprehensive guidance as to what constitutes a rescission for purposes of Rev. Rul. 80-58, 1980-1 C.B. 181.

19. Provide guidance on how to determine the amount of gain or loss that is recognized if an exchange of excess principal amount (as defined in section 354(a)(2)) occurs.

Financial Institutions and Products

20. Regulations under section 249 relating to the amount of a repurchase premium attributable to the cost of borrowing.

21. Provide guidance regarding the applicability of section 305(c).

22. Finalize the regulations under section 597.

Employee Benefits Taxation Technical Resource Panel (Kelly Davis, Chair, (602) 604-3526, Kelly.davis@claconnect.com; or Kristin Esposito, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9241, Kristin.Esposito@aicpa-cima.com.) NOTE: Comments are listed in priority order.

Retirement Benefits

1. Provide guidance on international tax issues relating to qualified retirement plans to aid in the administration and operational compliance with the plan terms.

2. Provide model language for preapproved qualified plan documents to provide for the deferral of compensation for unused vacation and leave time.

3. Provide guidance to simplify the correction methods under the Employee Plans Compliance Resolution System (EPCRS) as they pertain to correcting actual deferral percentage (ADP) and actual contribution percentage (ACP) testing failures after the 12-month statutory correction period has expired.

   Correction methods currently available under the EPCRS as they pertain to correcting ADP and ACP testing failures, after the 12-month statutory correction period has expired, is often inordinately expensive relative to the size of the failure. We recommend the Internal Revenue Service (IRS or "Service") revisit the correction methods available to provide expanded guidance that promotes compliance in a more cost effective and efficient manner.

   For section 401(k) retirement plans, the ADP and ACP tests provide a limit on the amount of certain benefits provided under a plan to highly compensated employees over benefits provided to non-highly compensated employees. A plan annually satisfies these nondiscrimination requirements if the plan passes the ADP or ACP tests; however, if a plan fails these tests for a given plan year, corrective action is necessary within the 12-month statutory correction period following the close of the plan year in which the failure occurred. It is necessary that any corrective action is in accordance with the EPCRS. Failure to correct within the statutory correction period will result in plan disqualification if the plan is not subsequently corrected in accordance with EPCRS.

4. Adapt EPCRS to take into account corrections of Roth employer retirement plans.

5. Provide guidance to assist plan sponsors in correcting areas of noncompliance relating to Rollovers as Business Start-ups (ROBS).

   ROBS are an arrangement in which prospective business owners uses their retirement funds to pay for their new business start-up costs in a tax-free transaction. The prospective business owners roll over their existing retirement funds to the ROBS plan, where the ROBS plan uses the rollover assets to

purchase stock of the new business, resulting in the ROBS plan owning the new business. It has been our members' experience that many ROBS plan sponsors are unaware that the plan is a qualified plan with its own set of regulatory requirements. Noncompliant ROBS plans are costly to correct and can result in discrimination, prohibited transactions, plan disqualification and adverse tax consequences to the plan sponsor and plan participants.

6. Regulations updating the rules applicable to employee stock ownership plan (ESOPs).

Executive Compensation, Health Care and Other Benefits, and Employment Taxes

7. Issue guidance under section 9831(d) and related provisions on Qualified Small Employer Health Reimbursement Arrangements (QSEHRA).

8. Issue Consolidated Omnibus Budget Reconciliation Act (COBRA)-related guidance, including guidance on the applicability of section 162(l) to deduct COBRA premiums paid for a former employer's plan.

9. Provide regulations to implement section 3121(z) related to foreign employers, as added by section 302 of the Heroes Earnings Assistance and Relief Tax Act of 2008.

10. Finalize Treas. Reg. § 1.409A-4 related to income recognition and provide consolidated guidance on the section 409A correction procedures.

11. Finalize the regulations on cafeteria plans under section 125. Proposed regulations were published on August 6, 2007. Also, regulations are needed under section 4980G on interaction of section 4980G and section 125 with respect to comparable employer contributions to employees' health savings accounts.

12. Issue final regulations under section 457(f).

Exempt Organizations Taxation Technical Resource Panel (Elizabeth E. Krisher, Chair, (412) 535-5503, bkrisher@md-cpas.com; or Ogochukwu Eke-Okoro, Lead Manager – AICPA Tax Policy & Advocacy, (202) 434-9231, Ogo.Eke-Okoro@aicpa-cima.com.) NOTE: Comments are listed in priority order.

1. Issue revenue procedures updating grantor and contributor reliance criteria under sections 170 and 509.

2. Issue revenue procedure to update Rev. Proc. 2011-33 for Exempt Organizations (EO) Select Check.

3. Provide guidance regarding the new excise taxes on donor advised funds and fund management under section 4966 as added by section 1231 of the Pension Protection Act of 2006 (PPA).

4. Provide guidance under section 512 regarding methods of allocating expenses relating to dual use facilities.

5. Issue regulations under section 501(c) relating to political campaign intervention.

6. Provide guidance under section 6033 relating to the reporting of contributions.

7. Issue final regulations on section 509(a)(3) supporting organizations. Proposed regulations were published on February 19, 2016.

8. Update Rev. Rul. 67-390 for when changes to the structure of an organization, which previously had been held exempt from federal income tax under section 501(a) or a counterpart provision of prior law, is deemed to create a new legal entity for which filing an application for exemption is necessary to establish that the new entity qualifies for exemption under the Code and applicable regulations.

9. Update Rev. Proc. 92-94 on sections 4942 and 4945. In the revenue procedure, the IRS provided a simplified procedure that private foundations, including nonexempt charitable trusts, may follow in making "reasonable judgments" and "good faith determinations" of the status under U.S. tax law of a foreign grantee and thereby determining whether grants made by the grantor foundations are qualifying distributions for purposes of section 4942 or taxable expenditures for purposes of section 4945.

10. Provide guidance under section 4941 regarding a private foundation's investment in a partnership in which disqualified persons are also partners.

11. Issue final regulations under section 529A on Qualified ABLE Programs as added by section 102 of the Achieve a Better Living Experience (ABLE) Act of 2014. Proposed regulations were published on June 22, 2015.

12. Issue final regulations under section 6104(c) (publication to state officials). Proposed regulations were published on March 15, 2011.

13. Issue final regulations under section 7611 relating to church tax inquiries and examinations. Proposed regulations were published on August 5, 2009.

14. Issue a revenue procedure allowing all members under a group ruling (including the central organization and the subordinate organizations) to file a single consolidated return rather than the current process which requires a separate return for the central organizations and a consolidated return for all consenting

subordinates. A single consolidated return more accurately reflects the operations of the group.

15. Clarify who constitutes a patient for purposes of the definition of patient care in telemedicine. For example, are the following services considered patient care (especially when the individual receiving the services is not an inpatient of a hospital at the time the services are rendered): services provided via a telemedicine network or reading of images; and laboratory services and pathology services where the technician or physician interpreting the tests does not actually see or touch the patient. Such guidance under section 501(r) would reduce uncertainty and support the move toward accountable care organization (ACO) and cost effective health care methods. In addition, absent guidance, costly information technology changes are being made by hospitals which, when guidance is finally issued, will most likely need changing again.

Individual and Self-Employed Tax Technical Resource Panel (Donald Zidik, Chair, (617) 807-5175, donald.zidik@marcumllp.com; or Amy Wang, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9264, Amy.Wang@aicpa-cima.com.) NOTE: Comments are listed in priority order.

1. Guidance is needed in emerging issues including online crowdfunding and the sharing economy, which are quickly expanding mediums through which individuals obtain funds or seek new sources of income. Tax preparers and their clients do not have the guidance necessary to accurately comply with the complex, out-of-date, or lack of tax rules in these emerging areas.

   We encourage the IRS and Congress to develop related guidance and simplified tax rules on sharing economy and crowdfunding. Some of the areas in need of modernization include information reporting (such as to avoid reporting excluded income, such as a gift, as income), simplicity in reporting and tracking rental losses from year to year, and simplified approaches for recordkeeping for small businesses. Also, additional guidance is needed to address ownership and various uses of virtual currency.[2] Offering clarity on these issues will allow taxpayers to follow a fair and transparent set of guidelines while the IRS benefits from a more efficient voluntary tax system.

2. Provide guidance regarding issues of basis reporting on Form 1099-B, *Proceeds from Broker and Barter Exchange Transactions*. Since basis reporting on Form 1099-B began with 2011 tax returns, various issues have arisen that warrant guidance. We encourage the IRS to request comments from the public to uncover additional issues to ensure that extended guidance addresses all issues. Examples

[2] The IRS sought input on additional virtual currency issues in need of guidance beyond what was provided in Notice 2014-21. The AICPA identified ten such issues in a comment letter "Comments on Notice 2014-21: Virtual Currency Guidance" dated June 10, 2016.

of issues with the basis reporting include the following:

- How do taxpayers and practitioners properly report the sale of a publicly-traded partnership? Broker-reported basis is not reflective of any return of capital or other changes to taxpayer's original basis. In addition, for royalty trusts, a broker has no information on what amount of depletion has been deducted by the taxpayer. Gain or loss must split between capital and ordinary gains or losses.

- How do taxpayers and practitioners properly report corrections to amounts indicated as "wash sale loss disallowed" where the broker used an inappropriate method of calculating figures reported to the IRS and taxpayer?

- How should taxpayers and practitioners respond to matching notices when the correct basis, gross proceeds, gain/loss, holding period and tax have been reported by the taxpayer on the return but either the wrong box was checked (A or B) on Form 8949, *Sales or Other Dispositions of Capital Assets*, or the improper adjustment code was entered on Form 8949 by the taxpayer?

- How should taxpayers and practitioners report sales reported on Form 1099-B where the broker reported an incorrect holding period?

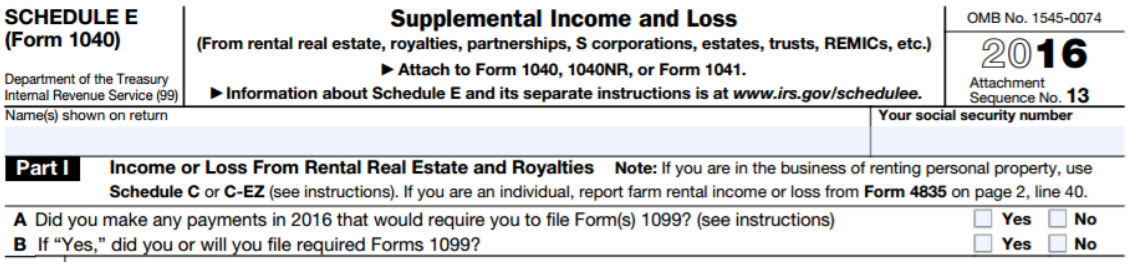
- How should taxpayers and practitioners respond to matching notices in regard to bond premium adjustments as taxpayers are reporting covered and non-covered adjustments for both taxable and tax-exempt bonds?

3. Guidance is needed with respect to when a real estate leasing arrangement rises to the level of a trade or business requiring Form 1099-MISC, *Miscellaneous Income*, reporting by the lessor.

   - Public Law (P.L.) 111-240 (9/27/10), the Small Business Lending Fund Act of 2010, modified section 6041 to add subsection (h) requiring certain landlords to file Form 1099-MISC for payments made for services in excess of $600. The legislative history provided: "Under the provision, recipients of rental income from real estate generally are subject to the same information reporting requirements as taxpayers engaged in a trade or business. In particular, rental income recipients making payments of $600 or more to a service provider (such as a plumber, painter, or accountant) in the course of earning rental income are required to provide an information return (typically Form 1099-MISC) to the IRS and to the service provider." This new provision was effective starting after 2010.

- P.L. 112-9 (4/14/11), the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, repealed section 6041(h) retroactive to January 1, 2011. Thus, the Form 1099-MISC reporting obligation for landlords never went into effect.

- Despite repeal of section 6041(h), since 2011 the Form 1040, *U.S. Individual Income Tax Return*, Schedule E, *Supplemental Income and Loss*, and the instructions have included the following two questions (A and B):



SCHEDULE E (Form 1040)
Department of the Treasury
Internal Revenue Service (99)

Supplemental Income and Loss
(From rental real estate, royalties, partnerships, S corporations, estates, trusts, REMICs, etc.)
▶ Attach to Form 1040, 1040NR, or Form 1041.
▶ Information about Schedule E and its separate instructions is at *www.irs.gov/schedulee*.

OMB No. 1545-0074
2016
Attachment Sequence No. 13

Name(s) shown on return | Your social security number

Part I **Income or Loss From Rental Real Estate and Royalties** **Note:** If you are in the business of renting personal property, use **Schedule C** or **C-EZ** (see instructions). If you are an individual, report farm rental income or loss from **Form 4835** on page 2, line 40.

A Did you make any payments in 2016 that would require you to file Form(s) 1099? (see instructions) ☐ **Yes** ☐ **No**
B If "Yes," did you or will you file required Forms 1099? ☐ **Yes** ☐ **No**

These questions contradict the legislative history of P.L. 111-240 (above) and repeal of section 6041(h). These questions added to Schedule E rather than Schedule C, *Profit or Loss from Business* imply that section 6041 may require landlords who are not in a trade or business to file Form 1099-MISC. The form raises issues as to the distinction between a real estate rental that qualifies as a trade or business for section 6041 purposes and one that does not.

In addition, the form instructions were also revised. Under the instructions for Schedule E, line A, the following language now appears (bold type added):

> TIP: **Generally, <u>you must</u> file Form 1099-MISC if you paid at least** $600 in rents, services, prizes, medical and healthcare payments, and other income payments. The Guide to Information Returns in the 2016 General Instructions for Certain Information Returns has more information, including the due dates for the various information returns.

However, under "General Instructions," the following language still appears (bold type added):

> "Information returns. **<u>You may</u> have to file information returns** for wages paid to employees, certain payments of fees and other nonemployee compensation, interest, rents, royalties, real estate transactions, annuities, and pensions. You generally use Form 1099-MISC to report rents and payments of fees and other nonemployee compensation. For details, see line A, later, and the 2016 General Instructions for Certain Information Returns."

The phrasing of "you may" that appears in the General Instructions has been used in the instructions for Schedule E for many years, and we believe is accurate. The new phrasing "generally, you must" used in the line A TIP is misleading.

Clarification is needed under section 6041 as to when an owner of rental real estate is required to file Form 1099-MISC. Also, given the use of the term trade or business and special rules for rental real estate included under section 1402 (self-employment tax), section 469 (passive activity loss limitation) and section 1411 (special tax on net investment income), further guidance should explain how each of these rules applies to owners of rental real estate. In addition, individuals should receive relief if they are rental real estate owners who are required to file Form 1099-C, *Cancellation of Debt*, but failed to file for the forms for post-2011 years due to the confusion in the law and instructions for Schedule E and Form 1099-MISC.

4. Update and finalize the longstanding temporary regulations under section 163(h) (Treas. Reg. §§ 1.163-9T and 1.163-10T) to provide greater clarity and certainty to taxpayers and practitioners.

The Tax Reform Act of 1986 made changes to section 163 regarding personal and home mortgage interest. Further changes were made to the home mortgage interest rules by the Revenue Act of 1987. Temporary regulations were issued on these provisions soon after the legislative changes. Several of the regulations were issued prior to the effective date of the change made to section 7805 by the Technical and Miscellaneous Revenue Act of 1988 providing that temporary regulations expire within three years of issuance (effective for regulations issued after November 20, 1988). Thus, temporary regulations issued after enactment of the Tax Reform Act of 1986 and before November 21, 1988, which have not been finalized, remain in their temporary form.

In addition, not all of the regulations are complete or current, such as Treas. Reg. § 1.163-10T on home mortgage interest. Among unsettled issues are the following:

- Section 163(h)(4)(A) does not provide certainty on how to define a qualified residence or a second residence in the context of divorce.
    - Must the taxpayer have responsibility for the mortgage and own the underlying property before the interest is deductible? (Or, may the taxpayer satisfy only one of these two requirements?)
    - For example, a husband may transfer ownership of the residence to the wife, but remain responsible for the mortgage. Is the interest deductible? A husband is able to pay the monthly mortgage payment and deduct this amount as alimony if he is required to make the

payments to a third party under the divorce decree or maintenance agreement.[3] However, if a husband and wife were jointly liable on the mortgage and remained so after the divorce, Husband is only entitled to an alimony deduction for one-half of the mortgage payments he is paying because one-half of the payment is considered a discharge of his own obligation (*Contreras*; *Harris*).

- What is the proper method to determine deductible qualified residence interest when there are multiple debts that exceed the debt limit? While Chief Counsel Advice (CCA) 201201017 and IRS Publication 936 provide information on this question, official guidance is needed, such as in regulations.

5. Update and finalize the longstanding temporary regulations under section 163 on interest tracing and identification of the type of interest generated from a debt, in order to provide greater clarity and certainty to taxpayers and practitioners. Also, incorporate the changes provided in Notices 89-35, 88-37 and 88-20, as well as any clarifications provided in court cases.

   The interest tracing regulations of Treas. Reg. § 1.163-8T were issued in 1987 (Treasury Decision (T.D.) 8145, 7/1/87), soon after enactment of the Tax Reform Act of 1986 which increased the importance of identifying the type of interest generated on any debt. These temporary regulations were issued before the effective date of section 7805(e) which provides that temporary regulations expire after three years.

   In 1989, these regulations were modified by Notice 89-35, 1989-1 CB 675, which made significant changes to how the regulations apply to identify the use of borrowed funds and their operation with respect to debt of pass-through entities. Notice 89-35 supplemented earlier guidance: Notice 88-20, 1988-1 CB 487 and Notice 88-37, 1988-1 CB 522. When a practitioner has a question on interest expense classification under section 163 and turns to the regulations, the practitioner will not readily find the notices and therefore, can easily not apply the Notice's provision for the taxpayer's benefit.

6. Provide formal guidance on filing, reporting and income/expense allocation procedures for registered domestic partners and similarly situated couples (e.g., civil unions) located in community property states. While the IRS has issued some unofficial guidance in the form of FAQs on www.irs.gov, several CCAs and Form 8958, *Allocation of Tax Amounts between Certain Individuals in Community Property States*, these taxpayers should receive official authoritative instructions relating to their unique tax situation.

[3] See Temp. Reg. **§** 1.71-1T(b), Q&A #6.

7. Provide guidance on the statutory terms that were introduced by Title XII of the PPA pertaining to appraisals and individuals performing these appraisals. Proposed regulations (REG-140029-07--Charitable Contributions: Cash and Noncash: Substantiation) were published in August 2008 but have not been issued to date. The AICPA comments submitted on November 5, 2008, requesting further clarification of the terms "generally accepted appraisal standards" and "qualified appraiser."

8. Provide guidance to clarify the requirements for deductibility of real property taxes under section 164.

   Issues have existed as to what types of real property taxes are deductible under section 164. This provision requires that personal property taxes are ad valorum; there is no such stated requirement for real property taxes. Treasury Reg. § 1.164-4(a) provides that in order for deduction, real property taxes are "levied for the general public welfare by the proper taxing authorities at a like rate against all property in the territory over which such authorities have jurisdiction." There is no definition of "like rate" in the Code or regulations.

   Revenue Rul. 80-121 provides that one characteristic of a deductible real property tax is that it is "measured by the value of real property." Private letter ruling (PLR) 8033022 held that a parcel tax was not deductible under section 164. The ruling explains that "rate" in "like rate" refers to a proportion or ratio. In the ruling, the IRS stated that the parcel tax is "not levied at a like rate within the meaning of the regulations under section 164 of the Code; the tax is a specific tax, not a tax levied according to value, one of the characteristics that a real property tax must have in order to be deductible under section 164(a)(1)."

   The 2016 instructions to Schedule A, *Itemized Deductions*, Publication 530, Tax Information for Homeowners and Tax Topic 503 (updated January 10, 2017), all contain statements that in order for deduction, property in the jurisdiction at a like rate must have real estate taxes charged uniformly against them.

   In April 2012, the IRS released Information Letter 2012-18 which states: "There is no statutory or regulatory requirement that a real property tax be an ad valorem tax to be deductible for federal income tax purposes." The letter also notes that the IRS "will recommend appropriate revisions to our forms and publications on this subject."

   Issues remain as to when real estate taxes are considered taxes under section 164 rather than assessments for local benefits. In addition, given the language of Rev. Rul. 80-121 and PLR 8033022, official guidance is needed on the application of section 164 to payments labeled as real property taxes at the local level. Such guidance could include a new revenue ruling or regulations under section 164;

merely updating the IRS form instructions and publications is insufficient as they are not binding authority for purposes of penalties under sections 6662 and 6694.

9. Provide guidance relating to the coordination of a tuition payment and the receipt of a distribution from a section 529 Plan. Specifically, guidance is needed on the permitted period of time prior to and after the payment of a qualified expense to make a qualified distribution. For example, if a taxpayer makes a tuition payment in September 2016, but receives the 529 distribution in January 2017, assuming no other tuition payments are made, is the 2017 distribution taxable? Section 529(c)(3) does not address the question. The same question arises if the distribution precedes the payment of qualified education expenses. Guidance is needed on what constitutes a taxable event with regard to the timing of distributions and subsequent payments.

   In January 2008, the IRS issued an advance notice of proposed rulemaking (Announcement 2008-17; 2008-9 IRB 512, March 3, 2008) (ANPRM) to curb the possible abuse of section 529 qualified tuition program accounts by creating a general anti-abuse rule and other obstacles to prevent individuals and entities from using the accounts to avoid transfer and other types of taxes. Although a number of organizations commented, there has been no action to date.

   Additionally, provide guidance on the recontribution of refunded section 529 amounts in order to address the changes made according to the Protecting Americans from Tax Hikes Act of 2015 (the "PATH Act").

10. Provide guidance on the treatment of Medicare Part B and section 162(l) for self-employed individuals. A change in the treatment of this item was first noted in the 2010 Form 1040 instructions. In addition, Publication 535, Business Expenses, states on page 18: "Medicare premiums you voluntarily pay to obtain insurance that is similar to qualifying private insurance can also be used to figure the deduction. If you previously filed a return without using Medicare premiums to figure the deduction, you can file an amended return to refigure the deduction." Issuance of this new interpretation is needed in an official pronouncement, such as a revenue ruling, rather than in form instructions and publications which are not considered binding guidance or "authority" for section 6662 or 6694 purposes. In addition, "voluntarily pay" and the application to owners of pass-through entities requires explanation in official guidance. Finally, clarification is needed regarding the treatment of Medicare premiums paid by a self-employed taxpayer's spouse. CCA 201228037 states that under section 162(l), Medicare premiums paid for a self-employed taxpayer's spouse are deductible. However, it also states that "sole proprietors must pay the Medicare premiums directly." Since Medicare premiums are usually withheld from the covered individual's Social Security payment, the Service should explicitly state that it would consider such payments as having come directly from the sole proprietor for purposes of section 162(l).

Additionally, clarification is needed on how the Service views Medicare premiums reimbursed by an S-corporation entity to a two percent shareholder or by a partnership entity to a partner. In both situations, the entities cannot make the payments directly on behalf of the taxpayer.

11. Provide guidance on how section 6041, "Information at source," applies to taxpayers making payments to non-corporate entities which cover both personal and business expenses. Also needed is an explanation of whether these individual taxpayers are subject to the Form 1099-MISC reporting requirements for applicable payments made to non-corporate entities. For example, there are certain taxpayers who may allocate tax preparation fees paid to their tax preparer between different schedules such as Schedules A, C and E. The allocation is made as a portion of the tax preparation expense is allocable to their trade or business (Schedules C and E) and the non-trade or business sections of their tax return.

    The instructions for Form 1099-MISC indicate that payments need reporting when made in the course of your trade or business. In addition, Form 1040, Schedule C and Form 1040, Schedule E have questions that ask the taxpayer if they have complied with the Form 1099 reporting requirements.

    Clarification is needed on whether taxpayers are required to file Form 1099-MISC in the circumstances when they file Schedule C for a sole proprietorship and pay expenses which are part non-business. Likewise clarification is needed for whether payments of unreimbursed partner expenses reported on Schedule E require Form 1099-MISC information reporting. Specifically, provide guidance on whether a partner or self-employed owner needs to file Form 1099-MISC for payments made to their tax preparer or other vendors, when the payments are part-business and part Schedule A.

International Taxation Technical Resource Panel (Philip Pasmanik, Chair, (212) 686-7160, ext. 122, Philip.Pasmanik@hertzherson.com; or Jonathan Horn, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9204, Jonathan.Horn@aicpa-cima.com.) NOTE: Comments are listed in priority order.

1. Issue temporary or proposed regulations under section 367 as described in Notice 2016-73.

2. Provide guidance relating to the carryover of tax attributes in section 355 transactions.

3. Finalize proposed regulations under section 959, regarding exclusions from income of previously taxed earnings, and proposed regulations under section 961, regarding basis adjustments.

4. Provide guidance to explain the application of section 304(b)(6).

5. Provide guidance on the amendment made to section 304(b)(5) by The Education Jobs and Medicaid Assistance Act (P.L. 111-226, August 20, 2010), including guidance on what is considered "subject to tax" for purposes of section 304(b)(5)(B).

6. Provide guidance under section 267(a)(3)(B), in particular transactions exempt from the application of this under the authority granted in section 267(a)(3)(B)(ii).

7. Provide more complete and definitive guidance under the Passive Foreign Investment Company (PFIC) regulations as follows:

   - Update the PFIC regulations to take into account the enactment of section 1297(d), which eliminates the overlap of the PFIC and Subpart F regimes under certain circumstances (including the application of section 1297(d) to a PFIC owned by a U.S. partnership that has U.S. partners) (see e.g., PLR 200943004).

   - Provide guidance and explanatory examples under section 1297(c) regarding the 25 percent ownership look-through rule and its interaction with the section 1297(b)(2)(C) related party income rules.

   - Provide guidance on the application of the definition of passive income under section 1297(b)(1) including whether the section 954(h) exception applies to section 1297 for foreign corporations that are not controlled foreign corporations.

   - 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*. Please see recommendation #9 of our comment letter, submitted on May 12, 2014, Treatment of Shareholder of Certain Passive Foreign Investment Companies.

   - Provide guidance on a standardized format for PFIC reporting by flow-through entities to their owners.

8. 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.

9. Revise and finalize the proposed section 163(j) "earnings stripping" regulations, taking into account taxpayer comments and developments since the original issuance of the proposed regulations.

10. Develop and provide guidance on a procedure under which U.S. partnerships may file a composite individual income tax return on behalf of partners who are nonresident aliens (NRA) that have been allocated effectively connected income. Currently, each NRA partner is subject to withholding in excess of the tax that will ultimately result, and must independently file Form 1040NR, *U.S. Nonresident Alien Income Tax Return*. A composite NRA partner filing, which has been long and widely used by states that impose state-level income taxes, would enhance both proper taxpayer compliance and the IRS's ability to review and audit compliance, by giving it a single point of contact for questions and other NRA taxpayer contacts. This will reduce the burden and cost of compliance by NRA partners, and the administrative burden and costs on the IRS.

11. Provide additional guidance under the Treas. Reg. § 301.7701-3(d) relevancy rules, including the impact of certain acquisitions of entities that are not relevant and the consequences of certain elections relating to such entities.

12. Provide guidance providing that internal restructurings within a U.S. multinational group following a section 338(g) election of a foreign target corporation made by one of the members of the U.S. multinational group is not a transaction described in Notice 2004-20.

13. Provide guidance on section 960(c), including guidance on the application of the provision when there is either a deficit or previously taxed earnings and profits in an upper-tier foreign corporation in the chain of ownership. Additionally, guidance is requested on the application of this provision when a taxpayer has section 956 investments that pre-date and post-date the effective date of section 960(c).

14. Issue regulations pursuant to Notice 2007-13 regarding the substantial assistance rules for foreign base company services income.

15. Provide guidance on how to determine the treatment of a transaction as a foreign base company sales transaction or a foreign base company services transaction.

16. Provide guidance under section 961(c) regarding basis adjustments to the stock of a CFC held through partnerships.

17. Finalize the proposed section 898 regulations on conforming year-ends of certain foreign corporations to the year-ends of their U.S. shareholders.

18. Provide guidance for the Treas. Reg. § 1.954-2(b)(4) substantial assets test relevant to qualification under the same country exception for interest and dividends, as applied to: (i) stock in non-CFC foreign corporations; and (ii) banks and insurance companies.

19. With respect to section 952(c)(2) subpart F income recapture, provide guidance regarding the application of "rules similar to rules applicable under section 904(f)(5)," and in particular the latter section's incorporation of the disposition rules of section 904(f)(3).

20. 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. 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 for attribution from its partners, shareholders or beneficiaries.

21. Clarify the administrative process for filing Form 5471 when an income tax return is not required. The instructions to Form 5471 clearly state that the only mechanism for submitting the form is attaching it to an income tax return. Form 1040 does not modify its filing requirements for situations in which an individual may have sufficiently low income that there is no requirement to file an income tax return but a requirement to file Form 5471. Separately filing Form 8865 with IRS is allowed in this circumstance and Form 8621 filings are waived.

22. Provide guidance on the application of Temp. Reg. § 1.897-6T and section 1445 to non-recognition transactions involving transfers of U.S. real property interests (USRPI) to partnerships, and dispositions of interests in partnerships that directly and indirectly hold USRPIs.

23. Provide guidance under Treas. Reg. § 1.861-18 regarding the taxation of software as a service (SaaS), platform as a service (PaaS) 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 and should consider Organization for Economic Co-operation and Development (OECD) guidance on the digital economy.

24. Provide guidance on the application of section 904(d)(6), including the interaction of the provision in the context of treaties that already contain their own separate limitation regime for the treaty credit.

25. Provide guidance under section 905(c) regarding taxes paid after a liquidation, stock sale, or section 338 election.

26. Finalize guidance under Temp. Reg. §§ 1.905-3T, -4T and -5T.

27. Provide guidance relating to the application of the overall foreign loss rules to certain dispositions involving partnerships.

28. Provide complete guidance regarding the application of Treas. Reg. §§ 1.865-1(a)(2) and 1.865-2(a)(3) under which losses are allocated to reduce foreign source income if gain on the sale of the property (including stock) would have been taxable by a foreign country and the highest marginal rate of tax imposed on such gains in the foreign country is at least ten percent.

29. Continue to provide guidance related to withholding tax regimes under Chapter 3 and Chapter 4.

30. Provide guidance relating to the operation of certain treaty provisions under section 894(c), including the application of reduced or zero-rate tax provisions in treaties with respect to dividends received through hybrid disregarded entities. (The Service has issued private letter rulings (e.g., PLRs 200626009 and 200522006) relating to this issue. See the application of certain anti-hybrid provisions (e.g., the treatment of such provisions in connection with the application of the branch profits tax.)

31. Relax the double reporting rules under the section 1461 regulations and the treaty-based reporting requirements under section 6114.

Foreign Related Trust and Estate Tax Issues

32. 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.

33. Provide guidance on issues relating to foreign trusts and the HIRE Act, including guidance on the section 679(d) presumption that a foreign trust has U.S. beneficiaries. [Note: See AICPA comments to the U.S. Department of Treasury ("Treasury") and the IRS submitted on March 28, 2011.]

34. 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 (FBAR), and U.S. beneficiary reporting of foreign accounts and foreign financial assets owned by foreign trusts, as required by section 6038D. The AICPA is concerned that a U.S. beneficiary of a foreign trust may not have access to books and records of the foreign trust necessary to make an accurate determination of filing requirements and reportable amounts. [Note: See AICPA comments to the Financial Crimes Enforcement Network (FINCEN), Treasury, and the IRS submitted on November 19, 2010 and November 16, 2009, and AICPA comments to Treasury and the IRS submitted on March 28, 2011.]

35. Change the due date of Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner (Under Section 6048(b))*, from March 15 to April 15, to coincide with the due date for calendar year filers of related returns. If a change

in the due date is not possible, then an extension or penalty relief is requested for taxpayers who file by April 15. In addition, the IRS should consider adding a box to Form 7004 to permit an extension of time to file Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, in cases where the beneficiary's income tax return (Form 1040 and Form 1040NR) is not extended. [Note: See AICPA comments to the IRS submitted on June 12, 2008, March 3, 2008, January 31, 2007, and June 17, 2003. This change in the Form 3520-A due date was included in proposed legislation, S. 420, introduced 2/28/13 by Senators Enzi and Tester, and H.R. 901, introduced 2/28/13 by Rep. Jenkins, as well as in former Chairman Camp's March 12, 2013 House Ways and Means Committee small business tax reform discussion draft and the Senate Finance Committee March 21, 2013 tax reform options paper on simplifying the tax system for families and businesses.] The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 modified the original and extended due dates for partnerships, C corporations, and trusts and estates effective for 2016 tax years, but did not change the due date for Form 3520-A. The same due dates that apply for individuals should apply to the original and extended due dates for Form 3520-A.

36. Change the form for tax reporting for foreign nongrantor trusts. The current tax reporting on Form 1040NR for foreign nongrantor trusts (and foreign grantor trusts with a U.S. owner) is extremely difficult because the IRS form is not designed for fiduciary tax return reporting. The IRS instructions direct the preparer to "change the form" for Subchapter J provisions, but attempts to do so result in inconsistent or inadequate changes and lead to return processing errors and confusion. The creation of a new Form 1041NR, *U.S. Income Tax Return for Foreign Estates and Trusts*, which could include information currently reported on Forms 3520 and 3520-A, would eliminate confusion and mistakes in processing returns and would enhance tax compliance filing requirements. [Note: See AICPA comments to the IRS submitted on September 22, 2008, March 3, 2008, and January 31, 2007.]

37. Provide guidance on whether a foreign grantor trust with a U.S. grantor is required to file Form 1041 or Form 1040NR and whether a foreign grantor trust with a foreign grantor and some U.S. income is required to file Form 1041 or Form 1040NR.

38. 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.

39. Provide guidance on how the generation skipping transfer (GST) tax applies to grandfathered domestic trusts that become foreign trusts. This issue is analogous

to a GST-grandfathered trust that migrates from one state to another; thus, Treasury and the IRS should consider similar rules and safe harbors.

40. Provide further guidance in addition to the proposed regulations (REG-112997-10) regarding several aspects of section 2801. [Note: AICPA submitted comments to Treasury and the IRS on May 17, 2016.]

    We note that the 2014-2015, 2015-2016, and 2016-2017 IRS Priority Guidance Plan includes a section 2801 guidance project.

41. Provide guidance 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 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. We also suggest safe harbor guidelines to administer this new law. [Note: See AICPA comments to the IRS submitted on March 28, 2011.]

42. 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. Guidance is needed as to the appropriate forms and reporting on applicable tax returns, as well as on possible expedited procedures for successful receipt of a private letter ruling for an expatriate to determine the value of his or her interest in the trust. This guidance should also define "adequate security" for a "tax-deferred agreement" for the covered expatriate's return under section 877A(b).

43. Provide regulations under section 6677 regarding the failure to file information returns with respect to certain foreign trusts. The HIRE Act amended section 6677, but guidance is not adequate in Notice 97-34, the only IRS guidance on making a determination on penalties under section 6677. As described in the IRS memorandum SBSE-20-0709-016, issuing newly-designed determination letters is based upon a review of a taxpayer's compliance with section 6677, but taxpayers need regulations to provide them with guidance before the applicable letters are issued.

44. The IRS should modify Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*, and Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, to assist the IRS in tracking U.S. withholding credit to which a U.S. beneficiary is entitled due to withholding flowing through a foreign nongrantor trust and to reduce the amount of correspondence needed between taxpayers and the IRS to justify withholding credit reflected on a beneficiary's U.S. income tax return.

- The IRS should require trustees of foreign nongrantor trusts to provide copies of Forms 1042/1042-S to U.S. beneficiaries receiving distributions and corresponding U.S. withholding credits from the trust, evidencing withholding on income paid to the trust.

    - The IRS should modify Forms 1042/1042-S to include the beneficiary's name and social security number and include an indication of whether a payee is a foreign nongrantor trust with a U.S. beneficiary.

    - The IRS should instruct U.S. beneficiaries to attach a copy of the Form 1042-S to the beneficiary's Form 3520 as well as to the beneficiary's Form 1040.

- The IRS should clarify and provide guidance regarding compliant non-U.S. trusts making distributions potentially subject to trust-specific withholding requirements under Chapter 3 (Qualified Intermediary (QI)) and Chapter 4 (Foreign Account Tax Compliance Act (FATCA)). Such IRS guidance should provide that the source and character retention rules relating to distributable net income (DNI)/undistributed net income (UNI) of foreign nongrantor trusts are not relevant for purposes of QI and FATCA. Alternatively, the guidance should grandfather any distributions from non-U.S. trusts potentially subject to withholding under both QI and FATCA until a final determination is made regarding the treatment of "Foreign Pass-through Payments" under FATCA. To the extent that grandfathering is not possible, we recommend a provision that ensures that there are no duplicate withholding requirements. For example, to the extent that there was QI withholding on the foreign nongrantor trust at a lower rate than would apply to the beneficiary, Treasury and the IRS should provide that withholding on the distribution to the beneficiary is applied on the difference between the two applicable rates.

IRS Advocacy & Relations Committee (Andy Mattson, Chair, (408) 558-7666, Andy.Mattson@mossadams.com; or Melanie Lauridsen, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9235, Melanie.Lauridsen@aicpa-cima.com.) NOTE: Comments are listed in priority order.

1. We commend the IRS in addressing our previous request for guidance on the Modernized e-File (MeF) system through your issuance of Publications 4163 and 4164. We request continued expansion of the MeF system to include the filing of additional forms that are crucial to streamlining the tax administration process. In particular, we request the ability to file Form 2848, *Power of Attorney and Declaration of Representation*, through the e-Services system and, upon IRS acceptance, have it immediately posted to the comprehensive annual report (CAFR) system to accommodate more efficient communication.

2. Provide guidance and coordinate the rules for obtaining an electronic filers identification number (EFIN) with the rules for obtaining a preparer tax identification number (PTIN). Given the mandate for tax return preparers to e-file most Forms 1040 and 1041, more tax return preparers are required to obtain an EFIN to participate in the e-file system as an electronic return originator (ERO). However, unlike the PTIN rules, a tax practitioner with any outstanding account balance (even if the tax practitioner disputes the account balance) cannot obtain an EFIN even if that preparer is diligent in engaging with the IRS to work through the issues, has a history of compliance with the tax laws, and the individual(s) named by the taxpayer as responsible parties on the EFIN application has a PTIN. Although the IRS has procedures that allow the preparer to prepare and a taxpayer to file a paper return in these circumstances, the limit on a preparer's ability to obtain an EFIN undermines the e-file mandate. We recommend that the IRS consider coordinating the rules for obtaining an EFIN with the rules for obtaining a PTIN and to allow for the option of having a single application and a single renewal process for both. Such coordination would not only allow PTIN-registered preparers the ability to e-file, but will reduce burden and duplication of effort on the part of the preparer and the IRS. Furthermore, additional reduction of duplication of efforts can occur if the PTIN and EFIN regimes were consolidated with the centralized authorization file (CAF) system, so that a preparer who is also a licensed Circular 230 practitioner is identified with a single number. For example, the single number could consist of a conjunction of numbers with various alpha prefixes or suffixes (e.g. P for PTIN, E for EFIN and C for CAF) so that a practitioner's authorizations is easily identified through a single number.

3. The IRS should create a new dedicated "executive-level" practitioner services unit.[4] This unit would allow it to rationalize, enhance, and place under common management the many current, disparate practitioner-impacting programs, processes, and tools. Moreover, the IRS would have a consolidated approach to timely resolving issues. The enhanced relationship between the IRS and practitioners would benefit both the IRS and the millions of taxpayers served by the practitioner community.

   As part of the new practitioner services unit, the IRS should provide tax practitioners with a tax professional account as part of the online portal with immediate account access to all of their clients' information. The secure tax professional account must also include single sign-on authentication and protection of users' identities and their data.

   The IRS should also offer a robust practitioner priority hotlines with higher-skilled employees that have the experience and training to address complex technical and procedural issues. The IRS should also assign customer service

[4] For additional details see IRS stakeholder letter, *Ensuring a Modern-Functioning IRS for the 21st Century*, April 3, 2017.

representatives (a single point of contact) to each geographic area to address unusual or complex issues that practitioners were unable to resolve through the priority hotlines.

Finally, to ensure success of the practitioner services unit, it is essential for these services to approximate comparable private sector services and allow practitioners to resolve account issues for their clients in a timely and efficient manner.

4. Issue regulations under sections 6662A, 6662, and 6664 regarding the accuracy-related penalty and reasonable cause. Section 6662A imposes an accuracy-related penalty on any reportable transaction understatement attributable to a listed transaction or a reportable avoidance transaction for taxable years ending after October 22, 2004. We recommend that Treasury issue regulations under section 6662A which addresses (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 net operating loss (NOL) carryback and carryover years. We also recommend that the IRS update the sections 6662 and 6664 regulations to reflect numerous statutory changes to those sections since the 1990s, such as changes made by the American Jobs Creation Act (AJCA) of 2004.

5. Provide guidance under section 6662A to address the application of the penalty to partnerships and partners. Under section 6662A, if a partnership fails to properly disclose a reportable transaction and the transaction creates a reportable transaction understatement, the partners of the partnership are also liable for a section 6662A penalty with no avenue to challenge the penalty because they did not make the required disclosure under Treas. Reg. § 1.6011-4, even though the partners might never have been aware of the transaction creating the understatement. Accordingly, we recommend issuing guidance under section 6662A to address the application of the penalty to partnerships and partners.

6. Clarify the instructions for Form 8886, *Reportable Transaction Disclosure Statement*. Treasury Reg. § 1.6011-4(b)(4) addressed the requirement for a statement disclosing participation in transactions with contractual protections. T.D. 9046 amended these regulations to exclude "tax insurance" from the definition of "transactions with contractual protection." We recommend that the IRS clarify the instructions for Form 8886 line 7b that a description for tax result protection (which includes "insurance company and other third party products commonly described as tax result insurance") with respect to the transaction is not mandatorily included in the description.

Partnership Taxation Technical Resource Panel ((Michael Greenwald, Chair, (212) 842-7513, MGreenwald@friedmanllp.com; or Jonathan Horn, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9204, Jonathan.Horn@aicpa.-cima.com.) NOTE: Comments are listed in priority order.

1. Provide detailed regulations and guidance on the numerous changes to partnership filing, reporting and audit procedures enacted as part of the Bipartisan Budget Act of 2015 (P.L. 114-74). This item appears on the IRS 2016-2017 Priority Guidance Plan under the Tax Administration heading. In addition to the procedural issues, guidance is needed regarding the impact on partnership capital accounts and partner basis.

2. Provide guidance on the treatment of limited liability company (LLC), limited liability partnership (LLP) and limited liability limited partnership (LLLP) members (and limited partners in light of recent judicial rulings) under section 1402(a)(13). Some taxpayers aggressively avoid classifying LLC income as earnings from self-employment, while others may take overly conservative approach in this regard. The IRS should withdraw and re-propose or finalize existing regulations addressing this important issue. This item appears on the IRS 2016-2017 Priority Guidance Plan under the Employee Benefits heading

3. 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 this statute. Section 6063 and the regulations thereunder require that the partnership tax return is signed "by any of its partners." However, the instructions to Form 1065, *U.S. Return of Partnership Income*, appear to narrow the pool of valid signatories by stating that the return "isn't considered to be a return unless it is signed by a general partner or LLC member manager." Further, the IRS has indicated in Publication 3402 and in informal advice that limited partners cannot sign the partnership tax return (GCM 38781; FSA 0556). A valid signature is a prerequisite to the valid filing of an income tax return (*Agri-Cal Venture Associates, v. Commissioner*, T.C. Memo 2000-271; *Burford Oil Co. v Commissioner*, 153 F.2d 745 (5th Cir. 1946); *Elliott v Commissioner*, 113 T.C. 125 (1999)). Because the tax ramifications of failure to timely file a return are significant, the IRS should clarify in one set of guidance, the signature requirements for signing a partnership tax return. In particular, such guidance should address if and when a limited partner or non-member manager LLC member can sign the partnership return, what partners are appropriate signatories in a non-member managed LLC, and what partners can sign in situations where the entity is a foreign eligible entity classified as a partnership. Furthermore, in cases where the appropriate partner signatory of a partnership return is itself another entity classified as a partnership, the guidance should address whether an authorized officer of such entity partner can sign the lower-tier partnership return in its capacity as an officer of the partner entity (e.g., if an LLC is the general

partner of a partnership, can an authorized officer of the LLC sign the partnership return on behalf of the LLC as general partner of the lower-tier partnership).

4. 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. On February 11, 2014, the AICPA submitted to the IRS a draft revenue ruling on partnership targeted allocations. [Note: See AICPA draft revenue ruling submitted on February 11, 2014.] Target allocations are widely used, but there is no guidance as to whether the IRS considers it an acceptable partnership allocation method and how they are treated. The proposed regulations on Disguised Payments for Services (REG–115452–14) issued July 23, 2015 requested comments on this issue.

5. Provide guidance on technical terminations. The AICPA support the proposal to repeal section 708(b)(1)(B) included in former House Way and Means Chairman Camp's proposals. Until legislation incorporating that proposal is enacted, guidance is requested for circumstances where partnerships have inadvertently filed a late short period return and associated Schedules K-1 due to a technical termination under section 708(b)(1)(B). It is common for partnerships to not realize that events have caused a technical termination until after the due date of the tax return for the short year.

6. Provide guidance with respect to partnerships that use the special aggregation rule for securities partnerships under Treas. Reg. § 1.704-3(e). Specifically:

   - Expand guidance under Treas. Reg. § 1.704-3(e)(4) to permit the aggregation of assets for certain partnerships that do not qualify for section 704(c) aggregation under the provisions of Treas. Reg. § 1.704-3(e)(3) or under Rev. Proc. 2007-59. Such guidance would expand the requirements to allow a greater number of taxpayers the ability to aggregate in appropriate situations.

   - Provide guidance on the methodology of applying section 743 for partnerships using the special aggregation rule for securities partnerships under Treas. Reg. § 1.704-3(e). Guidance should include a similar aggregation rule for allocating the section 743 adjustment under section 755 and a methodology for determining when the section 743 adjustment is taken into account.

   - Provide guidance that identifies certain forward section 704(c) circumstances where aggregation is available for use without obtaining a private letter ruling. Such guidance would allow eligible partnerships to aggregate built-in gains and losses from contributed property with built-in gains and losses from revaluations in appropriate circumstances (such as in the case of a merger of eligible partnerships), or provide automatic consent procedures. Permission

for such aggregation is currently obtainable only through a private letter ruling request.

7. Provide expanded guidance under the principles of Rev. Ruls. 99-5 and 99-6. [Note: See AICPA comments to the IRS submitted on June 5, 2013, and October 1, 2013.]

Revenue Ruling 99-5

Provide guidance related to Rev. Rul. 99-5 in the following areas:

- The amount of the LLC's liabilities that are included in the seller's amount realized on the deemed asset sale that occurs under Rev. Rul. 99-5, Situation 1.

- The treatment of the liabilities owed by the LLC to its single owner upon the formation of the partnership in Rev. Rul. 99-5, Situations 1 and 2 (springing liabilities).

- The treatment of transfers that are not described in Rev. Rul. 99-5 Situations 1 and 2, but which result in the conversion of the single-member LLC to a partnership.

Revenue Ruling 99-6

Provide guidance related to Rev. Rul. 99-6 in the following areas:

- The amount of the LLC's liabilities that are considered assumed by the buyer: (a) as part of the purchase of the selling partner's interest in the LLC; and (b) as part of the buying partner's liquidating distribution from the LLC.

- The amount of the LLC's assets that are considered acquired by the buyer: (a) from the selling partner; and (b) as part of the buying partner's liquidating distribution from the LLC.

- The deemed extinguishment of any liabilities of the LLC to the acquiring partner that results from the merger of the debtor-creditor relationship which occurs upon the termination of the partnership.

- Application of the section 704(c)(1)(B) and section 737 "mixing bowl" rules to the acquiring partner with respect to the deemed liquidating distributions that occur as part of the Rev. Rul. 99-6 construct.

- Application of the section 751(b) "disproportionate distribution" provisions to the acquiring partner with respect to the deemed liquidating distributions that occur as part of the Rev. Rul. 99-6 construct.

- The treatment of transfers that are not described in Rev. Rul. 99-6, Situations 1 and 2, but which result in the conversion of the partnership to a disregarded LLC.

- Application of Rev. Rul. 99-6 to interest over partnership merger transactions. The guidance should describe what constitutes a merger or a division under section 708(b)(2). In the preamble to the regulations issued in 2001, the IRS declined to provide a precise definition. Nevertheless, it would help if the IRS provided some examples showing mergers vs. non-mergers. Further, the guidance should address what constitutes a continuation under section 708(b)(1)(A) when one or more historic partner(s) continue in the new partnership.

8. Update and finalize the longstanding temporary regulations under section 469 to provide greater clarity to taxpayers and practitioners. The Tax Reform Act of 1986 created section 469, "Passive Activity Losses and Credits Limited." Temporary regulations were issued on these provisions soon after the legislative changes were made. Several of the regulations were issued prior to the effective date of the change made to section 7805 by the Technical and Miscellaneous Revenue Act of 1988 providing that temporary regulations expire within three years of issuance (effective for regulations issued after November 20, 1988). Thus, temporary regulations issued after enactment of the Tax Reform Act of 1986 and before November 21, 1988 that have not been finalized, remain in their temporary form. While parts of the section 469 regulations have been finalized (generally because portions were modified after November 20, 1988), many parts remain in temporary form. The current state of these regulations is problematic for a few reasons including the fact that it is difficult to find, read and apply the regulations because portions of a single regulation (e.g., Treas. Reg. §§ 1.469-2(f) and 1.469-2T(f) on re-characterizations), are part final and part temporary.

9. Provide guidance regarding the tax treatment to both the partnership and the partner when there is a cancellation of a partner loan. Specifically, guidance is requested on the manner in which the loan is cancelled including in context of a partnership liquidation (e.g., whether the cancellation of the debt occurs at the partnership level or whether the partner is viewed as assuming the partnership's liability, then cancelling the loan, under an approach similar to the principles applied in *Arthur L. Kniffen v. Commissioner*, 39 T.C. 553, 561 (1962), acq., 1965-2 C.B. 3). If the cancellation occurs at the partnership level, guidance is requested on the character of the bad debt loss to a partner (e.g., whether the business of the partnership is attributed to the creditor-partner to prevent a character mismatch under section 166).

10. Provide guidance with respect to publicly traded partnerships. Specifically:

- Provide guidance granting optional relief from the "single basis in a partnership" rule of Rev. Rul. 84-53 for owners of interests in publicly traded partnerships, similar to the special exception in the holding period rules of Treas. Reg. § 1.1223-3(c)(2)(i) for publicly traded partnerships.

- Provide guidance granting relief to publicly traded partnerships to use simplifying assumptions for purposes of calculating section 743 adjustments and section 751(a) amounts upon sale. Such relief would allow the partnership to use the same price for all trades in a particular month to calculate the section 743 adjustments of transferees as opposed to actual purchase price as required in the regulations. Such relief is necessary for ease of administration and due to the lack of precise trading data. Similar simplifying conventions for calculating the gain on the hypothetical sale of "hot assets" under section 751(a) to transferors are also needed.

11. Provide guidance regarding energy tax credit partnerships.

In response to the 2012 Third Circuit opinion in *Historic Boardwalk Hall v. Commissioner of Internal Revenue*, the IRS issued Rev. Proc. 2014-12. This revenue procedure establishes a safe harbor under which the IRS will not challenge partnership allocations of section 47 rehabilitation credits by a partnership to its partners. Revenue Proc. 2007-65 provides a safe harbor for wind production tax credit partnerships. There is no guidance for energy investment credit partnerships. The Rev. Proc. 2014-12 and Rev. Proc. 2007-65 safe harbors differ in several respects. For example, Rev. Proc. 2014-12 only allows a fair market value put option to eliminate the tax equity investor (TEI) after the TEI has flipped down to a small continuing interest. Revenue Proc. 2007-65, for a similarly timed option, only allows a call option and the exercise price is set from the beginning of the deal at a reasonably projected fair market value amount. Although neither safe harbor applies to wind, solar, and other energy investment credit partnerships, traditionally those deals have tried to come within the spirit of the rules in Rev. Proc. 2007-65 as necessarily modified to account for an investment credit instead of a production credit. The energy investment credit industry needs to know whether it can, for example, use the guarantee rules of Rev. Proc. 2014-12, combined with the option rules of Rev. Proc. 2007-65.

S Corporation Taxation Technical Resource Panel (Laura MacDonough, Chair, (202) 327-8060, laura.macdonough@ey.com; or Amy Wang, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9264, Amy.Wang@aicpa-cima.com.) NOTE: Comments are listed in priority order.

1. Provide guidance regarding worthless stock deductions under section 165(g) for S corporations. This item was included in the 2016-2017 Priority Guidance Plan. Since 1996, an S corporation has been permitted to own stock of another corporation meeting the requirements of section 1504(a)(2). If such stock becomes wholly worthless, existing guidance does not clarify whether the S corporation is entitled to an ordinary loss deduction under section 165(g)(3). While section 1363(b) could lead to a conclusion that an S corporation is not eligible for section 165(g)(3), the principles of *Rath v. Commissioner*, 101 T.C. 196 (1993), and, by analogy, section 1371(a), suggest that an ordinary loss deduction is possibly available to an S corporation. [5]

2. Develop a new shareholder-level income tax form that shareholders are required to attach to any income tax return with items of income, loss, deduction, or credit of an S corporation. The purpose of the form is to compute the S corporation shareholder's basis in the stock and debt of the S corporation. The form can provide both shareholders and the IRS with the information necessary to properly determine the taxability of distributions and loan repayments made by the S corporation to its shareholders, gain or loss on stock dispositions, as well as the amount of losses and deductions that shareholders are allowed to take into account when computing taxable income for the year. The development of this form can benefit all relevant stakeholders (i.e., taxpayers, the IRS, and tax return preparers).

3. 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. This circumstance could occur if the S corporation election of the subsidiary's parent has terminated or the QSub status of the subsidiary has independently terminated (and relief under section 1362(f) is not sought or not granted) but the parent continues to treat the subsidiary as a disregarded entity. Patterning such guidance after Treas. Reg. § 1.1502-75(g)(1), which applies when a corporation is improperly included in the consolidated return filed by the common parent, is an option.

4. 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). For a trust to qualify as a QSST, the terms of the trust must provide, among other things, that any corpus distributed during the life of the

[5] AICPA submitted comments on "Guidance Regarding Worthless Stock Deductions Under Section 165(g) for S Corporations," dated September 18, 2015.

current beneficiary is only distributed to such beneficiary. A trustee may have the power to decant a trust under the terms of the trust instrument or under a state's decanting statute. "Decanting" refers to the trustee's authority to distribute property to another trust for the benefit of the original trust's beneficiaries. If decanting a trust is permitted, distributing its assets is possible, during the life of the current beneficiary, to another trust for the benefit of such beneficiary. This raises a question as to whether the ability of a trustee to decant a trust precludes the trust from qualifying as a QSST. In addition, if the mere power to decant a trust does not preclude the trust from qualifying as a QSST, would the trustee's exercise of such power cause the trust to cease to qualify as a QSST? We recommend that the guidance provide that neither the ability to decant a trust nor the actual decanting of a trust causes the trust to fail to qualify as a QSST. The guidance should also address whether the new trust is required to obtain its own taxpayer identification number and whether making a QSST election is necessary for the new trust in order for it to qualify as such.

5. Issue a revenue ruling incorporating the guidance from PLRs 201306004 and 201306005. Specifically, guidance is requested concerning whether a second class of stock is created if an S corporation has a governing provision allowing distributions based on the shareholders' varying interests in the S corporation's income for any taxable year, and not only based on the current or immediately preceding taxable year.

   Treasury Reg. § 1.1361-1(l)(2)(iv) provides that a governing provision does not alter rights to liquidation and distribution proceeds conferred by an S corporation's stock merely because the governing provision provides that, as a result of a change in stock ownership, distributions in a taxable year made based on the basis of the shareholders' varying interests in the S corporation's income in the current or immediately preceding taxable year.

   In PLRs 201306004 and 201306005,[6] an S corporation and its shareholders proposed to enter into an agreement that would contain minimum distribution provisions to shareholders by the S corporation. The S corporation and its shareholders intend that the S corporation will make distributions under these provisions based on the shareholders' varying interests in the S corporation's income in the current or immediately preceding taxable year ("Varying Interest Distributions") or earlier if such earlier year's taxable income is adjusted after the S corporation's original return for such earlier year is filed ("Discretionary Payments"). In addition, the S corporation may declare dividends and make pro rata distributions to the shareholders based on the number of shares that the shareholders own as of a record date ("Record Date Distributions"). The ruling holds that the agreements provisions relating to Varying Interest Distributions, Record Date Distributions and Discretionary Payments do not cause the corporation to have more than one class of stock.

[6] See also PLRs 201017019 and 200308035.

Because taxpayers other than the taxpayer to whom a ruling letter is issued may not rely on the ruling letter, a revenue ruling incorporating the holdings of PLRs 201306004 and 201306005 is needed to allow taxpayers to adopt provisions similar to those described in these letter rulings without concern that such provisions resulting in more than one class of stock.

6. Update Treas. Reg. § 1.1361-5 to reflect the addition of clause (ii) (relating to termination of a qualified subchapter S subsidiary by reason of the sale of qualified subchapter S subsidiary stock) to section 1361(b) (3)(C) made by section 8234 of P.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.

7. Provide additional guidance as to when, for alternative minimum tax (AMT)[7] purposes, S corporations will have attributes that are different for regular tax and AMT purposes. For example, does an S corporation have an accumulated adjustments account (AAA) for AMT purposes that would differ by the adjustments of sections 56, 57 and 58 from the AAA for regular tax purposes? Assuming there are AAAs kept for each type of tax, if distributions in excess of the regular tax and AMT AAAs are made by an S corporation with accumulated earnings and profits, how much is taxable to the recipient shareholder for regular tax purposes and how much for AMT purposes? It is important for taxpayers to have guidance on how the regular tax and AMT interface with respect to common transactions in order to exposure to AMT.

8. Provide additional guidance as to whether a state tax refund attributable to the S portion of an electing small business trust (ESBT) is allocated to the S portion. Section 641(c)(2)(C) provides a finite list of tax items that are taken into account by the S portion of an ESBT. This list does not include state tax refunds attributable to the S portion. Treas. Reg. § 1.641(c)-1(h) provides for the allocation of state and local income taxes but does not address state and local tax refunds. As an example, an ESBT has state taxes paid in 2015 related strictly to S portion of the ESBT. In addition, the trust has prior year overpayments of state taxes related 100 percent to S corporation income which the trust picked up as income in 2016 (since the trust took the deduction in 2015). Should the taxpayer include these items, which are directly related to the S corporation, in the S

[7] AICPA submitted comments on alternative minimum tax repeal in a letter regarding "AICPA Suggestions to Tax Reform Working Group on Business Income Tax," dated March 31, 2015.

portion tax calculation rather than reporting these items on lines 8 (income) and 11 (tax deduction) on page 1 of the 1041? We recommend that the IRS issue guidance providing that the items attributable to the S portion including allocating the state tax refund to the S portion.

9. Provide additional guidance regarding the inability to utilize certain suspended passive activity losses upon redemption. Section 469(g) generally allows for the utilization of all suspended passive activity losses that have been carried forward when a taxpayer disposes in a taxable transaction of his entire interest in a passive activity. This rule does not apply, however, when the sale of S corporation stock is to a related party described in sections 267(b) and 707(b)(1). When the related party exception applies, the loss is deferred until the party acquiring such stock interest in the passive activity disposes of it to a party that is unrelated to the initial selling taxpayer. In the case of a redemption of S corporation stock, the second disposition cannot occur because the stock redeemed no longer exists for federal income tax purposes. It is not possible to trace the redeemed stock to a subsequent disposition.

   The legislative history to the provision does not appear to contemplate this situation. Although the statute treats redemptions of corporations differently than redemptions of partnership interests with regard to the ability to recognize realized losses on redemption,[8] a complete redemption of interests in a pass-through entity should release all suspended losses. Suspended passive losses do not result from a sale or exchange of property between related parties, but rather from true economic losses. The sale transaction solely governs the timing of taking the loss into account. If such losses are not allowed upon a complete redemption in a pass-through entity, true economic losses are never recognized as the provisions of section 469(g) are not satisfied.

10. Provide additional guidance regarding the ordering rule for adjustments to the AAA when ordinary and redemption distributions are made in the same year and an ordinary distribution occurs after the redemption distribution. This item was included in the 2016-2017 Priority Guidance Plan. Under Treas. Reg. § 1.1368-2(d)(1)(ii), AAA is adjusted first for ordinary distributions and then for redemptions. The regulations only provide an example where the redemption occurs on the last day of the taxable year and, as a result, do not address how the rule applies when an ordinary distribution occurs after a redemption distribution earlier in a taxable year. Because the redemption distribution is based on the AAA amount as of the date of the redemption, the rule is not clear in the case of a post-redemption ordinary distribution. The regulation simply says to adjust first for ordinary distributions but does not make a distinction for those ordinary distributions that are before or after redemption. A taxpayer could interpret the rule either way. Reducing the AAA balance for all ordinary distributions

[8] See section 707(b)(1) allowing for losses on redemption of partnership interests; and see section 267(b) and Rev. Rul. 57-387 for disallowance of loss on redemption of corporate stock.

regardless of the timing relative to the redemption provides the best answer in most circumstances. Because a complete redemption is a sale or exchange transaction, the presence of AAA is irrelevant for purposes of determining the shareholder's gain or loss on the redemption. Allocating more AAA to redemptions by ignoring post-redemption distributions does not benefit the redeemed shareholder while it provides a smaller tax free recovery of AAA for the post redemption distribution by the recipient shareholders. We request an example where ordinary distributions are made subsequent to a redemption within the same taxable year and how AAA is affected in that situation. We suggest the issuance of a revenue ruling to provide such guidance or modifying the existing regulation.

11. Provide guidance regarding the application of section 302(b)(4) to distributions by an S corporation. Generally, S corporations can make tax free distributions to its shareholders. When an S corporation sells a "qualified trade or business" under section 302(e) and distributes the proceeds, the partial liquidation rules are interpreted to treat an otherwise tax free operating distribution as a capital gain, or may result in unallowed and unusable capital losses. The S corporation recognizes a gain or loss at the corporate level on the disposition of a qualified trade or business. Under sections 1366 and 1367, this recognized gain or loss is allocated to all outstanding shares. When applying the partial liquidation rules under section 302(b)(4) to only a portion of the redeemed shares, the shareholders could end up recognizing gain or loss on the deemed shares that are redeemed. A normal operating distribution is most likely tax free because it is applied to the aggregate basis of all outstanding shares. However, if the partial liquidation proceeds are applied only against the stock basis of the deemed shares redeemed, it is likely that the partial liquidation proceeds will trigger a gain or loss at the shareholder level. If the shareholders could use the aggregate basis on all outstanding shares because no shares are actually redeemed, the partial liquidation distribution is less likely taxable at the shareholder level. Guidance is needed on whether the shareholders can use an aggregate basis approach in a partial liquidation. Without more clarity, partial liquidation rules provide a trap for the unwary in an S corporation setting.

Tax Methods and Periods Technical Resource Panel (Jennifer Kennedy, Chair, (703) 918-6951, jennifer.kennedy@us.pwc.com; or Ogochukwu Eke-Okoro, Lead Manager – AICPA Tax Policy & Advocacy, (202) 434-9231, Ogo.Eke-Okoro@aicpa-cima.com.) NOTE: Comments are listed in priority order.

1. Provide guidance under sections 167 and 1032 regarding whether property held simultaneously for sale and for lease (also known as "dual-use property") is eligible for depreciation deductions and/or like-kind exchange treatment.

2. Provide guidance under sections 167 and 168 for determining whether certain assets used by a wireline telecommunication service provider are primarily used for providing one-way or two-way communication services.

3. Issue Rev. Proc. under section 263(a) regarding the capitalization of natural gas transmission and distribution property.

4. Modify and clarify Rev. Procs. 2017-30 and 2015-14 to, among other things, reinstate the 90-day window, and include additional method changes in the List of Automatic Method Changes. [Note: See AICPA comments to the IRS submitted November 14, 2016.]

5. Provide additional guidance on capitalization under section 263A:

   - Modify and finalize the regulations regarding the modified simplified production method and negative additional section 263A costs.

   - Issue proposed regulations under section 263A for resellers: (1) updating rules to reflect changes in retail business practices (including those resulting from technological advances and current trends) that have affected the application and administrability of the existing regulations under section 263A to retailers that transact both on-site sales and sales that are not on-site sales from the same sales facility; and (2) modifying the definitions of on-site sales, a retail customer, a retail sales facility, a dual-function storage facility, and other terms in Treas. Reg. § 1.263A-3(c)(5)(ii) to reflect current business practices of retailers that transact both on-site sales and sales that are not on-site sales from the same sales facility.

   - Issue proposed regulations under section 263A: (1) clarifying definition of costs included in and excluded from the simplified service cost production and labor cost formulas; (2) clarifying sufficient documentation for classification of activities and departments (e.g., sufficiency of interviews with employees); and (3) updating examples to reflect more common situations such as an information technology (IT) department.

   - Issue regulatory and/or procedural guidance under section 263A(f) that provide rules: (1) for the application of section 263A(f) to related parties; (2) modifying Treas. Reg. § 1.263A-9 to permit taxpayers to use reasonable methods to allocate capitalizable interest to units of designated property; (3) modifying Treas. Reg. § 1.263A-9(d)(1) with respect to the election to trace debt; (4) modifying Treas. Reg. § 1.263A-8(b)(4) to make application of the *de minimis* rule for determining designated property elective; and (5) including 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. [Note: See AICPA comments to the IRS submitted on January 4, 2017.]

6. Issue revenue procedure under section 168(k)(4) regarding election to accelerate carryover alternative minimum tax credits in lieu of claiming bonus depreciation.

7. 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 final Treas. Reg. § 1.174-2.

8. Provide guidance regarding advance payments under section 451:

   - Provide guidance addressing the treatment of advance payments that are adjusted through purchase accounting in connection with an acquisition of stock (taking into account public comments with respect to the proposed regulations). [Note: See AICPA comments to the IRS submitted on February 13, 2015.]

   - Provide guidance addressing the treatment of advance payments between members of an affiliated group that are eliminated in consolidated financial statements. [Note: See AICPA comments to the IRS submitted on February 13, 2015.]

   - Issue proposed regulations under section 451 regarding advance payments received for goods and services, including amounts received in exchange for the sale or issuance of gift cards, trading stamps, and loyalty points that are redeemable for goods or services.

   - Issue procedural guidance for accounting method changes necessitated by the Joint Financial Accounting Standards Board (FASB)-International Accounting Standards Board (IASB) Revenue Recognition Standard.

   - Provide guidance regarding the treatment of deferred revenue in taxable asset sales and acquisitions (taking into account public comments with respect to the proposed regulations). [Note: See AICPA comments to the IRS submitted on April 23, 2015.]

9. Modify the existing section 199 regulations for determining qualified gross receipts from the disposition of computer software. [Note: See AICPA comments to the IRS submitted on August 19, 2016.]

10. 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.

11. Issue proposed 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 8 ½ months after year end and transactions in which an amount accrued is includible in the earnings and profits of a controlled foreign corporation.

12. 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 ten percent taxable income limitation for corporations under section 170(b)(2). [Note: See AICPA comments to the IRS submitted on June 7, 2016.]

13. Provide guidance under section 118 specifically relating to the treatment of refundable and transferable credits and incentives as non-shareholder contributions to capital.

14. Provide guidance regarding the time when a business is considered to start for purposes of section 195.

15. Provide guidance under section 453:

    - 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.

16. Issue proposed regulations under section 472 regarding the carryover of last-in first-out (LIFO) layers following a section 351 or section 721 transaction.

17. Issue proposed regulations under section 472 to provide rules relating to internal management reports.

18. Issue final LIFO inventory price index computation (IPIC) pooling regulations under section 472.

19. Provide guidance under section 6655 regarding corporate estimated tax payments. [Note: See AICPA comments to the IRS submitted on October 20, 2014.]

20. Provide guidance pertaining to section 172(f) loss carryback waivers.

    - Issue time and manner guidance under section 172(f)(6) for waiving the 10-year carryback with respect to non-product liability specified liability losses; and

- Issue an overlap rule with the section 172(b)(3) waiver with respect to non-product liability specified liability losses.

Tax Practice Responsibilities Committee (Thomas J. Purcell, III, Chair, (402) 280-2062, ThomasPurcell@creighton.edu; or Henry J. Grzes, Lead Manager – AICPA Tax Practice & Ethics, (919) 402-4889, Henry.Grzes@aicpa-cima.com.) NOTE: Comments are listed in order of priority.

1. Provide guidance or information regarding the IRS's and Office of Professional Responsibility's (OPR) interpretation of the court's decision in *Ridgely v. Lew*, No. 1:12-cv-00565 (CRC) (D.D.C. 7/16/14), with respect to the preparation of amended returns under a contingent fee arrangement. There remains uncertainty among practitioners regarding how OPR views the submission of Form 2848 in relation to its authority to enforce the contingent fee rule. For example, is the jurisdiction granted by Form 2848 limited to the taxpayer issues covered on the face of Form 2848? Does Form 2848 submitted for one taxpayer subject the practitioner to OPR enforcement of the contingent fee rule with respect to other taxpayers? Does the timing of submitting Form 2848 have an effect on jurisdiction?

2. Provide guidance related to certain core principles (including "significant" and "avoidance") for defining "tax shelter" under section 6662(d), including that the term tax shelter is intended to apply to an entity, plan or arrangement involving an abusive application of the federal income tax laws, but that the determination of whether a tax shelter exists depends upon all pertinent facts and circumstances. The definition is important for purposes of the taxpayer accuracy-related penalties under sections 6662 and 6662A, reasonable cause showing under section 6664, the tax return preparer penalty under section 6694, the section 7525 federal tax practitioner privilege, and the Circular 230 written tax advice rules.

3. Provide additional guidance in connection with reportable transactions and the reporting of same as follows:

   - Eliminate from the category of reportable transactions the "loss transaction," defined in Treas. Reg. § 1.6011-4(b)(5). As currently defined, the category captures a large number of transactions that reflect true, economic losses, thereby increasing the cost of compliance and monitoring to taxpayers, tax practitioners and the IRS and diluting the relevance of information received. The costs involved in administering the program are not commensurate with any benefits generated, particularly in light of the decreased taxpayer services resulting from budget cuts.

   - Eliminate the need for taxpayers to submit Form 8886 twice – once with the taxpayer's return and once to the Office of Tax Shelter Analysis. Asserting a

penalty under section 6707A is possible if one of the two submissions is missed. The requirement for taxpayers to make two submissions of the same form creates an unnecessary burden and risk of penalty.

- Taxpayers are required to disclose reportable transactions on Form 8886 for tax years in which they participate in those transactions. Because of the way that participation is defined in Treas. Reg. § 1.6011-4(c)(3), passive investors in pass-through entities are required to disclose a reportable transaction entered into by the entity. This can lead to a multitude of repetitive disclosures for the same transaction, particularly when there are multiple tiers of pass-through entities in the chain of ownership. The IRS previously addressed the problem of these repetitive disclosures triggered by the contingent deferred swap transaction in Notice 2002-35 by adopting special rules for defining participation in Notice 2006-16. Extending the approach adopted in Notice 2006-16 to other reportable transactions to avoid the need for passive investors to file separate Forms 8886 is necessary so long as: (a) their only interest in the transaction is by virtue of their passive ownership interest; and (b) the pass-through entity confirms to these investors that it will disclose the transaction on Form 8886.

- Further, extending the disclosure safe harbor adopted in Notice 2006-16 with respect to a specific listed transaction to reportable transactions of all types is important. In that notice, a taxpayer who participates in the identified listed transaction solely by reason of that taxpayer's direct or indirect interest in a pass-through entity is not required to submit a disclosure statement provided that the taxpayer receives acknowledgment that the pass-through entity has or will comply with its separate disclosure obligation under Treas. Reg. § 1.6011-4.

4. Regarding guidance under Treas. Reg. § 1.6011-4, withdraw the proposed regulations regarding patented transactions as reportable transactions. Due to changes in the statute, this provision is deadwood.

5. Section 6676(a) was amended by section 209(b)DivQ, of the Protecting Americans From Tax Hikes Act of 2015, (P.L. 114-113, 12/18/2015) as follows:

> "If a claim for refund or credit with respect to income tax is made for an excessive amount, unless it is shown that the claim for such excessive amount ~~has reasonable basis~~ *is due to reasonable cause*, the person making such claim shall be liable for a penalty in an amount equal to 20 percent of the excessive amount."

With this change, there is no longer a level of confidence associated with this penalty. The other accuracy-related penalties of sections 6662 and 6662A each have a standard. The absence of the penalty in section 6676 leaves uncertainty as

to when the IRS would consider a penalty appropriate. Guidance is requested as to the level of authority needed for any particular item in order to establish reasonable cause. The prior version of the section provided that reasonable basis was sufficient. With the amendment, there is uncertainty whether a penalty is imposed for a claim for refund or credit that was supported by reasonable basis.

6. In connection with Circular 230, action is requested on the following items:

   - Eliminate from Circular 230, section 10.51, the enumerated items of misconduct or failure to act that are addressed through penalties or other sanctions under the Code. As currently drafted, the regulations appear to inappropriately serve as an enforcement tool for regulatory requirement.

   - Provide guidance regarding both the possible criteria used to determine the competence of practitioners subject to Circular 230, section 10.35, as well as the timing of the development of that competence. Examples of the determination of whether a practitioner demonstrates the required knowledge, skill, thoroughness and preparation would assist the practitioner community in complying with this provision. Furthermore, statements that have been made by OPR representatives that competence is measured at the time the service is provided begs the question of application in complex and continuing transactions that involve services provided over long periods of time.

   - Provide additional guidance regarding the imposition of monetary penalties under Circular 230 as amended by section 822 of the AJCA of 2004. [Note: See AICPA comments on Notice 2007-39 submitted on August 22, 2007.]

7. Provide guidance, with the opportunity for comment before finalizing the guidance, regarding criteria the IRS will use in determining whether to:

   - Assert a section 6694 preparer penalty;

   - Refer a matter to OPR, 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.

   Guidance regarding the interpretation of applied standards beyond, for example, "assessment of penalties" as an enumerated standard, set forth on page 14 of Publication 3112, to deny a practitioner participation in the e-file program, is essential to provide consistency of application of the standards to limit abuse of discretion by an IRS employee and to adequately inform practitioners of the standards to which they are expected to adhere.

8. Provide needed guidance regarding the safeguarding of the taxpayer's rights in an OPR investigation of the preparer. To illustrate, to gather evidence against the preparer, the IRS examines the tax returns of the preparer's clients. Asking those taxpayers to give testimony about the targeted tax preparer's preparation procedures is recommended. In an effort to build a case against the targeted tax practitioner, we are concerned that the OPR investigator may inadvertently compromise the taxpayer's rights in the examination. For example, the OPR investigator may require that the taxpayer accompany the representative to the initial tax interview, contrary to the taxpayer's right to representation as described in the Internal Revenue Manual (IRM) 4.10.2.7.5. The IRS may also require, in an affidavit, completed at the initial interview, that the taxpayer provide answers relating to the tax preparer's procedures. A taxpayer who is under examination at that time may fear reprisal if the affidavit is not completed.

9. Provide guidance in connection with changes made under the Protecting Americans From Tax Hikes Act of 2015, (P.L. 114-113, 12/18/2015) 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). This law change prevents the claim for these credits if the Social Security Number (SSN) or Taxpayer Identification Number (TIN) is issued after the filing due date of the return. Provide guidance as to how a preparer is to know if a new client just received the SSN or TIN and advise as to what protection there is afforded a practitioner in this matter.

   For additional information, see Sections 204, 205 and 206 DivQ of P.L. 114-113 and General Explanation of Tax Legislation Enacted in 2015 - Joint Committee on Taxation (JCS-1-16, page 225 et seq.).

10. Provide guidance regarding signature authority and signature protocols in the following areas:
    - Provide guidance regarding who can sign the e-file authorization form. When using the Practitioner PIN method for e-filing (Publication 1345), the taxpayer is required to sign Form 8879, *IRS e-file Signature Authorization*, but neither Publication 1345 nor the related Regulations nor the Form 8879 instructions specifically state who can sign on behalf of an entity taxpayer. The requirement is buried in the jurat for the taxpayer's signature. We request that Form 8879 instructions incorporate information as to who can sign each form.

    - While the IRS accepts electronic signatures on certain documents requiring a signature by a taxpayer or tax practitioner, manual signatures are still required for certain documents (e.g., Form 8879-C).[9] However, the Electronic Signatures in Global and National Commerce Act of 2000 (ESIGN) provides that electronic signatures are not denied enforceability notwithstanding any statute, regulation, or other rule of law. 15 U.S.C. 7001(a). This statute

[9] See IRS website "New esignature Guidance for IRS efile".

applies to Federal agencies and limits or supersedes the authority of an agency to adopt regulations or guidance that are inconsistent with ESIGN. 15 U.S.C. 7004(b); 12 CFR 609.910(e). We request that the IRS follow federal law to adopt regulations consistent with ESIGN, to permit the use of electronic signatures for all returns and other documents required or permitting signatures under the Internal Revenue Code, the Treasury regulations thereunder or Circular 230.

11. In light of recent court decisions (*Loving v. Internal Revenue Service*, 742 F.3d 1013 (D.C. Cir. 2014) & *Ridgely v. Lew*, No. 1:12-cv-00565 (CRC) (D.D.C. 7/16/14)) which have eliminated the substantive requirements to obtaining a PTIN, we request that the IRS reconsider the section 6109 requirements for non-signing preparers and eliminate the PTIN requirements for staff who mainly provide data entry for review by others.

12. Additional clarification of Notice 2009-5 (IRB 2009-03) is requested as well as incorporating 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).

Trust, Estate and Gift Tax Technical Resource Panel (Mary Kay Foss, Chair, (925) 648-3660, marykay@cpaskllp.com; or Eileen Sherr, Senior Manager – AICPA Tax Policy & Advocacy, (202) 434-9256, Eileen.Sherr@aicpa-cima.com.) NOTE: Comments are listed in priority order.

Domestic

1. Issue final regulations on compliance with consistent basis reporting between an estate and persons acquiring property from decedents. Additional guidance beyond the proposed regulations and IRS Notice 2015-57, Notice 2016-19, and Notice 2016-27 is needed. [Note: See AICPA comments to the Treasury and IRS on the needed guidance submitted on January 29, 2016.]

   We note that the 2016-2017 IRS Priority Guidance Plan includes this guidance project.

2. Revise IRS Form 8971, *Information Regarding Beneficiaries Acquiring Property from a Decedent*, and instructions. [Note: See AICPA comments to Treasury and the IRS on the form and instructions submitted on January 29, 2016.]

3. Issue further guidance on the portability of the deceased spousal unused exclusion amount under section 2010(c)(4). [Note: See AICPA comments to the IRS submitted on September 14, 2012 and on March 19, 2015] We appreciate that the IRS issued Rev. Proc. 2014-18, providing an automatic extension of time for

certain estates without a filing requirement to elect before December 31, 2014, portability of the decedent's unused exclusion amount for the benefit of the decedent's surviving spouse, including same sex married couples. We recommend the IRS provide an automatic extension of time until 15 months after the decedent's death for estates without a filing requirement to elect portability.

4. Issue PLRs on issues under section 2601, which governs GST tax, for modifications to GST exempt trusts, including dynasty trusts. The IRS should also hold pre-submission conferences on estate, gift, and GST tax issues. These pre-submission conferences allow taxpayers to meet with the IRS prior to submitting a ruling request and are helpful both to taxpayers and the IRS. We understand that this year, the IRS suspended work on these types of PLRs due to budget cuts and a prolonged strain on agency resources, and we are hopeful that the IRS will restart issuing these rulings again soon.

5. Issue final regulations, including examples, on the simplified method for computing net investment income under section 1411 for distributions from charitable remainder trusts. [Note: See AICPA comments to Treasury and the IRS submitted on March 31, 2014.]

   We note that the 2014-2015, 2015-2016, and 2016-2017 IRS Priority Guidance Plan includes this guidance project under General Tax.

6. Provide guidance regarding transfers by a trustee of an irrevocable trust to another irrevocable trust (often referred to as decanting). [Note: See AICPA comments to Treasury and IRS submitted on June 26, 2012, in response to IRS Notice 2011-101, released December 27, 2011.]

   We note that the 2011-2012 IRS Priority Guidance Plan included the notice on decanting of trusts under sections 2501 and 2601, but no project on decanting was included in the IRS Priority Guidance Plans since then.

7. Provide a final ruling on the consequences under various estate, gift, and generation-skipping transfer tax provisions of using a family-owned company (private trust company) as the trustee of a trust. [Note: See AICPA pre-release comments submitted on March 29, 2006, and AICPA comments on the proposed revenue ruling submitted on November 12, 2008.]

   We note that the 2013-2014 IRS Priority Guidance Plan included this guidance project, but it was not included in the 2014-2015, 2015-2016, and 2016-2017 IRS Priority Guidance Plan.

8. Provide guidance on 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.

Such guidance is particularly needed in the case of late filing of gift tax returns. Because of the late filing, there is no opportunity to elect out of deemed allocation (i.e., each spouse's GST exemption is allocated to his or her portion of the transfer) (Treas. Reg. § 26.2632-1(b)(4)(iii), Ex. 5). [Note: See AICPA comments to the IRS submitted on June 26, 2007.]

9. Add to regulations under section 6034 an administrative exception to the Form 1041-A, *U.S. Information Return Trust Accumulation of Charitable Amounts*, filing requirement for complex trusts that claim charitable deductions under section 642(c) solely for contributions flowed through to them from partnerships and S corporations. Treasury and the IRS could amend these as part of a project to update the section 6034 regulations to reflect the changes made to that section by the Pension Protection Act of 2006. In order to implement this administrative exception as soon as possible, Treasury and the IRS should issue a notice stating that they plan to revise the regulations to allow this administrative exception to the Form 1041-A filing requirement for these trusts and that these trusts no longer are required to file Form 1041-A. [Note: See AICPA comments to the IRS submitted on September 14, 2010 and AICPA comments to Congress submitted on October 19, 2012.]

10. 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. Many PLRs have been issued allowing extensions of time to elect out of the automatic rules, but a simplified method for obtaining such extensions without the need for a private letter ruling would benefit taxpayers and the IRS. [Note: See AICPA comments to the IRS submitted on June 26, 2007.]

11. Provide guidance regarding the appropriate means and timing of GST allocations to pour over trusts from a Grantor Retained Annuity Trust (GRAT) terminations. Guidance is also needed under section 2632(c)(5)(A)(i) and examples, 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. [Note: See AICPA comments to the IRS submitted on June 26, 2007.]

We appreciate that the 2014-2015 and 2015-2016 Priority Guidance Plan includes this item, but it was not included the 2016-2017 IRS Priority Guidance Plan.

12. Provide final regulations under section 2642(g) regarding extensions of time to make allocations of GST exemption.

We note that the 2014-2015 and 2015-2016 IRS Priority Guidance Plan includes this guidance project, but it is not included in the 2016-2017 Priority Guidance Plan.

13. Provide guidance for marital trusts under section 2056(b)(7) similar to Rev. Rul. 2006-26, regarding plans other than individual retirement accounts (IRAs) and defined contribution plans (i.e., defined benefit plans and deferred compensation plans).

14. Provide clarification in the instructions to Form 709, *U.S. Gift (and Generation-Skipping Transfer) Tax Return*, 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. 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.

15. 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. Six types of GST trusts are defined in the statute, but taxpayers would benefit from additional guidance on many gray areas. Also, until regulations are issued under section 2632(c)(3)(B)(i)(III), as required by such section, we believe this provision has no effect.

16. 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, including whether an allocation on the gift tax return timely filed for the prior year is effective as of January 1 and what valuation date is used for purposes of determining the new inclusion ratio.

17. 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).

18. Change Form 8868, *Application for Automatic Extension of Time To File an Exempt Organization Return*, to allow taxpayers to obtain an extension of time to file Form 5227, *Split-Interest Trust Information Return*, and Form 4720, *Return of*

Certain Excise Taxes Under Chapters 41 and 42 of the Code, by filing only one Form 8868, rather than two.

19. 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 Related

20. 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.

21. Provide guidance on issues relating to foreign trusts and the HIRE Act, including guidance on the section 679(d) presumption that a foreign trust has U.S. beneficiaries. [Note: See AICPA comments to the U.S. Department of Treasury ("Treasury") and the IRS submitted on March 28, 2011.]

22. 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 (FBAR), and U.S. beneficiary reporting of foreign accounts and foreign financial assets owned by foreign trusts, as required by section 6038D. The AICPA is concerned that a U.S. beneficiary of a foreign trust may not have access to books and records of the foreign trust necessary to make an accurate determination of filing requirements and reportable amounts. [Note: See AICPA comments to the Financial Crimes Enforcement Network (FINCEN), Treasury, and the IRS submitted on November 19, 2010 and November 16, 2009, and AICPA comments to Treasury and the IRS submitted on March 28, 2011.]

23. Change the due date of Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner (Under Section 6048(b))*, from March 15 to April 15, to coincide with the due date for calendar year filers of related returns. If a change in the due date is not possible, then an extension or penalty relief is requested for taxpayers who file by April 15. In addition, the IRS should consider adding a box to Form 7004 to permit an extension of time to file Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, in cases where the beneficiary's income tax return (Form 1040 and Form 1040NR) is not extended. [Note: See AICPA comments to the IRS submitted on June 12, 2008, March 3, 2008, January 31, 2007, and June 17, 2003. This change in the Form 3520-A due date was included in proposed legislation, S. 420, introduced 2/28/13 by Senators Enzi and Tester, and H.R. 901, introduced 2/28/13 by Rep. Jenkins, as well as in former Chairman Camp's March 12, 2013 House Ways and Means Committee small business tax reform discussion draft and the Senate

Finance Committee March 21, 2013 tax reform options paper on simplifying the tax system for families and businesses.] The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 modified the original and extended due dates for partnerships, C corporations, and trusts and estates effective for 2016 tax years, but did not change the due date for Form 3520-A. The same due dates that apply for individuals should apply to the original and extended due dates for Form 3520-A.

24. Change the form for tax reporting for foreign nongrantor trusts. The current tax reporting on Form 1040NR for foreign nongrantor trusts (and foreign grantor trusts with a U.S. owner) is extremely difficult because the IRS form is not designed for fiduciary tax return reporting. The IRS instructions direct the preparer to "change the form" for Subchapter J provisions, but attempts to do so result in inconsistent or inadequate changes and lead to return processing errors and confusion. The creation of a new Form 1041NR, *U.S. Income Tax Return for Foreign Estates and Trusts*, which could include information currently reported on Forms 3520 and 3520-A, would eliminate confusion and mistakes in processing returns and would enhance tax compliance filing requirements. [Note: See AICPA comments to the IRS submitted on September 22, 2008, March 3, 2008, and January 31, 2007.]

25. Provide guidance on whether a foreign grantor trust with a U.S. grantor is required to file Form 1041 or Form 1040NR and whether a foreign grantor trust with a foreign grantor and some U.S. income is required to file Form 1041 or Form 1040NR.

26. 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.

27. Provide guidance on how the generation skipping transfer (GST) tax applies to grandfathered domestic trusts that become foreign trusts. This issue is analogous to a GST-grandfathered trust that migrates from one state to another; thus, Treasury and the IRS should consider similar rules and safe harbors.

28. Provide further guidance in addition to the proposed regulations (REG-112997-10) regarding several aspects of section 2801. [Note: AICPA submitted comments to Treasury and the IRS on May 17, 2016.]

    We note that the 2014-2015, 2015-2016, and 2016-2017 IRS Priority Guidance Plan includes a section 2801 guidance project.

29. Provide guidance 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 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. We also suggest safe harbor guidelines to administer this new law. [Note: See AICPA comments to the IRS submitted on March 28, 2011.]

30. 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. Guidance is needed as to the appropriate forms and reporting on applicable tax returns, as well as on possible expedited procedures for successful receipt of a private letter ruling for an expatriate to determine the value of his or her interest in the trust. This guidance should also define "adequate security" for a "tax-deferred agreement" for the covered expatriate's return under section 877A(b).

31. Provide regulations under section 6677 regarding the failure to file information returns with respect to certain foreign trusts. The HIRE Act amended section 6677, but guidance is not adequate in Notice 97-34, the only IRS guidance on making a determination on penalties under section 6677. As described in the IRS memorandum SBSE-20-0709-016, issuing newly-designed determination letters is based upon a review of a taxpayer's compliance with section 6677, but taxpayers need regulations to provide them with guidance before the applicable letters are issued.

32. The IRS should modify Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*, and Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, to assist the IRS in tracking U.S. withholding credit to which a U.S. beneficiary is entitled due to withholding flowing through a foreign nongrantor trust and to reduce the amount of correspondence needed between taxpayers and the IRS to justify withholding credit reflected on a beneficiary's U.S. income tax return.

- The IRS should require trustees of foreign nongrantor trusts to provide copies of Forms 1042/1042-S to U.S. beneficiaries receiving distributions and corresponding U.S. withholding credits from the trust, evidencing withholding on income paid to the trust.
    - The IRS should modify Forms 1042/1042-S to include the beneficiary's name and social security number and include an indication of whether a payee is a foreign nongrantor trust with a U.S. beneficiary.
    - The IRS should instruct U.S. beneficiaries to attach a copy of the Form 1042-S to the beneficiary's Form 3520 as well as to the beneficiary's Form 1040.

- The IRS should clarify and provide guidance regarding compliant non-U.S. trusts making distributions potentially subject to trust-specific withholding requirements under Chapter 3 (Qualified Intermediary (QI)) and Chapter 4 (Foreign Account Tax Compliance Act (FATCA)). Such IRS guidance should provide that the source and character retention rules relating to distributable net income (DNI)/undistributed net income (UNI) of foreign nongrantor trusts are not relevant for purposes of QI and FATCA. Alternatively, the guidance should grandfather any distributions from non-U.S. trusts potentially subject to withholding under both QI and FATCA until a final determination is made regarding the treatment of "Foreign Pass-through Payments" under FATCA. To the extent that grandfathering is not possible, we recommend a provision that ensures that there are no duplicate withholding requirements. For example, to the extent that there was QI withholding on the foreign nongrantor trust at a lower rate than would apply to the beneficiary, Treasury and the IRS should provide that withholding on the distribution to the beneficiary is applied on the difference between the two applicable rates.