TaxNewsFlash

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Notice 2017-38: Interim list of Treasury regulations, responding to executive order to reduce tax burden

The IRS today released an advance version of Notice 2017-38 that contains an interim list of tax regulations that have been identified as either imposing an undue financial burden on taxpayers, or adding excessive complexity to the tax system. This list is in response to an April 2017 executive order, and the IRS release notes that the U.S. Treasury Department has identified eight regulations that satisfy the criteria of the executive order—including regulations issued under sections 385, 987, and 367.

Read **Notice 2017-38** [PDF 38 KB]

Background

President Trump on April 21, 2017, signed an **executive order** (Executive Order 13789) directing U.S. Treasury to examine recent tax regulations to determine whether any of the regulatory projects: (1) imposed an undue financial burden on U.S. taxpayers; (2) added undue complexity to the federal tax laws; or (3) exceeded the statutory authority of the IRS.

Treasury was directed to review "significant tax regulations" issued on or after January 1, 2016, and to issue an interim report no later than 60 days after April 21. Treasury was then directed to submit a report to the president recommending specific actions to mitigate the burden imposed by regulations identified in the interim report. The final report to the president is due by September 18, 2017.

According to the executive order, Treasury was to take "appropriate steps" to delay or suspend the effective date of the identified regulations, and to modify or rescind the regulations, through notice and comment rulemaking.

Notice 2017-38

Today's IRS notice explains that for the period from January 1, 2016, through April 21, 2017:

- There were 105 final, temporary, and proposed regulations issued.
- Of these, 53 regulations were "minor or technical in nature."
- The 52 remaining regulations were treated as "potentially significant" and were re-examined for the purpose of the interim report.
- Of these, eight (8) have been identified as meeting one of the first two criteria of the executive order and qualify as "significant."

KPMG observation

Treasury declined to state that any of the potential significant regulations exceeded the statutory authority of the IRS (the third criterion of the executive order).

Eight regulations identified for burden reduction

The IRS notice states that Treasury concluded that the eight regulations identified for burden reduction purposes satisfy at least one of the first two criteria specified by Executive Order 13789. Therefore, Treasury intends to propose reforms—ranging from streamlining "problematic rule provisions" to full repeal of the regulations—in the final report submitted to the president.

The eight regulatory projects are:

- Proposed regulations (REG-129067-15) on the definition of a political subdivision that is eligible to issue tax-exempt bonds for governmental purposes under section 103.

- Temporary regulations (T.D. 9770) under section 337(d) on transfers of property by C corporations to real estate investment trusts (REITs) and regulated investment companies (RICs); the regulations provide guidance relating to measures enacted in 2015, intended to prevent certain spinoff transactions involving transfers of property by C corporations to REITs from qualifying for nonrecognition treatment.

- Final regulations (T.D. 9778) concerning IRS summons under section 7602, allowing outside economists, engineers, consultants, or attorneys to receive books, papers, records, or other data summoned by the IRS and participate fully in the interview of a person who the IRS has summoned as a witness to provide testimony under oath.

- Proposed regulations (REG-163113-02) concerning estate and gift tax under section 2704, and specifically concerning restrictions on the ability to dispose of or liquidate family-controlled entities, by creating an additional category of restrictions that also would be disregarded in assessing the fair market value of an interest.

- Temporary regulations (T.D. 9788) on liabilities recognized as recourse partnership liabilities, to provide rules for how liabilities are allocated under section 752 solely for purposes of disguised sales under section 707, and rules for determining whether “bottom-dollar payment obligations” provide the necessary “economic risk of loss” to be taken into account as a recourse liability.

- Final and temporary regulations (T.D. 9790) under section 385 on the treatment of certain interests in corporations as stock or indebtedness. These regulations address the classification of related-party debt as debt or equity for federal tax purposes, and are comprised of: (1) rules establishing minimum documentation requirements that ordinarily must be satisfied in order for purported debt among related parties to be treated as debt for federal tax purposes; and (2) transaction rules that treat as stock certain debt that is issued by a corporation to a controlling shareholder in a distribution or in another related-party transaction that achieves an economically similar result.

- Final regulations (T.D. 9794) under section 987 on income and currency gain or loss with respect to a section 987 qualified business unit. These final regulations provide rules for: (1) translating income from branch operations conducted in a currency different from the branch owner’s functional currency into the owner’s functional currency; (2) calculating foreign currency gain or loss with respect to the branch’s financial assets and liabilities; and (3) recognizing such foreign currency gain or loss when the branch makes a transfer of any property to its owner.

- Final regulations (T.D. 9803) under section 367 on the treatment of certain transfers of property to foreign corporations; the regulations eliminate the ability of taxpayers under prior regulations to transfer foreign goodwill and going-concern value to a foreign corporation without immediate or future U.S. income tax.

Comments are requested about whether these eight regulations need to be rescinded or modified, and if modified, how this is to be done to reduce burdens and complexity. Comments are due by August 7, 2017.

Comments are also requested as to whether any existing regulations warrant “a broader review.” These comments are due by July 31, 2017.

KPMG observation

Today’s notice does not specify what action Treasury will take or even when any such changes would be effective. This indicates that the most prudent course of action generally would be for taxpayers to continue applying the regulations in their current form pending further, definitive guidance.

information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

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