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TAXATION SECTION

2023 DC DELEGATION

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EXECUTIVE SUMMARIES

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These ideas for these proposals were generated by the work the authors do for clients including pro bono ones, and from teaching and research activities. Generally, these recommendations would simplify the tax law, make it more equitable, update certain tax laws, and/or improve compliance and enforcement.

For the full text of the papers, please visit:

https://calawyers.org/section/taxation/washington-dc-delegation/

1. Expand the dependent care credit by removing the "same principal place of abode" requirement of IRC §21 by Saba Shatara, Campbell McLaren and Elizabeth Yang

Internal Revenue Code ("IRC") Section 21 allows individuals to claim an income tax credit for expenses for household and dependent care services (the "Credit"). Notably, the Credit covers taxpayers who pay "employment-related expenses." These costs can include medical, in-home care, and related costs the taxpayer pays on behalf of the "*qualifying individual*." At present, the Credit is almost exclusively used for expenses related to dependent children, with very few taxpayers taking advantage of the Credit for elder care related expenses. Indeed, as of 2021, sources provide that primarily middle and upper-middle-income taxpayers claim the Credit, for an average of $500 to $600 per tax year, and the Credit is used almost exclusively for care of dependent children under 13 years old.

As demographics shift in this country, with some experts predicting a nearly twofold increase in individuals over the age of 65 by 2030, concerns are arising around what national elder care costs will look like in the near future. However, whether expenses paid for elder care can be applied to Credit is subject to two significant limitations. First, the qualifying individuals must have the "*same principal place of abode* as the taxpayer for more than one-half of the taxable year" [emphasis added]. Thus, expenses paid on behalf of elderly individuals who do not live with the taxpayer do not qualify for the Credit. Second, the Credit requires that medical expenses be paid on behalf of an individual who is "*physically or mentally incapable of self-care* as certified by a licensed health professional" (Treas. Reg. 1.21-1). The definitions for incapacity in this context give rise to ambiguity regarding whether expenses for in-home care of individuals facing certain conditions (such as Alzheimer's or dementia) meet the required standard, which will be discussed in greater detail below.

IRC Section 213 lays out a complementary deduction available to taxpayers which comes with fewer limitations and is thus more applicable to individual taxpayers (the "Medical Expense Deduction"). Under IRC Section 213, taxpayers may deduct non-reimbursed "medical expenses for the diagnosis, cure, mitigation, treatment or prevention of disease affecting any part or function of the body" from their taxable income. However, the deduction is only available to the extent a taxpayer itemizes their deductions.

The Credit aims to encourage individuals to seek employment instead of staying at home to care for dependents. However, the principal place of abode requirement under IRC Section 21, coupled with the uncertainty around whether care costs for individuals with certain ailments qualify for the Credit, restrict its accessibility to Americans to assist with elder care-related expenses. The paper presents the limitations posed in IRC Section 21's current formulations and provides considerations for possible amendment.

2. Proposed revenue procedure to standardize the information corporations give shareholders to show that stock is QSBS by Andrew Gradman

As a solo tax lawyer, I often represent shareholders who want help showing that their shares constitute Qualified Small Business Stock (QSBS) under IRC Section 1202. In these cases, I am struck by how unprepared both shareholders and the corporation are to answer this question. Even more striking, when it's unclear whether the shares qualify, the shareholder often claims these tax benefits, without really knowing whether entitled to them.

The source of the problem is misaligned incentives. For an investor to show that his stock is QSBS, he must rely on information provided by a corporation. But the corporation may not wish to spend resources answering the shareholder's questions, confess failure or ignorance, or make representations which will be relied upon by the IRS. Under IRC Section 1202(d)(1)(C), the Treasury Department has the power to address this imbalance by imposing reporting new requirements on the corporations, but to date it has not done so.

This paper proposes one example of a reporting requirement which Treasury or the IRS might adopt, in the form of a new revenue procedure. Compliance with this revenue procedure would be entirely optional for taxpayers. It would set forth a certificate, to be signed by a representative of the corporation, disclosing compliance with certain elements of the QSBS rules, which taxpayers claiming QSBS can attach to their returns.

The remaining details of this revenue procedure will depend on how the IRS chooses to answer the following three questions.

1. First, how detailed should these statements be?
2. Second, should concessions be extended to shareholders who obtain the certificate, and/or to corporations which supply it?
3. Third, should burdens be imposed on shareholders who obtain the certificate, and/or to corporations which supply it?

The main beneficiary of this proposal would be the IRS, in that widespread adoption of this certificate will incentivize corporations to maintain records on an ongoing basis and to respond candidly to shareholder inquiries. Conversely, if a corporation cannot submit a perfect certificate, this puts the shareholder on notice that he should not claim QSBS benefits. The IRS can then treat a shareholder's failure to attach a complete certificate as grounds for prioritizing an audit.

3. Proposed changes to the tax treatment of losses incurred by taxpayers who invest in cryptocurrency, virtual currency, and other digital assets under IRC §165 by Charles J. Taylor

Last year, there were four notable crypto currency bankruptcies: (i) Celsius Network, (ii) Three Arrows Capital, (iii) Voyager Digital, and (iv) FTX and FTX.US. The primary reasons for the cryptocurrency losses were because (i) the digital assets the customers' held in their accounts abruptly and significantly dropped in value as a result of events that precipitated the bankruptcy or (ii) the customers' custodially held assets disappeared through misappropriation, hacking of the platform, or were simply unaccounted for. It is not known whether customers of bankrupt cryptocurrency entities will ever see their money again. And, under current rules, it is not known when (or if) these investors will ever be able to claim a tax loss deduction as a result of the losses suffered from their cryptocurrency investments. This proposal makes it possible for cryptocurrency investors who suffered losses from investments in a failed digital currency exchange to claim tax loss deductions immediately.

This proposal encourages the IRS to allow a well-defined and specific set of taxpayers who suffered investment losses from cryptocurrency to claim losses immediately, in accordance with the rules established in Revenue Ruling 2009-9 for Ponzi schemes. More specifically, taxpayers who initiated investments in digital currency through a cryptocurrency exchange and suffered losses from a Ponzi type scheme would, under this proposal, have the ability to claim immediate tax loss deductions on their 2022 and/or 2023 tax returns.

Regulators and prosecutors are still in the early stages of investigations related to the cryptocurrency exchanges and their related entities that failed last year (in 2022). Even though it's unlikely many cryptocurrency investors will recoup their lost investments, it may be sometime before these investors will have the ability to claim a tax deduction for their investment losses until ongoing criminal and civil inquiries conclude. For example, how should the IRS characterize losses incurred by victims of the failed cryptocurrency exchange FTX.us, and its related entities, where customers' custodially held assets disappeared through misappropriation, hacking of the platform, or were simply unaccounted for? The character of an investor's loss related to fraudulent activity depends, in part, on the nature and type of the investment. Under this proposal, a limited set of taxpayers who fit a defined set of criteria and fall within a specific set of facts, would be allowed to use a uniform and simplified method to determine the timing, character, and maximum available deduction for their cryptocurrency losses.

4. Proposed changes to the penalty for failure to report foreign gifts received by a U.S. person under IRC §6039F by Daniel W. Soto and Michael E. Romero

Enacted as part of the Small Business Job Protection Act of 1996, Internal Revenue Code (IRC) Section 6039F imposes a penalty upon United States taxpayers who fail to report large gifts received from foreign persons. Under Section 6039F, a United States taxpayer who receives foreign gifts with an aggregate value of more than $10,000 during the tax year must report such gifts. To report such gifts, a taxpayer is required to file Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts. Form 3520 has the same due date as the taxpayer's Form 1040, Individual Income Tax Return, but is filed separately from the taxpayer's income tax return.

The penalty for failing to timely file Form 3520 is two-fold. First, Section 6039F(c)(1)(A) allows the Service to determine the tax consequences of a foreign gift if a taxpayer does not adequately furnish the information as required. Second, section 6039F(c)(1)(B) allows the Service to penalize taxpayers five percent of the value of the gift for each month the gift is not reported, up to twenty-five percent of the value of the gift. The degree of the penalty imposed by Section 6039F is excessive and concerning for multiple reasons.

The penalty imposed under Section 6039F is excessive given the nature of the transaction being reported. Like domestic gifts, foreign gifts are generally not taxable to the recipient in the United States and may not be taxable in the foreign jurisdiction. Further, many taxpayers and tax return preparers are not aware of Form 3520 reporting requirements as it is a niche form and reporting requirement. Additionally, the United States otherwise has no financial interest in the gift the recipient receives because these gifts are generally not taxable. Regardless, failure to report the gift can result in a penalty of up to twenty-five percent of the gift value, a potentially substantial financial burden for taxpayers.

This paper proposes a statutory change to the penalty imposed by Section 6039F. First, this paper proposes that Section 6039F(c)(1)(A) allowing the Service to determine the tax consequences of a foreign gift be stricken. Second, this paper proposes that Congress change the current penalty to the lesser of (1) five percent of the value of the gift for each month the gift is unreported not to exceed twenty-five percent of the gift value, or (2) $10,000. This paper also proposes that section 6039F be changed to include a continuation provision similar to IRC Section 6038(b)(2). Such statutory changes would make the penalty more comparable to other penalties for international information returns, minimize the financial burden for non-willful taxpayers, and allow the United States to enforce section 6039F against taxpayers who fail to report after they are informed of their filing requirement.

5. Proposal for the IRS to provide clarification to the IRS website and related resources regarding an entity's ability to retain its historic EIN in a domestic entity reorganization and the process for documenting such change by John C. Miles

The Internal Revenue Code has long provided the IRS with this Authority to require entities to obtain an identifying number, often referred to as an "employer identification number" ("EIN"), including for any person (including entities) "required to make a return, statement, or other document." The process of obtaining an EIN is relatively simple for many taxpayers, especially with the advent of the IRS online application system.

This Author is aware of three primary sources of authority for determining when an entity is required to obtain a new employer identification number ("EIN"). In this Author's opinion, the IRM contains the most helpful information for the circumstances discussed in this Paper, but it is also the least "accessible" to taxpayers.

EINs serve an obvious role with respect to federal taxes and the IRS' ability to track and collect tax dollars. Over time, however, EINs have also become an essential and integrated part of operating businesses *outside* of simply identifying such entity to the IRS.

In this Author's opinion, there are certain ambiguities in the context of specific entity reorganizations as to whether an entity may retain its EIN pursuant to the IRS Guidance. To that end, this Author makes four (4) proposals in this "Paper" to clarify a taxpayer entity's ability to retain their EIN:

1. That the IRS update the IRS Website in way that more clearly reflects an entity's ability to retain its EIN after certain entity reorganizations;

2. That the IRS clarify the meaning of the .27 IRM, and publish such information on the IRS Website;

3. That the IRS delete erroneous or misleading information regarding EINs from the IRS webpage entitled, "Business Name Change," last reviewed or updated 08-24-2022 (the "Business Name Change Website"); and

4. That the IRS provide a process, including by way of a simple 1-page form, for taxpayers to document the "transfer" of their EIN from a predecessor entity to a successor entity in the context of corporate reorganizations discussed herein.

Regardless of current IRS Guidance, <u>there is no tax planning, including opportunities for tax avoidance, connected with an entity retaining its EIN after a corporate reorganization</u>. For this reason, this Author believes that the IRS should interpret the proposals contained in this Paper liberally with taxpayers' legitimate business needs, both tax and non-tax, in mind.

6. Proposed changes to IRC §36B refundable credit for coverage under a qualified health plan by Andrew D. Allen, Nicola Liu, Kendall Keshtkar, and Anthony Cipriano

Enacted as part of the *Affordable Care Act* ("*ACA*"), Internal Revenue Code ("*IRC*") Section 36B provides eligible taxpayers a premium tax credit ("*PTC*") that lowers their health insurance premiums. The PTC is generally available to taxpayers whose modified adjusted gross income ("*MAGI*") is at least 100 percent but not more than 400 percent of the Federal Poverty Line ("*FPL*"). Taxpayers can elect to receive the PTC as an advanced payment ("*APTC*"). The APTC amount is based on taxpayers' estimated MAGI for a taxable year and is paid directly to their health insurance provider. When taxpayers who qualified for advanced credits file their federal income tax returns, they must reconcile the PTC amount they are eligible for against the APTC they actually received. Generally, a taxpayer must pay back any excess amount of APTC, subject to certain limitations. The MAGI calculation includes the entire amount of any lump-sum Social Security Disability Insurance ("*SSDI*") payment the taxpayer received in the current tax year. Although the APTC is a significant benefit to millions of taxpayers, the MAGI calculation can create unexpected and harsh results for the same low-income taxpayers the APTC is designed to help.

To get SSDI, recipients often endure a long application process with the Social Security Administration ("*SSA*") to prove eligibility. Due to these delays, some SSDI recipients are issued a one-time retroactive lump-sum payment to cover the period from their initial application to the date of approval, which can span multiple tax years. For purposes of calculating MAGI, lump-sum SSDI payments are treated as received in a single tax year, even if such awards are attributable to multiple tax years. This results in some SSDI recipients (many of whom are low-income and dependent on the APTC for health insurance) discovering they are expected to repay some or all of their APTC payments because their MAGI was artificially inflated by the lump-sum SSDI payment.

The PTC is designed to assist low- and middle-income taxpayers, yet the application of IRC Section 36B can eliminate this assistance and produce a considerable, unexpected tax liability. SSDI recipients have no control over when they receive their SSDI one-time retroactive lump-sum payment, and the longer the SSA takes to approve an application, the larger the lump sum payment becomes. The delayed processing time of the SSA increases the likelihood that a one-time retroactive lump-sum SSDI payment will push a taxpayers' MAGI above 400 percent of the FPL, rendering them ineligible for the PTC and creating a tax liability to repay excess APTC.

This paper reviews the PTC and comments on how the inclusion of one-time retroactive lump-sum SSDI payments in MAGI unfairly impacts vulnerable taxpayers. This paper proposes legislative changes to protect taxpayers from this inequitable result. SSDI applicants cannot anticipate when their SSDI payments will be received and are therefore blindsided by a resulting tax liability stemming from excess APTC. Ultimately, in these circumstances, the tax liability is arbitrary and unpredictable, as it depends on how quickly the SSA can process the taxpayer's SSDI application.

7. Get out of 1993, and into 2023: Moving the substantiation requirements for charitable contributions out of the past and into the present by Gregory Zbylut

This paper addresses current issues regarding the substantiation requirements for charitable contributions. Under §170(f)(8), charitable contributions of $250 or more must be acknowledged by a contemporaneous, written acknowledgment from the donee organization. 'Contemporaneous' means "before the due date of the return, plus extensions."

In addition, noncash donations carry additional requirements. For donations under $500, no additional documentation is required. For donations above $500 and below $5,000, Form 8283 must be filed which specified information. For donations with a declared value above $5,000, an additional requirement applies: the taxpayer must also provide a 'contemporaneous' appraisal.

On paper, these requirements seem to be straightforward and simple. In practice, they are anything but. When §170 was enacted in 1956, making a cash charitable contribution meant writing a check payable to a charity and dropping the check in the mail (usually accompanied by a voucher provided by the charity). Charities reached out to potential donors primarily in one of three ways: written pleas for donations (letters to previous donors); door-to-door solicitations and in-person requests at fundraising activities. In addition, the only substantiation for a donation was

a canceled check; the $250 written acknowledgement requirement wouldn't enter the code until 1995.

Ironically, the change in substantiation rules arrived just in time for a new method of commerce: the Internet. The impact of the Internet wasn't immediate; mail delivery increased year-over-year until 2006. But contributions have changed dramatically. Today, while charities still mail donation requests and hold fundraisers, door-to-door solicitation has been replaced by websites such as Go Fund Me, apps such as iDonate and even the charity's own website as primary drivers of contributions. Checks, in turn, have been replaced by credit cards, often authorized through third parties, and set up for repetitive donations.

A written acknowledgement from the donee organization presents several problems today: first, the donor may not be donating directly to a charity, but through a third party acting as a conduit; and second, the code does not address donations through third party conduits. Consequently, the third party may not collect the information necessary to allow the donee organization to acknowledge the donation. Even where that happens, many charitable organizations have not adopted proper acknowledgement letters in accordance with Section 170(f)(8). Finally, the requirement of a "contemporaneous" acknowledgement can be problematic where the item is unique, the item is difficult to value, or the taxpayer, receives a letter which does not comply with the Code.

This paper suggests: (1) allow for reasonable cause as a defense for online donations; (2) allow for a broader scope for substantial compliance; and (3) provide guidance to new nonprofits.

8. Proposed changes to ensure appropriate safeguards for imposition of appraiser penalties under IRC § 6695A by Avram Salkin, Robert S. Horwitz and Gary Markarian

Section 6695A imposes a monetary penalty on an appraiser who knows or reasonably should know that an appraisal they prepared would be used in connection with a return or refund claim if the value claimed on the return or refund claim is based on that appraisal and results in a substantial valuation understatement as defined in §6662(e), a substantial estate or gift tax valuation understatement as defined in §6662(g), or a gross valuation misstatement as defined in §6662(h). Under §6695A(c), no penalty is imposed if the appraiser "establishes to the satisfaction of the Secretary that the value established in the appraisal was more likely than not the proper value." The penalty is "assessable," meaning that an appraiser has no right to pre-payment judicial review.

The sole defense to an asserted penalty (other than that the appraiser did not know and had no reason to know the appraisal would be used in connection with a tax return or refund claim) is to prove to the Secretary's satisfaction that the value in the appraisal "was more likely than not the proper value." Accordingly, §6695A imposes liability on an appraiser regardless of whether the appraisal was a reasonable determination of value or whether proper methodologies were used.

Additionally, the statute does not state when the determination of whether there has been a substantial or gross valuation misstatement is to be made by the IRS. However, the Internal Revenue Manual para. 20.1.12.3 states that the penalty against an appraiser will not be proposed until the examination of the return or claim for refund to which it relates (the "related tax examination") is completed at the group level and that the appraiser penalty case can proceed when the related tax examination case is closed agreed, closed no response after default, is in Appeals or is in Tax Court. Normally, the penalty will not be assessed if the related tax examination case is in Appeals or in Tax Court unless no more than 180 days is left on the §6695A statute of limitations. Thus, the penalty can be assessed against an appraiser even if there has been no final resolution of the related tax examination case.

We propose that §6695A be amended to provide that the penalty will not be imposed if the appraiser can establish either a) that there was no substantial or gross valuation misstatement on the return or claim for refund to which it relates or b) that there was reasonable cause for the valuation in the appraisal. We further propose that §6695A be amended to provide that the determination with respect to a return or claim for refund will be deemed made when a deficiency is assessed against the taxpayer with respect to the return and, with respect to a refund claim, after there is final action on the claim (including a decision by a court of competent jurisdiction). We finally propose that the statute of limitations on assessment of the penalty be the later of three years after the underlying return or claim for refund was filed or six months after the determination with respect to the related tax examination return is final.

9. Proposed changes to judicial jurisdiction for assessable penalties and foreign information penalties by Edward M. Robbins, Jr. and Michael Greenwade

Currently, civil tax penalties are assessed using one of two methods. On the one hand, there are penalties that are assessed in conjunction with the underlying tax and are subject to deficiency procedures, thus, such penalties cannot be assessed until a Notice of Deficiency ("NOD") is issued. On the other hand, there are other penalties that are assessed immediately without a right to pre-assessment judicial review.

The penalties subject to deficiency procedures, such as the accuracy penalty under IRC § 6662 or the fraud penalty under IRC § 6663, give the taxpayer the opportunity for pre-assessment review of the penalty by the Tax Court. Assessment and collection are then postponed until the decision of the Tax Court becomes final. Other penalties, such as those found under Code's Chapter 61A (e.g., IRC §§ 6038, 6038A, 6038(B), etc.) and Chapter 68B (e.g., IRC § 6707A), are assessed without the taxpayer being afforded the right to challenge the penalty in court before assessment. Penalties for violations of foreign information reporting are included in this list.

To challenge these other penalties in court, the taxpayer must first pay the penalty in full and file a refund claim. Not until the refund claim has been denied or six months has passed, can the taxpayer file a refund suit in U.S. District Court or U.S. Court for Federal Claims to challenge these penalties. As a direct result of the absence of pre-assessment and pre-collection judicial review for these select penalties, particularly as to the foreign information reporting penalties and Chapter 68 assessable penalties, a clear inequity and financial hardship persists as a direct result of the disparate treatment of such penalties.

This paper advocates for a unified deficiency procedure for all penalties and suggests that Congress amend the Internal Revenue Code to make the deficiency procedures apply to foreign information reporting penalties in Chapter 61A and assessable penalties in Chapter 68B. A unified procedure eliminates the need to distinguish between penalties that are subject to deficiency procedures and those that are not, allowing for pre-assessment judicial review by the Tax Court, and ensuring all taxpayers' due process rights.

10. Proposed changes to computation of the imputed underpayment under the BBA partnership audit regime pursuant to IRC §6225(b) by Sandra R. Brown-Bodner, Michel Stein, and Philipp Behrendt

This paper addresses the need for consistency in the IRS's examination of partnerships under the Bipartisan Budget Act of 2015 ("BBA"). Specifically, this paper will address inconsistencies inherent in the computation of the Imputed Underpayment (IU), as well as the lack of clear directives as to when it would be an abuse of discretion for the examination agent to include otherwise excluded non-income items to compute an IU.

The definitions under relevant Treasury Regulations treat certain non-income partnership items as if they would necessarily create an additional income tax. Examples of these non-income items include basis adjustments, recharacterizing the partnership's liabilities, changes in characterization of partnership income as subject to self-employment, and adjustments in capital accounts. Adjustments to these items could create an IU under the applicable regulations, even though in some cases these items may not have directly changed any partner's tax liability if they were reported correctly by the partnership in the first place.

The IU is determined by grouping partnership-related items and netting all adjustments within each grouping and subgrouping, as described in §6225(b)(1) and Reg. § 301.6225-1(b) and (e), resulting in the Total Netted Partnership Adjustment ("TNPA"). The TNPA is multiplied by the highest tax rate applicable, resulting in the IU.

For the netting process, all partnership-related adjusted items are classified as either positive or negative adjustments. Positive and negative adjustments are defined in Treas. Reg. § 301.6225-1(d)(2). Negative adjustments are the decrease of an item of gain or income, or an increase of an item of loss or deduction. Positive adjustments are conversely defined as any adjustment that is not a negative adjustment. Imputed Underpayment By default, all adjustments that are not a decrease of an item of income or gain or an increase of an item of loss or deduction are positive adjustments. This includes non-income items or items that, if properly reported on the original return, may not have resulted in any increase in tax owed by any partner.

Under Reg. § 301.6225-1(b)(4), if any positive adjustment, including a non-income item, is related to, or results from, a second positive adjustment, one of the positive adjustments may be treated as zero. However, the examiner retains discretion to include the non-income item in the computed IU. This provision does not sufficiently alleviate the concern, since the regulations do not specify the appropriate standard for the exercise of the IRS's discretion.

This paper proposes the implementation of clear directives as to what would be an appropriate exercise of discretion for consistency to include or exclude non-income items in calculating the IU. Adopting this proposal would result in the consistent treatment of taxpayers, which is a key component of a fair and just tax system and thus, important to an equitable and effective tax administration.

11. Rethinking tax return preparer penalties and other ways to increase oversight of tax professionals by Kevan P. McLaughlin

Ethical tax return preparers are an integral part of ensuring a properly functioning tax system, and a critical component of overall tax compliance. In that context the process of encouraging the "good" and disincentivizing the "bad" requires a rethinking of return preparer penalties and general oversight of the industry. This paper explores the following topics and makes several recommendations.

First, this paper argues that the IRS needs to realign penalties such that the magnitude of consequences and perception of accountability truly impacts noncompliant preparers. The current statutory penalties under IRC §§ 6694 and 6695 are insufficient to act as an adequate deterrent for the majority of tax return preparers. Moreover, the application of certain provisions, namely IRC § 6695(g), is likely to create unwanted collateral consequences. This paper supports increasing the statutory minimum penalties under IRC §§ 6694(a) and (b) and suggests expanding the statute of limitations for IRC § 6694(a) penalties. Furthermore, this paper suggests expanding the scope of preparer penalties to capture returns and other claims beyond the current limits of income, estate, gift, and excise taxes. Finally, regulations under IRC § 6695(g) must be revised to prevent the otherwise unavoidable consequence of alienating taxpayers from ethical return preparers.

Second, the holdings of *Loving*, *Sexton*, *Ridgley*, and other cases continue to undermine the IRS's ability to regulate all tax professionals even beyond OPR and Circular 230. The apparent lack of statutory authority under 31 U.S.C. § 330 also undermines the probability of detection – a key element in effectively regulating behavior. Statutory changes to 31 U.S.C. § 330 are desperately needed as are various changes to Circular 230 itself. As an alternative, this paper suggests a new statutory position, with authority to regulate the industry, in IRC § 7803.

Third, experience has shown that OPR is often one of the last participants in any practitioner or preparer misconduct situation, and OPR has admitted that internal referrals within the IRS (other than IRC § 6694(b) penalties) are few and far between. Effectively receiving referrals for conduct-based investigations is the first step in regulating preparers and concurrently disseminating that information to the public. To do so this paper suggests reorganizing OPR directly within the Department of the Treasury, mandating OPR accountability with annual reports, and increasing opportunities for collaboration with the IRS.

Finally, the need to protect taxpayer information under IRC § 6103 is no doubt important, but as applied in the context of tax return preparers, creates several problems. First, unless clearer guidance is given, additional litigation from sanctioned practitioners is possible. Second, resistance to providing OPR with case related information reduces detection of unethical practitioners. Third, redactions in the name of IRC § 6103 undermine the effectiveness of publishing decisions concerning practitioner misconduct. This paper concludes with suggestions to change IRC § 6103 to reduce barriers for OPR to receive critical information while concurrently increasing the effectiveness when publishing decisions of successful disciplinary cases.

12. Proposed guidance regarding the treatment of encumbered assets in late allocation of GST exemption and qualified severances under IRC §§ 2631(a) and 2642(a)(3), (b) by Elizabeth Glasgow and Brian Tsu

This paper summarizes the wealth transfer tax rules pertaining to the valuation of encumbered trust property and the practical implications of those rules in the context of (1) a late allocation of generation-skipping transfer tax exemption and (2) a qualified severance for purposes of the generation-skipping transfer tax. This paper will also propose alternatives derived from existing law to provide guidance to taxpayers in these affected areas.

The generation-skipping transfer tax is a wealth transfer tax levied on certain transfers, whether outright or in trust, to a transferee who is two or more generations below the generation of the transferor. The generation-skipping transfer tax is computed by multiplying the value of the transferred property by the applicable rate. The applicate rate is the product of the maximum estate tax rate multiplied by the inclusion ratio, which is a function of the fair market value of the subject property and the generation-skipping transfer tax exemption of the transferor as applied to the subject property.

Accordingly, the valuation of trust property for generation-skipping transfer tax purposes is critical. In many instances, the valuation of trust property is clear for such purposes. For example, section 2642(b)(1) and (2) generally provides that the valuation of property for generation-skipping transfer tax depends on whether such transfer is subject to gift or estate tax (i.e., gifted property shall be valued as finally determined for gift tax purposes, while property transferred at death shall be valued as finally determined for estate tax purposes).

This paper notes that (1) encumbered property is reported differently for gift and estate tax purposes and that (2) neither a late allocation of generation-skipping transfer tax exemption nor a qualified severance is a transfer, and as such neither is, in and of itself, subject to gift or estate tax. With this in mind, what body of rules ought to apply in such circumstances? After an analysis of these rules, this paper will propose options derived from existing law to provide guidance to taxpayers in the context of (1) a late allocation of generation-skipping transfer tax exemption and (2) a qualified severance for purposes of the generation-skipping transfer tax.

13. Making IRC §197 more relevant and simpler for today's digital economy by Annette Nellen

Section 197 was enacted in 1993 to address a significant issue of whether certain intangibles such as workforce in place and customer lists were amortizable and if yes, how to determine the amortizable life. The IRS and some courts viewed these types of intangibles as too similar to goodwill which at the time was not amortizable for tax purposes. Section 197 generally allows acquired intangibles, including goodwill, to be amortized over 15 years using the straight-line method. While the list of amortizable Section 197 intangibles is broad, it does not address all types of intangibles acquired for use in a business, particularly those that only came into existence after 1993 such as domain names for websites (URLs), various social media assets such as Twitter usernames or handles, and some metaverse assets.

This proposal suggests changes to Section 197 to bring clarity and certainty to the treatment of modern types of acquired intangibles for use in a business. This treatment is in line with why Section 197 was enacted and will eliminate uncertainty on the treatment of commonly acquired intangible assets used by a business. This clarification will also improve equity and efficiency in the treatment of all types of assets used in a business.

This paper also recommends that modernization of Section 197 include repeal of what should be considered a "deadwood" provision today, specifically, repeal of the anti-churning rule at Section 197(f)(9).

This paper also proposes that when favorable tax treatment is provided to tangible business assets consideration should also be given to expanding the covered assets to include certain acquired intangibles that play an operational role similar to equipment and other tangible personal property.

Finally, given the expansion of the types of intangible assets used by businesses today relative to 1993, and the continuing innovation and changes in the digital world, this paper proposes a study of today's intangibles, similar to what the GAO released in 1991 that informed the design and enactment of Section 197 in 1993. A study would allow for review of categorization and description of all intangible assets used in a business today, appropriate amortization lives, treatment of self-created intangibles for use in the business and acquisition of any intangible that is not part of the acquisition of a trade or business (separately acquired) and be informed by economic analysis and public comment.

14. Definitive guidance on U.S. tax classification and reporting requirements for cross-border retirement contributions, earnings and distributions in countries with hybrid social security regimes by Marsha Dungog and Jennifer Silvius

Post-pandemic, as workers have re-evaluated where, when, and how they work, this evolution continues to expose the notable differences between the tax systems in the United States ("U.S.") and in other countries which existed even before the pandemic. Notably, these differences include such as differences with respect to the various features of each country's "social security" plans and the resulting questions of how those plans should be classified, taxed, and reported for U.S. tax purposes. These differences are even more pronounced now that certain governments are allowing workers and retirees early access to retirement savings and implementing comprehensive pension reforms both to buffer pension financial sustainability and compensate for economic hardships. For taxpayers who are also "U.S. Persons" this equation becomes even more complicated as such amounts attract various income and withholding taxes, penalties and reporting burdens when remitted across borders. In the most serious cases, these issues can lead to financial ruin, resentment and in some cases, even renunciation of US citizenship.

This paper will: (1) provide an overview of foreign pension plans in countries that have implemented pension reform; (2) review the existing statutory framework for the U.S. tax classification and reporting of foreign private pension contributions, earnings and distributions (collectively, "Cross Border Pensions") by U.S. Persons under Sections ("§") 72, 402, and Subchapter J of the Internal Revenue Code of 1986, as amended (the "Code"); (3) examine the pension provisions under the U.S. Model Income Tax Convention ("MITC") which provide guidance on U.S. policy positions when negotiating bilateral tax treaties and ascertain whether such provisions provide relief for U.S. Persons with beneficial interests in Cross Border Pensions; (4) propose an alternative analytical framework for the U.S. tax classification, treatment and reporting of foreign pension plans that are based in OECD countries with privatized social security regimes; and (5) advocate for long overdue Congressional action that would make U.S. Persons with beneficial interests in Cross Border pensions on equal footing, tax-wise, with U.S. Persons who participate in domestic tax-qualified plans. In the short term however, administrative guidance can be issued by the Internal Revenue Service ("IRS") and Treasury Department based on the recent passage of SECURE ACT 2.0 of 2022 (the "SECURE ACT 2.0"), which recalibrates traditional U.S. domestic retirement planning vehicles such as plans created under Code §401(k) and individual retirement accounts ("IRAs" and brings them one step closer to the pension and retirement regimes of the Organization for Economic Co-operation and Development ("OECD") member countries with mandatory employer funded accounts.

15. Applying a safe harbor under the qualified appraisal rules by Robin Klomparens

Section 155 of the Deficit Reduction Act of 1984 ("DEFRA") sets forth the substantiation requirements for certain noncash charitable contributions. Per the Senate Finance Committee, Section 155 was enacted to reduce incidents of overvaluation. Reg 1.170A-13 sets forth the reporting requirements for a taxpayer seeking to take a charitable deduction for noncash donations of property in excess of $5,000. Specifically, the taxpayer must obtain a qualified appraisal as well as attach a fully completed appraisal summary to his or her tax return. The taxpayer must also maintain certain specified records. In determining whether a taxpayer has complied with a given Treasury Regulation, it must first be determined whether the regulation in question requires literal compliance or merely substantial compliance.

The question of whether Reg. §1.170A-13 demands literal compliance has been answered squarely in the negative (for example, *Bond*, 100 T.C. 32). The *Bond* court determined that because Reg §1.170A-13 is directory in nature (in that its purpose is to streamline paperwork processing rather than to adequately identify whether a charitable contribution has actually been made), strict compliance with said Reg §1.170A-13 is not required. Instead, so long as the taxpayer can show that he or she has substantially complied with the regulations, the taxpayer is entitled to the charitable deduction.

The courts have been inundated with cases for years and continue to be where the taxpayer failed to comply with the regulations. There also have been multiple substantial compliance cases tried as well. Unfortunately, many taxpayers do not realize the complexity of the rules in the charitable arena when donating non-cash assets on charitable donations in excess of $5,000. If a qualified appraisal is not timely attached to the return, then no deduction is allowed and to make matters worse, penalties can apply for negligence or a substantial understatement. Many taxpayers trapped in this situation have prepared their own returns, as they have been told by the government that they can do so, and of course many have no concept of the strict qualified appraisal requirements.

To continue to avoid abuses of overvaluations by taxpayers on non-cash charitable donations, but to bring fairness to the tax system, this paper proposes that a safe harbor be instituted under the regulations. The safe harbor will provide guidance on when a taxpayer has substantially complied with the qualified appraisal requirements under Reg §1.170A-13. Substantial compliance will occur if a taxpayer ¨(1) provides sufficient information on his, her or their Individual Federal Income Tax Return in question to establish that a charitable contribution had been made, (2) provides sufficient information on their Individual Federal Income Tax Return in question to alert the IRS to the claimed deduction so that the IRS can easily monitor the possibility of an overvaluation and (3) if the property is sold within two years of the donation it is sold for either a value not less than ninety percent (90%) of the charitable contribution claimed; or a qualified appraisal is provided within sixty days of when the audit begins and the value determined in the qualified appraisal is not less than ninety percent (90%) of the charitable contribution claimed.

16. Proposal for clarification regarding the extended due date to file Form 3520 for dual residents taking a treaty position as nonresidents and filing Form 1040NR by Raúl Villareal Garza and Pedro E. Corona

There is no clear extended due date to file Form 3520 (as defined below) by dual resident taxpayers who take the position as nonresidents under an income tax treaty entered by the United States and, thus, are required to file Form 1040NR ("Dual Residents").

U.S. persons may be required to report certain events with respect to foreign trust and foreign gifts, by filing IRS Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts* ("Form 3520"). This reporting obligation may also be applicable to Dual Residents.

The Internal Revenue Code ("IRC") provides that Form 3520 is due "at such time and in such manner as the Secretary shall prescribe". The IRS has issued administrative guidance, including IRS Notice 97-34 and the Internal Revenue Manual ("IRM"), stating that the due date for filing Form 3520 is the same due date as the taxpayer's income tax return, including extensions.

The extended due date for a U.S. person is <u>October 15</u>. Generally, the extended due date for a nonresident alien, including a Dual Resident, is <u>December 15</u>.

The instructions to Form 3520 ("Instructions to Form 3520") provide that the extended due date for filing Form 3520 is October 15. Notwithstanding, the Instructions to Form 3520 do not expressly address the extended due date for Dual Residents.

The authors have seen confusion among taxpayers and tax return preparers with respect to the extended due date for filing Form 3520 by Dual Residents. The authors suggest that issuing administrative guidance, including but not limited to updating the Instructions to Form 3520, expressly addressing this issue would benefit both taxpayers and the tax authority.

17. Expanding the tax attributes succeeded by a bankruptcy estate: A proposal to the IRS to issue additional regulations under IRC §1398(g) by M. "Dennis" Nguyen

When a debtor files for bankruptcy, a bankruptcy estate is created and generally succeeded to all the debtor's legal and equitable properties interest. However, the tax code only allows the estate to succeed to a limited number of "tax attributes" which exist as of the first day of the debtor's taxable year when the bankruptcy commences.

IRC Section 1398(g) enumerates seven specific tax attributes that pass to the estate from the debtor, and IRC Section 1398(g)(8) allows for other tax attributes to the extent provided in regulations prescribed by the IRS. The courts have generally not allowed non-enumerated tax attributes to be used by the bankruptcy estate. Tax attributes that do not pass to the bankruptcy estate generally remain with the debtor outside of the bankruptcy.

Since IRC Section 1398 enactment in 1980, the IRS has only issued three regulations expanding this code provision. Treas. Reg. §§ 1.1398-1 & -2, promulgated in 1994, pertain to passive activity losses, passive activity credits, and "at risk" losses. Treas. Reg. § 1.1398-3, promulgated in 2002 after years of litigation, permits the succession of IRC Section 121 exclusion of gain from the sale of the debtor's primary residence.

Without further regulations, bankruptcy estates must try to fit a non-enumerated tax attribute peg into one of the existing statutory holes. If the attempt fails, the estate will incur additional tax liabilities, thereby reducing the available funds for distribution to creditors and allowing the debtor to retain the tax attribute outside of the bankruptcy to their own benefit.

This paper proposes that the IRS issue additional IRC Section 1398(g) regulations to update the archaic statute with up -to-date regulations that account for tax attributes that properly belong to the bankruptcy estate but did not exist at IRC Section 1398's enactment. These tax attributes should be made available to the bankruptcy estate to ensure the equitable distribution of funds to creditors and debtors.

18. Improving filing efficiencies and reporting compliance for taxable gifts and filing of Form 709 by Kristin N. Capritto and Wayne R. Johnson

The current process for filing gift and estate tax returns is cumbersome and antiquated. Though most taxpayers electronically file their income tax returns (with most preparers being summarily required to do so), gift and estate tax returns must be filed by mailing hardcopy-paper returns to the appropriate IRS Service Center. If a taxpayer later supplements or amends their gift or estate tax return, the amended return must also be hardcopy-paper filed with the appropriate IRS Service Center. Taxpayers may, however, pay gift and estate tax liabilities using the Electronic Federal Tax Payment System online. The Service, taxpayers, and practitioners would benefit from improving the efficiency and ease of this process.

The easiest way to alleviate the administrative burdens on the Service affiliated with the hardcopy-paper filing of gift and estate tax returns is to facilitate e-filing of Forms 709 (United States Gift (and Generation-Skipping Transfer) Tax Return, hereinafter "gift tax return"), and 706 (United States Estate (and Generation-Skipping Transfer), herein after "estate tax return"). Doing so would also reduce the confusion and ministerial burdens for taxpayers and practitioners, arguably increasing compliance with reporting requirements for taxable gifts and estates. Moreover, since Forms 709 and Forms 706 must include a significant amount of supporting documentation (appraisals and valuations, trusts, and other testamentary documents, etc.), it would be far more efficient and less costly for taxpayers to electronically file these returns and upload supporting documentation to a secured portal.

This paper will propose the Service allow for and facilitate the electronic filing of Forms 709 and 706, and will analyze the efficiency, compliance, and administrative benefits the Service, taxpayers, and practitioners would likely derive from the Service's decision to do so.

19. The need for cross-agency enforcement of FATCA tax fraud with new tools provided by the Anti-money Laundering Act of 2020: Fraud that utilizes the U.S. financial system via professional enablers by Patrick W. Martin and Daniel C. Silva

The Departments of Justice and the Treasury have a proud and successful history of investigating, prosecuting, and forfeiting proceeds of financial crimes. Working jointly or independently, these Departments have shown the ability and willingness to team up in innovative ways to combat all types of fraud. This paper proposes a new innovation to confront a specific type of international tax fraud—known colloquially as "snow washing"—with a targeted approach that would apply the lessons and successes gained by IRS-CI led financial crimes task forces that developed and saw outsized success across the country.

"Snow washing", and the tax loopholes described in this proposal, are variations on traditional international tax evasion schemes involving legal vehicles that shield the identity of beneficial owners of assets, which allows these owners to avoid declaring assets or income by deceiving the taxing authorities in their country of residence. As such, foreign governments are the victims of tax, wire, and related fraud.

United States Code, Titles 31, 18, and 26, as enhanced by international treaties and governmental agreements, provide the necessary legal framework to disrupt these international tax evasion schemes. This paper explains why the U.S. should use these laws to do exactly that, and how. Beyond increasing tax collection, combatting fraud, and providing restitution to victims, these prosecutions will further serve to contradict the perception that the U.S. is "becoming the world's new tax haven."

The best way to shine a light on blind spots in international tax reporting, noncompliance, and fraud is through the successful prosecution of the criminals who park global fraud proceeds in U.S. financial institutions. And if the fraudsters cannot be extradited, or otherwise refuse to appear in the U.S. to respond to criminal allegations, then asset forfeiture laws can punish them and their professional "enablers"—e.g., accountants, tax advisors, financial institutions, bankers, and lawyers.

In the authors' experience, a dedicated, multi-agency initiative is necessary to bring the required skills and commitment to unravel these novel and complex frauds. Sophisticated crimes demand innovative responses. Department of the Treasury agencies like IRS-CI" and the FinCEN have every incentive to deter the professional enablers that offer expensive guidance for exploiting transparency loopholes to defraud governments of taxes through shell companies, sham trusts, and other complex transactions that conceal beneficial ownership.

Failure to address the perception that the U.S. is a safe haven for white-collar criminal proceeds presents the risk that those proceeds will reside in the U.S. financial system with impunity. This impunity is drawing the attention of Congress. As the laws catch up to the desire to confront this issue, the Departments of Justice and the Treasury can deploy a task force model to bring our most effective resources to protect one of our most critical national assets—the U.S. financial system.