

AMERICAN BAR ASSOCIATION
SECTION OF TAXATION

COMMENTS ON NOTICE 2017-38 REGARDING
PROPOSED REGULATIONS UNDER SECTION 2704

Comments' W/ H³ V X E P L W W H G R Q E H K D O I R I V
\$ V V R F L D W L R Q 6 H F W S E C O N R I D R Q D W L E E N G A P P R O V E D B Y
of Delegates or Board of Governors of the American Bar Association. Accordingly, they
should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Benjamin
G. Carter, Chair of the 6 H F W L R Q ¶ V & R P P L W W H H R Q (V W D W H D Q G * L I
Substantive contributions were made by Hannah W. Mensch and George D. Karibjanian
The Comments were reviewed by Julian Y. Kim, the S H F W L R Q ¶ V 9 L F H & K D L U * R Y
Relations).

Although the members of the Committee who participated in preparing these
Comments have clients that might be affected by the federal tax principles addressed by
these Comments or have advised clients on the applicability of such principles, no such
member (or the firm or organization to which such member belongs) has been engaged by
a client to make a government submission with respect to, or otherwise to influence the
development or outcome of, the specific subject matter of these Comments.

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2 Q \$ SULO 3 UHVLGHQW 7 UXPS WKH 3 UHVLGH
WKH 3 ([HFXWLYH 2 UGHU' 7 KH ([HFXWLYH 2 UGHU
Treasury to review all significant tax regulations issued by the Treasury Department
3 7 UHDXU\ ' RQ RU DIW MUK HD 3 QXD 5 HJXODWLRQV' DQG WR
report to the President that identifies those 2016 Regulations that (1) are an undue
financial burden on U.S. taxpayers; (2) add undue complexity to the Federal tax laws; or
H [FHHG WKH VWDWXWRU\ DXWKRULW\ RI WKH , QWHUQD

In response to the Executive Order, the Service issued Notice 201738 (the
3 1 RWLFH' LQ ZKLFK 7 UHDXU\ LGHQWLILHG HLJKW
5 HJXODWLRQV' WKDW 7 UHDXU\ FRQFOXGHG LPSRVH DQ
or add undue complexity to the Federal tax laws. Notably, the ~~Service~~ Regulations
included proposed regulations under section 2704 issued on September 6, 2016 (noting
WKDW WKH SURSRVHG UHJXODWLRQV DOVR LPSDFWHG
5 HJXODWLRQV'

On November 2, 2016, the American Bar Association (ABA) issued Notice 2016-38 (the
3 7 D [6 HFWLRQ' VXEPLWWHG GHWDLOHG FRP 3 7 DQ WV RQ
6 HFWLRQ & RPPH Section Comments addressed a variety of ways that the
Proposed Regulations, once finalized, could be improved to provide additional clarity,
efficiency, and fairness. Moreover, thousands of other organizations and individuals
provided substantive comments to the Proposed Regulations. The level of attention and
scrutiny given to the Proposed Regulations, not only by the written comments and by the
testimony at the full day public hearing on December 1, 2016, can be described as
3 XQS UHFHGHQWHG'

7 KH 7 D [6 HFWLRQ & RPPH QWV DUH LQ DJUHHPHQW ZL
Notice that, absent changes, the Proposed Regulations could impose an undue financial

¹ 8 QOHVV RWKHUZZLVH VSHFLILFDOO\ VWDWHG DOO UHWHQFHV KHU
WR WKH , QWHUQDO 5HYHQXH & RGH RI DV DPHQGHG DQG DOO UH
to the Treasury Regulations promulgated under the Code.

² Internal Revenue Bulletin 2016-36 (REG-16311302). Note that the Notice refers to the Proposed
Regulations by only referencing regulations under section 2704 although the citation in the Notice to REG
16311302 covers regulations issued under both sections 2701 and 2704.

³ American Bar Association, Section of Taxation Comments Concerning Proposed Regulations Under
Section 2701 and 2704 (November 2, 2016) available at
[https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/110216comments.authcheckd
am.pdf](https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/110216comments.authcheckd
am.pdf)

⁴ On January 9, 2017, as part of the Current Developments Panel at the 51st Annual University of Miami
Philip E. Heckerling Institute on Estate Planning in Orlando, Florida, Catherine V. Hughes, Esq., the Estate
and Gift Tax Attorney Advisor for Office of Tax Policy at the Department of Treasury, stated that during the
90-day comment period, in excess of 10,000 comments were submitted.

burden on U.S. taxpayers and add undue complexity to the Federal tax laws. Unlike many of the comments provided to Treasury by other organizations which concluded that the Proposed Regulations should be withdrawn, the Tax Section Comments instead focused on specific changes to the Proposed Regulations that could improve the overall regulatory structure. Some of the recommendations are as follows:

- x ~~& O D U L I \ L Q J W K D W W K H 3 U R S R V H G 5 H X X O D W I K R A Q V G P~~
for all entity Interests that would otherwise be subject to section ~~2704~~⁶;
- x Addressing the impact of the regime created by the Proposed Regulations on the income tax basis adjustment at death for those Entity Interests that are not subject to ~~the~~ income tax basis consistency requirements under section ~~1014(f)~~⁷;
- x ~~3 U D F W L F D O L V V X H V D V V R F L D W H G Z L W K W K H 3 U R~~
Nonfamily Member Interests~~s~~ and
- x Issues surrounding the valuation methodology in the case of estate tax inclusion under the ~~three~~ year rule of section ~~2704(a)~~⁸.

The Tax Section reaffirms all of its recommendations to Treasury contained in the Tax Section Comments. Should Treasury elect to revise the Proposed Regulations in an effort to issue final regulations as to ~~the~~ subject material, the Tax Section respectfully suggests its recommendations be considered in such final regulations. Moreover, in the interest of time, the Tax Section now submits these comments regarding the Proposed Regulations. The Tax Section may ~~submit~~ comments on others of the ~~Selected~~ Regulations at a later date.

⁵ The capitalized terms in the bullet pointed items herein are defined within the Tax Section Comments.

⁶ Section IV.A of ~~the~~ Tax Section Comments.

⁷ Section IV.B of the Tax Section Comments.

⁸ Section IV.D of the Tax Section Comments.

⁹ Section IV.G of the Tax Section Comments.