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BY E-MAIL AND REGULAR MAIL

CC:PA:LPD:PR (REG-101896-09)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Submission on Proposed Guidance for Basis Reporting for Securities

Please find enclosed Wolters Kluwer Financial Services comments on the Proposed Regulations for Basis Reporting by Securities Brokers and Basis Determinations for Stock.

These comments have been prepared on behalf of Wolters Kluwer Financial Services by Stevie D. Conlon, Tax Director, GainsKeeper, Wolters Kluwer Financial Services, with assistance from Dale Collinson, KPMG, LLP and Steven M. Rosenthal, Ropes & Gray LLP.

Best regards,

Steven M. Rosenthal

Enclosure

cc: Stevie D. Conlon, Wolters Kluwer Financial Services
Dale S. Collinson, KPMG, LLP

WOLTERS KLUWER FINANCIAL SERVICES

COST BASIS PROPOSED REGULATION COMMENTS TO INTERNAL REVENUE SERVICE AND TREASURY

FEBUARY 8, 2010

Set forth below are our comments on the proposed cost basis regulations released on December 16, 2009 (REG 101896-09)(the "Proposed Regulations"). These comments supplement our earlier comments on the need to prioritize selected pieces of the Proposed Regulations. That prioritization is necessary to allow time to program and implement the required technology to prepare cost basis information. Our earlier technical comments have been incorporated below.

Our comments do not generally address specific rules under the Proposed Regulations relating to basis averaging, its election, revocation, discontinuance or the single account election, because we anticipate that interested industry organizations will comment extensively on those rules.

We may further supplement our comments at a later time regarding basis averaging or other aspects of the Proposed Regulations if we believe it will be helpful.

We have divided our comments into two principal sections: substantive comments and technical comments.

We sincerely appreciate the opportunity to provide you these comments. As indicated by separate letter, we request the opportunity to speak at the scheduled hearing. If you have any questions, please contact us.

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Substantive Comments:

1. **More clearly define DRP (dividend reinvestment plan) stock.**

DRP stock must be defined more clearly to implement cost basis reporting for stock. This is because stock that is not DRP must be reported on the first applicable effective date of January 1, 2011, and stock that is DRP is reported a year later. A broker must be able to readily determine whether particular shares of stock are considered DRP stock, in

order to determine the applicable effective date (Jan. 1, 2011 or Jan. 1, 2012) and whether particular shares are eligible for averaging.

The Proposed Regulations define DRP stock as "shares of stock acquired . . . in connection with a dividend reinvestment plan." Prop. Reg. Sec. 1.1012-1(e)(1)(i). The Proposed Regulations then define a "dividend reinvestment plan" broadly to cover issuer and non-issuer administered plans. Prop. Reg. Sec. 1012-1(e)(6)(i). There are more rules to determine when stock is acquired in connection with a DRP (Prop. Reg. Sec. 1012-1(e)(6)(ii)):

> Stock is acquired in connection with a dividend investment plan if the stock is acquired under that plan, arrangement, or program, or if the dividends paid on the stock are subject to that plan, arrangement or program. Shares of stock acquired in connection with a dividend reinvestment plan include the initial purchase of stock in the dividend reinvestment plan, transfers of identical stock into the dividend reinvestment plan, additional periodic purchases of identical stock in the dividend reinvestment plan, and identical stock acquired through reinvestment of the dividends paid under the plan.

We make no comment on the broad scope of these definitions and whether they can be administered properly. Under the current definitions, DRP classification will be highly factual and brokers will struggle to determine when stock is, or is not, DRP stock. We recommend that a broker be required to treat stock as DRP stock only when it has received documentation of the DRP plan and, with respect to particular stock, only when it knows or has reason to know that the stock is covered by the plan. That approach could be implemented by language such as the following:

> "(e)(6)(ii) *Acquisition of stock in connection with a dividend reinvestment plan.* Stock is acquired in connection with a dividend reinvestment plan only if it is described in paragraphs (6)(ii)(A)(relating to connection to the plan) and (6)(ii)(B)(relating to broker knowledge)."
>
> Paragraph (A) would be the current paragraph (ii) as quoted above except that the phrase "described in this paragraph (A)" would be substituted for "acquired in connection with a dividend investment plan" in the two sentences in which the latter phrase appears.
>
> Paragraph (B) would read as follows:
>
> Stock is described in this paragraph if a broker knows or has reason to know the stock has been acquired in connection with a dividend reinvestment plan because (a) it administers the plan itself, (b) its customer, the customer's agent or the plan's administrator or agent has provided to it documentation regarding the existence of the plan and the participation of the particular stock in the plan, (c) the stock is received as a dividend (or plan reinvestment of a dividend) on stock identified as DRP stock through the application of (a) or (b) or (d) the customer,

plan administrator or their agents have advised the broker that stock is being transferred to the plan.

Paragraph (e)(6)(iv) would be modified by adding the following: "However, stock will cease to be stock acquired in connection with a dividend reinvestment plan only when the broker receives notice from the taxpayer, the plan administrator, or their agents that the stock is being withdrawn from the plan or the plan is being terminated, as the case may be."

Our recommended language is only a suggestion. The essential point is that a rule is needed to provide an objective basis for the broker to readily identify stock as DRP stock (or non-DRP stock).

2. **Modify Schedule D to permit taxpayers to reconcile their basis calculations with basis reported by brokers.**

The Proposed Regulations acknowledge that a broker's computation of cost basis reported on Form 1099 takes into account only activity within a single customer account while the taxpayer/customer is required to take into account all basis and holding period adjustments required under the law in preparing his income tax return. As a result, there will likely be differences in the cost basis amounts reported by brokers and the amounts reported by taxpayers. A common example would be wash sales occurring between two different accounts of the same customer (whether with the same broker or with different brokers). Another example would be a broker's decision not to include pre-effective date wash sale related basis adjustments to covered shares.

We are concerned that such differences could occur regularly and could be significant. We believe that computational differences are fundamentally different from gross proceeds reporting where the amount of proceeds received is typically relatively clear. Matching systems could be overwhelmed, resulting in significant matching notices to taxpayers. Differences could be difficult for IRS personnel to readily analyze.

We believe that the likelihood of basis adjustments is significant enough that we recommend that Schedule D to income tax returns for individuals, trusts and estates, partnerships and S corporations be modified to include a column or section that permits a taxpayer to reconcile the cost basis amounts he has computed with the amounts reported by brokers on Form 1099s, or to explain the difference.

3. **Lot selection when transferring less than all shares to a new broker.**

The Proposed Regulations permit a taxpayer to identify specific shares to be sold, including pursuant to a standing order with a broker. See Prop. Reg. Secs. 1.1012-1(c)(1) and (c)(8). Otherwise, the default method is first-in, first-out (FIFO).

In the case of reportable transfers of securities from one account to another where less than the entire position of a security within an account is being transferred, the Proposed

Regulations provide that the transfer must be reported on a FIFO basis unless the customer notifies the applicable person furnishing the transfer statement of an adequate identification under the rules of Reg. Sec. 1.1012-1(c). See Prop. Reg. Sec. 1.6045A-1(b)(6).

Although this rule provides that identification is made in the same manner as for sales transactions, the language suggests that a separate communication from the taxpayer to the transferor is required apart from any previously provided standing order relating to sales transactions. Such additional communication is unnecessary. Any method of customer communication relating to adequate identification of shares for sales transactions should also be acceptable for transfer purposes, rather than requiring separate communication.

We recommend that a broker be permitted to rely on an existing standing order or other customer communications relating to sales transactions for purposes of selecting shares transferred under Prop. Reg. 1.6045A-1(b)(6) provided such communications satisfy the adequate identification standard of Prop. Reg. Sec. 1.1012-1(c).

4. Exclude transfer reporting for accounts held by exempt recipients.

The Proposed Regulations include securities that are transferred to or from the account of an exempt recipient (i.e., those for which a broker is not required to provide Form 1099-B) in the transfer reporting requirement. See Prop. Reg. Sec. 1.6045A-1.

We believe that many brokers do not intend to maintain cost basis reporting systems for customer accounts held by exempt recipients because of the extra cost to maintain these systems. The imposition of transfer reporting in connection with transfers to or from accounts held by exempt recipients seems unduly burdensome given that brokers are not required to provide cost basis information on Form 1099-B to exempt recipients.

We recommend that the transfer reporting requirement not be applied to transfers of securities to the account of an exempt recipient.

5. Transfer reporting for transfers of securities due to inheritance.

The Proposed Regulations include special transfer reporting rules for transfers of securities pursuant to an inheritance. See Prop. Reg. Sec. 1.6045A-1(b)(3). Essentially, the transferor must obtain instructions or valuations provided by an authorized representative of the estate or ask such representative for such information. If the information is not received by the due date of the related transfer statement, the transferor can report the security as noncovered. However, if at a later date the transferor receives instructions or valuations from the authorized representative of the estate, a transferor must send a corrected transfer statement within 15 days of the date such instructions or valuations are received. See Prop. Reg. Sec. 1.6045A-1(b)(3)(ii).

We understand the desire to conform the valuations reported by the authorized representative of the estate and the valuations reported by a transferor for cost basis reporting purposes. However, transferors would frequently be required to send corrected statements because many estate representatives will likely complete their valuations late. Also, the flow of information seems backwards since brokers, transferors and other securities market intermediaries typically provide the valuation services that will be used by the authorized representatives.

We recommend that transferors be permitted to use valuations that they or other intermediaries calculate at the time of transfer provided the authorized representative does not affirmatively dissent from the use of such valuations and that corrections would only be required if the authorized representative subsequently contacts the transferor with different valuations.

6. **Provide for *de minimis* exceptions from corrected 1099s and transfer statement reporting and a reasonable cutoff date after which corrected 1099s and transfer statements would no longer be required.**

The Preamble (1.b, at 74 Fed. Reg. 67014) notes that the Proposed Regulations rejected the suggestion that "corrected reporting not be required for *de minimis* adjustments or for statements furnished beyond a specific period after the close of the calendar year" but requests further comments regarding corrected reporting. We believe some relief should be afforded brokers for reporting changes that arise from late or corrected transfer and issuer statements as the brokers have little ability to affect the timing or quality of the statements they receive. Absent such relief, we believe that the burden on brokers to provide corrected Forms 1099 would be excessive. We also expect taxpayers will be confused and aggravated by small, and late changes, to their Form 1099s (which might be received long after they have filed their tax returns).

There are many different circumstances in which a corrected Form 1099 might be required. If a broker has provided a Form 1099 treating transferred securities as not being covered securities and thereafter receives a transfer statement treating the securities as covered, it must file a corrected Form 1099. Similarly, corrected Forms 1099 may be required if complete issuer corporate action statements are received with respect to covered securities after Forms 1099 have been provided to customers.

The Proposed Regulations include an example of a corporation that has paid a cash distribution to shareholders when the corporation was unable prior to the due date for its issuer statement to determine whether the distribution will exceed its earnings and profits (so that the distribution will be partially a dividend and partially a return of capital). The example suggests that, if the issuer subsequently determines that the distribution was partially a return of capital, it must file an amended issuer statement. See Prop. Reg. Sec. 1.6045B-1(f), Example 2. That may mean that the original issuer statement was incomplete, and brokers may have an obligation to provide corrected Forms 1099 upon receipt of the corrected issuer statement.

The requirement to correct transfer statements can result in cascading corrections in the case of multiple transfers as a transferee/transferor that receives a corrected transfer statement must then provide a corrected transfer statement to the subsequent transferee. See Prop. Reg. Sec.1.6045A-1(c). And these in turn may trigger a requirement for a corrected Form 1099.

We are concerned that the preparation of corrected 1099s and transfer statements in the absence of a cutoff date or *de minimis* exception will be unduly burdensome on brokers and transferors. We are also particularly concerned with the cost of processing corrected written, rather than electronic transfer statements for brokers and transferors because such work would be labor intensive for them.

Finally, the requirement for corrected transfer statements or corrected Forms 1099 may apply after the customer's account has been closed. Depending upon when a correction is made, a transferor or broker may no longer have access to information regarding a closed account because such information is generally purged from data systems due to storage limitations and costs.

We recommend a cut off date occurring three years after the due date for the required form or statement. We recommend a one year cut off date for corrections with respect to new information received on transfer statements that are not provided electronically in accordance with a standardized industry format. We also support a *de minimis* exception for reporting Form 1099 or transfer statement corrections. In the case of closed accounts, we further recommend a special cut off date that is linked to a set period of time after the closing of the account such as two years.

7. Require standardized number format for corporate actions.

The Proposed Regulations require issuers of specified securities to include a sequential identification number when reporting corporate actions (an "Issuer Corporate Action ID"). See Prop. Reg. Sec. 1.6045B-1(a)(1)(vi). Transferors must include this number in transfer statements. See Prop. Reg. Sec. 1.6045A-1(b)(1)(vii).

The Issuer Corporate Action ID has been controversial for several reasons. For one, it is a new item not currently associated with corporate actions and one more item that brokers and applicable persons must track. For another, applicable persons other than brokers are not required to make basis adjustments for corporate actions and the Proposed Regulations contemplate that brokers will use the Issuer Corporate Action ID to determine when the last corporate action basis adjustment was made. There may have been corporate actions that occurred before a broker took possession of a security that were not taken into account for cost basis purposes because the security was held by an applicable person that was not a broker. The obligation to adjust for corporate actions occurring before the broker takes possession of a security is inconsistent with current practice and therefore seems unduly burdensome.

We understand that in order for basis calculations to be consistent between one broker and another there must be some method to determine whether all applicable corporate actions have been taken into account. As a result, an identification method of some sort seems appropriate to assist in this sort of reconciliation. However, we are concerned with the use of an issuer created identification number for two reasons. First, obtaining the numbers from issuers is dependent on when they file their corporate action issuer statements or publish on their websites. As an operations matter, the delay in obtaining the numbers could create difficulties because corporate actions are typically processed as close to the effective date as possible. Second, for very small issuers or foreign issuers, corporate action issuer statements may never be filed or published. And the lack of a number would hinder the reconciliation that is needed in all cases.

We recommend a standardized number format that is readily apparent and that issuers must follow. This way, brokers can independently determine the number and insert it at the time of the corporate action. The format would permit the establishment of a number even if the issuer never provides one. To the extent the Service wants to understand whether the number is referencing issuer provided data regarding a corporate action or other information, this could be indicated by one of the digits in the format. Standardized date, sequential number of corporate actions on such date, and whether the information was issuer provided, determined independently by the broker or was corrected could all be indicated in such a format.

8. Obtaining corporate action information if it is not published on public websites and avoiding the monopolization of corporate action data.

The Proposed Regulations permit but do not require issuers of specified securities to publicly report corporate action information. See Prop. Reg. Sec. 1.6045B-1(a)(3). Thus, some issuers may not publicly report such information. Instead, corporate action information in such cases will be filed with the Service and provided to nominees and certificate holders ("nonpublicly reported corporate actions").

We are concerned that brokers may be unable to properly adjust cost basis for certain nonpublicly reported corporate actions. We see two potential problems. First, in connection with securities transferred after the date of the corporate action, the receiving broker would likely not receive the corporate action information if the broker was not a holder or nominee for the security (*e.g.,* with respect to another customer) at the time the corporate action information was provided. Second, if the security was held by an applicable person that was not a broker at the time of the corporate action, such person is not required to adjust cost basis for corporate actions under the Proposed Regulations and when the security was ultimately transferred to a broker, the broker would not have the corporate action information necessary for it to adjust the cost basis of the security for the earlier corporate action.

We recommend that the Service publish on its website corporate action information relating to nonpublicly reported corporate actions. Alternatively, we recommend that issuers be required to provide copies of the related corporate action returns or statements

to securities market organizations and corporate action reporting services that request them.

One alternate suggestion of which we are aware of is that corporate action information should be provided to a single officially recognized repository. We recommend that the Service not adopt such a suggestion. We do not believe the cost basis legislation intended the establishment of a corporate action information monopoly—particularly if the information is to be provided for a fee. We note that there are several corporate action reporting services that compete and satisfy market needs currently and we believe that the current system is consistent with free enterprise.

Technical Comments:

1. **Holding period versus holding date.**

Prop. Reg. Sec. 1.6045-1(d)(7) requires brokers to determine whether any gain or loss on the sale of security is long-term or short-term within the meaning of Code Sec. 1222 with regard only to items occurring within the account plus information reported on transfer and issuer statements. Prop. Reg. Sec. 1.6045A-1(b) sets forth required information that a transferor must deliver to a transferee in connection with transfer reporting. Prop. Reg. 1.6045A-1(b)(1)(vii) requires the transferor to provide in part "...the date for computing whether any gain or loss with respect to the security is long-term or short-term..." This requirement seems to focus on a deemed "holding date" for the security that may have pre-dated the actual acquisition date for the security.

Focusing on holding date rather than holding period can change whether gain or loss is long-term or short-term. Present law focuses on holding period, the actual days the prior security and the adjusted security were held by the taxpayer (and excludes the gaps between the date the prior security was sold and the date the adjusted security was acquired, in a wash sale for example). See Code Sec. 1223(3).

Such a gap can readily occur because the wash sale rule of Code Sec. 1091 takes into account purchases of substantially identical [merely identical securities under the simplifying assumptions of the cost basis reporting law] that occur up to 30 days after the date of the sale at a loss. If a gap occurs and the original acquisition date of the loss security is used to determine whether gain or loss is long-term or short-term, such a determination could be considered incorrect.

If a transferor provides a "holding date" relating to a wash sale adjusted security that does not account for a gap between the sale date of the related loss security and the related adjusted security, the recipient may be unable to accurately determine whether gain or loss on disposition of the transferred security is long-term or short-term. There is a significant difference between architecting and developing a system that tracks holding date (if understood to mean prior acquisition date) versus holding period. Thus, guidance on this issue would be necessary as soon as possible so that the proper information is tracked in cost basis related computer systems.

We believe that the existing tax law generally supports the use of holding periods rather than holding dates for determining whether gain or loss is long-term or short-term. We recommend that this be clarified and that transfer statement information be revised to provide holding period information rather than a holding date.

2. **Comingling DRP and Non-DRP identical CUSIP shares for wash sales calculations.**

Under Prop. Reg. Sec. 1.1012-1(e)(4) stock within a DRP plan is not considered identical to stock with an identical CUSIP that is outside the DRP plan even if both sets of stock are within a single customer account. This rule applies for purposes of paragraph (e) of the proposed regulation. Separately, brokers must compute wash sales and adjust basis of acquired shares for wash sales under Prop. Reg. 1.6045-1(d)(6)(iii). The broker wash sale rule does not provide for the separation of DRP and non-DRP identical CUSIP shares. Due to the complexities of architecting and developing cost basis computer systems, guidance on whether such shares are commingled for wash sale computation purposes is also necessary as soon as possible.

We do not believe that averaged and nonaveraged shares should be commingled for purposes of calculating wash sales and related basis and holding period adjustments. We recommend that this should be clarified.

3. **Clarify wash sale rules for transferred accounts.**

As stated above, brokers must compute wash sales and adjust basis of acquired shares for wash sales under Prop. Reg. 1.6045-1(d)(6)(iii). A key limitation is that the wash sale rules are only applied if the sale and purchase transaction occur within the same account. Whether this limitation applies for securities that have been acquired by transfer from another account is unclear. Additional information on transfer statements may be needed to implement the limitation, as well as guidance on the treatment of transferred shares under the wash sale basis adjustment rules.

The wash sale rules are difficult to apply when securities are transferred between different accounts. For example, if Taxpayer A has a loss on Jan. 30, 2012 with regard to 100 shares of Acme stock while it is in Old Account with Broker A and then transfers his holdings to New Account with Broker B, the acquisition of another 100 shares of Acme stock in New Account on Feb. 1, 2012 would presumably not trigger a reportable wash sale because the sale at a loss and the purchase of identical shares did not occur within the same account. Without additional information regarding stocks sold (and that were therefore not transferred), Broker B would not be able to make basis adjustments or notify Broker A that a wash sale loss has occurred that should be reported. Thus, the within an account limitation makes sense.

We recommend that this aspect of the Proposed Regulations be clarified due to its significance in calculating wash sales. We do not recommend that this rule be revised

unless and until it appears that taxpayers are readily taking advantage of it to avoid broker reporting of wash sales.

Transferred securities raise additional concerns regarding the application of the wash sale rule. For example, assume that taxpayer acquires three separate lots of Acme stock in New Account between Jan. 20 and Jan. 30, 2012, and then transfers an additional lot of Acme stock from Old Account on Feb. 1, 2012 (which had been acquired before Jan. 20). Assume a wash sale then occurs in New Account on Feb. 10, 2012. The wash sale rule provides for first-in/first-out (FIFO) selection of the lots/shares to which the wash sale loss deferral basis adjustment is applied. See Treas. Reg. Sec. 1.1091-1(c) and (d). Is the transferred lot ignored because it was not purchased in the New Account? If the transferred lot is not ignored, what is the relevant acquisition date of the transferred lot for purposes of applying the FIFO selection rule and determining which shares of the four lots are subject to the wash sale related basis adjustment?

Treas. Reg. 1.1091-1(e) may also be significant. It provides that shares (or a tax lot) that has already been subject to a wash sale basis adjustment is not adjusted again. To the extent transferred shares are considered in wash sale calculations in the New Account, whether the transferred shares were previously subject to wash sale related basis adjustments might be critical. Additional information indicating this fact would need to be included in transfer reporting in order to properly apply Treas. Reg. 1.1091-1(e) in the New Account. Due to the complexities of architecting and developing cost basis computer systems, guidance on whether transferred shares are considered for wash sale computation purposes subsequent to transfer is also necessary as soon as possible.

We believe that transferred shares should be considered as purchases available for wash sale consumption in the new account. We recommend that transfer statement information include a designation regarding whether a particular lot has previously been subject to a wash sale adjustment. This information could be considered in the new account and such a lot would not be subject to further wash sale adjustment. We also recommend that transferred lots be date-analyzed based on their holding period when compared with purchased lots within a new account for purposes of applying the first-in/first-out wash sale adjustments to lots purchased within the prior 30 days under Treas. Reg. 1.1091-1(c) and (d).

4. **Coordinate the New FIFO basis rule of Treas. Reg. § 1.1012-1 with other rules.**

We believe the new FIFO basis rule (Prop. Reg. Sec. 1.1012-1(c)) should be better coordinated with other rules in the Code and regulations. First, a taxpayer must use the new FIFO rule to determine the basis and holding period of stock ***for purposes of subchapter P, Chapter 1 of the Internal Revenue Code*** [i.e., the subchapter to determine capital gains and losses, including the holding period rules of Code Sec. 1223]. By comparison, the new Average Cost rule (Prop. Reg. Sec. 1.1012-1(e)(1)) permits a taxpayer to use an average method to determine the cost or other basis of identical shares of stock, without limitation. We believe the FIFO rule should be used for both basis and

holding period for all purposes of the Code, not just subchapter P (e.g., the FIFO rule should be used for purposes of Code Sec. 1001, Subchapter O, to determine the amount of gain or loss from a sale). We note that existing Treas. Reg. Sec. 1.1012-1(c) requires the FIFO rule to be used to determine basis for all purposes of the Code and to determine holding period for purposes of subchapter P (which, in our view, is an unnecessary limitation).

Second, we recommend a clarification that the FIFO default rule is applied on an account-by-account basis, just as the new Average Basis rule is applied in Prop. Reg. Sec. 1.1012-1(e)(7). Thus, for example, if a taxpayer owns shares of ABC stock in two separate accounts, the taxpayer could specify the account from which the shares would be sold, and the shares that were sold would be determined on a FIFO basis within that account, without the need for further identification. This would coordinate the rules applicable to taxpayers to the rules applicable to brokers. Under current law the FIFO default rule applicable to taxpayers might be interpreted to apply across accounts.

Finally, the new broker reporting rule (Prop. Reg. Sec. 1.6045-1(d)(2)) generally requires a broker to report a sale "on a first-in, first-out basis within the account," but first-in, first-out is not a defined concept. We suggest the new FIFO basis rule clarify that "charged against the earliest lot the taxpayer purchased or acquired" is "first-in, first-out."[1]

As a result, we suggest that Prop. Reg. Sec. 1.1012-1(c)(1) be revised to read:

". . . the stock sold or transferred is charged against the earliest lot the taxpayer purchased or acquired within an account to determine the basis and holding period of the stock (i.e., a first-in, first-out, determination)."

5. Permit multiple purchases or sales of same stock on same day to be a single "lot."

Under the new FIFO rule, as under the old FIFO rule, if a taxpayer sells or transfers stock that the taxpayer "purchased or acquired on different dates or at different prices and the taxpayer does not adequately identify the lot from which the stock is sold or transferred, the stock sold or transferred is charged again the earliest lot the taxpayer purchased or acquired to determine the basis and holding period."

Taxpayers often buy or sell the same stock in multiple trades (i.e., with different sellers or different buyers) on the same date. Often, the multiple trades result from a single buy or sell order, which might be either a market or limit order. That is because the size of the buy or sell order may be large relative to the supply or demand for the stock on the market. This size imbalance has increased over the years as stocks are traded more frequently on secondary markets (off the primary exchange), and odd lot trades have

[1] The cited FIFO rule is a default rule that applies if the customer fails to make a specific identification of shares sold. It should be revised to reflect that the applicable default rule may be a broker's default rule with respect to shares eligible for averaging.

become more frequent (a day order to buy 1000 shares of ABC stock might, for example, result in two dozen purchases during the day, with individual trades of 12 or 162 shares). There is a procedure for a taxpayer to request a trade to be "all or none," but that procedure is rarely, if ever, used, in light of the added delay and difficulty to complete an "all-or-none" order (which makes the procedure impractical, economically).

We believe taxpayers should be able to instruct their broker to report one confirmation for all purchases or sales of a single stock on a particular day made through that broker (and the confirmation would show the aggregate purchase or sale price). Alternatively, we believe brokers should be permitted to report on such an aggregate basis, if they choose to do so.

In LTR 8852028 (Sept. 29, 1988), the Service explicitly authorized an institutional investor to adopt such an aggregate approach. In that private ruling, the investor instructed its broker to report one confirmation for all purchases of a single stock on a particular day made through that broker showing an aggregate purchase price. Likewise, the broker issued a single confirmation for all sales of a single stock on a particular day transaction showing an aggregate sales price. The Service acknowledged the business purpose for the proposed approach was to save time and money.

We believe the Service should accommodate a similar approach for all investors. The new basis reporting regime will confuse many investors, in light of the complexity of the basis calculations and the adjustments to basis that will need to be made in many instances. For example, there often will be wash sales within an account, or across multiple accounts. A taxpayer may want to understand the wash sale adjustment that was performed by his or her broker. Alternatively, the taxpayer might need to unravel the adjustments to make further wash sale adjustment across multiple accounts. Permitting the aggregation of purchases or sales of a single stock on a single day would vastly simplify these calculations and adjustments. At the least, we suggest the Service acknowledge the aggregate approach in the preamble to permit investors and brokers to pursue aggregate reporting.

6. Change effective date for short sale reporting

Under the new law, a broker is required to report gross proceeds, basis, and whether any gain or loss is short-term or long-term, for a short sale in the year in which the short sale is closed (rather than report, under present law, gross proceeds only, in the year in which the short sale is opened). Generally, whether the closing of a short sale results in short-term or long-term gain or loss, depends on the holding period of the property used to closed the short sale.[2]

The change for the reporting of short sales generally will occur for short sales that are closed after January 1, 2011. However, the Proposed Regulations require reporting for

[2] However, if, at the opening of the short sale, a short seller held substantially identical property for more than one year and the seller has a loss on closing of the short sale, the loss is long-term even if the property used to close the short sale is held by the seller for less than a year. See Code Sec. 1233(d).

both a short sale that is closed with a covered security as well as one that is closed with a non-covered security.

If a short sale is closed with a covered security, the broker must report gross proceeds, basis, and whether any gain or loss is short-term or long-term. For a short sale that is closed with a non-covered security, then the broker reports only the gross proceeds information from the opening of the short sale (the information that was required to be reported previously).

The change in reporting for short sales that are closed with non-covered securities will be duplicative and will create data processing problems for brokers that do not have access to the earlier proceeds information. A short sale may have been opened many years earlier, and the broker may not have retained the original gross proceeds information. Alternatively, the short position may have been acquired from another broker, and a transfer of a short position is not considered an entering of a short sale under Treas. Reg. Sec. 1.6045-1(a)(9). See LTR 200335033 (Mar. 25, 2003).

We believe the effective date in the Proposed Regulations is impractical in light of the late promulgation of the Proposed Regulations, and the later promulgation of final regulations. Brokers simply may not have a system in place to process information from short sales that are open prior to 2011. We believe brokers should only be required to report gross proceeds information for short sales that are closed in 2011 or beyond under the new rules if the short sale is closed with stock that has been acquired in 2011 or beyond. If brokers are able to report more information, they should be be permitted to do so pursuant to the elective rule of Prop. Reg. Sec. 1.6045-1(c)(3)(xi)(B).

7. The determination of whether transfer statements received are "complete."

Consider the situation of a person required to report basis information that has not received a required transfer statement or corporate action statement, or has received an incomplete statement. See Prop. Reg. Secs. 1.6045-1(d)(2)(v) and 1.6045A-1(b)(8). If a receiving broker does not receive a complete transfer statement by the transfer statement due date, it is required to notify the transferor and request a complete statement. If one is not received, it may treat the transferred securities as not covered when sold (in which case tax basis information would not need to be provided).

The requirement that a broker assess each transfer statement received to determine whether it was complete and if not, to request a "complete" statement itself could be viewed as potentially imposing an excessive administrative burden given the large amount of information required on transfer statements. See Prop. Reg. Sec. 1.6045A-1(b), and permitted flexibility regarding the format of transfer statements, see Preamble 15.a, at 74 Fed. Reg. 67021. (The preamble contains a specific request for comments about the form and format for the transfer statement and any substitute thereto.)

For most transfer statements provided electronically between brokers (which may be the large majority of all transfers), we anticipate that standardization of the transfer format

may reduce to an acceptable level the administrative burden of identifying incomplete transfers. But in cases involving written statements or formats that are not standardized, the receiving broker may be required to process and review the transfer statements manually using a check list to determine the completeness of each transfer statement received. We are also concerned that the incidence of late or revised transfer statements is likely to be much greater for these transfer statements.

8. Basis adjustments due to liquidating distributions.

We note that regulations under Code Sec. 6043 now require returns with respect to certain corporation actions such as liquidating distributions, acquisitions of control or a substantial change in capital structure. Some of the transactions or events reported on such returns may be accompanied by the recognition of gain or loss by shareholders. See, *e.g.*, Treas. Reg. Secs. 1.6043-4, and 1.6043-4T(a)(1)(v) and (b). These regulations need to be coordinated with the new corporation action reporting requirements with respect to minimizing duplication of reporting and ensuring that information affecting broker reporting obligations is made available to brokers.

To the extent any corporate actions reportable under Code Sec. 6043 result in recognition of gain or loss or a basis adjustment with respect to specified securities, we recommend that such actions be explicitly subject to corporate action reporting by issuers under the regulations. Our reasoning is that corporate action reporting is generally more timely and widely distributed as compared to Code Sec. 6043 reporting, which is important as an operations matter in timely adjusting basis of affected securities. We further recommend that such corporate action reporting be coordinated with reporting under Code Sec. 6043 to prevent unnecessary duplication.

9. Basis and holding period adjustments relating to short sales and straddles.

For the sale of a covered security, a broker is required to report the adjusted basis of the security and whether the gain or loss with respect to the security is long-term or short-term. Prop. Reg. Sec. 1.6045-1(d)(2). A broker must apply the wash sale rules with respect to securities in the same account (without regard to securities that are held or acquired in other accounts), and is not required to take into account constructive sale or mark-to-market adjustments. Prop. Reg. Sec. 1.6045-1(d)(6)(iii) and (iv). When reporting a sale, a broker is permitted, but is not required, to take into account any information with respect to securities that are held by the same customer in other accounts with the broker. Prop. Reg. Sec. 1.6045-1(d)(2)(B). To determine whether gain or loss on the sale of a security is long-term or short-term, a broker is not required to consider transactions, elections, or events occurring outside the account, except for information that has been reported on transfer or issuer statements. Prop. Reg. Sec. 1.6045-1(d)(7)(i).

The new reporting rules are silent on whether a broker must make other adjustments for securities that are held or acquired within the same account. For example, an account might contain offsetting positions that are subject to the straddle rules, which would

affect both the adjusted basis and how the gain or loss on the sale of a security in an account should be treated. See, for example, Code Secs. 263(g) and 1092(a). Likewise, the short sale rules can determine whether gain or loss on the sale of a security is long-term or short-term. See Code Secs. 1233(b) and (d).

We suggest the reporting rules clarify whether a broker must take into account the straddle rules, the short sale rules, and other adjustments that may arise from securities that are held within the same account. A determination of the effects of the straddle rules on basis and holding period requires the application of a number of rules that present often thorny questions of substantive law or involve new statutory provisions for which authoritative guidance is relatively sparse.[3]

We recommend that the regulations should explicitly provide that the straddle rules do not need to be taken into account. We believe that the inclusion of specific short sale rules in the cost basis reporting legislation suggests that the short sale rules should be applied and we recommend that the regulations clarify this.

10. Basis adjustments due to regulated investment company and real estate investment trust retained capital gains.

To report adjusted basis, a broker must take into account organizational actions affecting the basis of the security if reported on any issuer statement but is not otherwise required to consider transactions, elections or events occurring outside the account. Prop. Reg. Sec. 1.6045-1(d)(6)(i). Likewise, to determine whether any gain or loss is long-term or short-term, a broker is not required to consider transactions, elections, or events occurring outside the account other than those set forth in Prop. Reg. Sec. 1.6045-1(d)(7).

Any issuer of a specified security that takes any organizational action that affects the basis of the security must file an issuer return setting forth certain information. Prop. Reg. Sec. 1.6045B-1(a). For purposes of this rule, an issuer that makes a return-of-capital distribution must file such a return. Prop. Reg. Sec. 1.6045B-1(f), Example 2. Presumably, the foregoing provisions mean that a regulated investment company or a real estate investment trust must file an issuer return for its undistributed capital gain, when it follows the procedures under Code Secs. 852(b)(3)(D) or 857(b)(3)(D).

We recommend that the regulations clarify that brokers should take into account basis adjustments relating to undistributed capital gains from regulated investment companies and real estate investment trusts.

The proposed reporting rules are also unclear in the case of shares of a regulated investment company or real estate investment trust that makes a capital gain (or regulated investment company that makes a tax-exempt distribution) with respect to whether any subsequent loss on the sale of shares in the regulated investment company or real estate

[3] See Code Sec. 1092(a)(2), as amended in 2007; Temp. Treas. Reg. Sec. 1092(b)-2T; Prop. Treas. Reg. Secs. 1.263(g)-1 through 1.263(g)-4.

investment trust are long-term or short-term, or disallowed (even though the cost basis of the shares are not affected). See Code Secs. 852(b)(4) and 857(b)(8). Note that in order for a broker to apply these rules, it must know whether capital gain or exempt interest dividends were received on the related shares.

We recommend you clarify whether brokers must take into account these rules in determining whether losses are long-term or short-term or disallowed and if it is determined that brokers are so required, we ask that you consider how brokers will be informed of the tax character of the related distributions as capital gain or exempt interest dividends.

11. Broker reporting of corporate actions in the absence of clear corporate action information from the issuer.

The Proposed Regulations permit but do not require a broker to take into account information that is not reflected on a transfer statement or issuer statement and is afforded penalty relief if customer or third party information is relied on in good faith. See Prop. Reg. Sec. 1.6045-1(d)(2)(iv)(B).

In many cases corporate actions change the quantity or nature of a security held by a customer. In such cases, brokers must make a corresponding change to reflect the customer's new position in such security.

We are concerned that corporate action issuer statements may not be filed or made public in certain cases. We are particularly concerned regarding small issuers of public securities and foreign securities. Brokers will be required to make corporate action adjustments to reflect the change in quantity or nature of securities and will need to decide whether such changes result in basis adjustments.

We believe that Prop. Reg. Sec. 1.6045-1(d)(2)(iv)(B) is intended to permit brokers to rely on corporate action reporting services and other information relating to corporate actions when issuers do not provide clear information. However, we believe that adding an example to the regulations would clarify this. Accordingly, we recommend the addition of the following example:

On Apr. 30, 2012, S sells 400 shares of common stock of C, a corporation, which was held in an account with B, a broker. S retains 300 shares in the account. Prior to the sale, the common stock of C underwent a 7-for-4 forward split, but C did not file or publicly post an issuer statement describing the quantitative effect of the split on the basis of C common. B receives a report on the forward split from a third party in the business of providing corporate action information. The report states that splits of common stock are typically nontaxable and, if so, basis should be allocated 57.1429% to old common and 42.8571% to new common received in the split. B may take into account information received from the third party in reporting the quantitative effect on the basis of C common if B neither knows nor has reason to know that the information from third party is incorrect.

12. Additional corporate actions data required for foreign securities held as depositary receipts.

There are a number of concerns about the ability of foreign issuers to provide accurate and meaningful information for brokers to comply with the cost basis reporting requirements. There are particular concerns relating to foreign securities traded on U.S. exchanges as depositary receipts because the depositaries do not typically provide important corporate action related information.

We recommend that regulations explicitly treat such depositaries as issuers for corporate action reporting purposes, and require the following specific information:

i. Gross amount of any cash distribution received per share
ii. Number of securities received per share
iii. Date of receipt of cash or securities
iv. Date of sale of securities, if applicable
v. Gross proceeds received on sale of securities
vi. Date of conversion into U.S. dollars of any foreign currency
vii. Exchange rate for any conversion
viii. The amount of any fees assessed and the reason for the assessment
ix. The amount of any foreign tax withheld

The reported information should be made publicly available as currently provided and as discussed earlier in our comments.

13. Updating corporate actions information due to updated relevant facts.

The Proposed Regulations permit an issuer to file a corporate action issuer statement in advance of the 45 day deadline and in advance of the occurrence of the corporate action. See Prop. Reg. Sec. 1.6045B-1. Note that the Proposed Regulations provide that filing before the date of the corporate action is permitted "if the quantitative effect on basis is determinable beforehand."

Currently, issuers often provide holders and make public disclosure documents relating to such corporate actions in advance of the corporate action. In many cases such as mergers or spin-offs, where the tax consequences of an organizational action are unclear or contingent on certain facts, the public disclosure documents do not specify what specific factors render the outcome unclear or what facts would result in a different outcome.

We recommend that the regulations clarify that an issuer should be required to initially include or amend its corporate action issuer statement with additional facts that may affect taxability once they are known (*e.g.*, the number of shares outstanding after a redemption offer, the number or percentage of shares taken up in an exchange offer, the effects of any proration that change the amount or form of consideration paid).

We recommend that the following example be added to Prop. Reg. 1.6045B-1(a)(2)(ii):

On Dec. 15, 2012, C, a corporation, offers to redeem up to 10% of its outstanding common stock. The offer is originally open for acceptance for 3 months, but is later extended for an additional 3 months. Shareholders may tender and receive payment at any time during this 6 month period.

By Jan. 15, 2013, C files a return with the IRS stating that receipt of the redemption payment may result in a capital gain or loss, or dividend treatment, under Code Sec. 302. Determining the correct treatment has a material impact on the basis of the shares redeemed and shares retained. One of the factors in determining the correct treatment of the redemption payment is the number of shares outstanding before the redemption offer and immediately after the redemption offer is completed. *See, e.g.,* Prop. Reg. 1.1441-3(c)(5)(iii)(C)(1) regarding section 302 payment certifications.

At the time of filing the original return, C cannot determine the quantitative effect on the basis of stock to be redeemed. C must file a corrected return within 45 days after the organizational action is complete stating the number of shares outstanding after the redemption, as well as any other information necessary to implement basis adjustments.