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March 18, 2003

The Honorable Pamela F. Olson
Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Robert E. Wenzel
Acting Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Dear Assistant Secretary Olson and Commissioner Wenzel:

I am pleased to submit the New York State Bar Association Tax Section's Preliminary Report (the "Report") on the Administration's Dividend Exclusion proposal. The essential features of the Treasury Department's Dividend Exclusion proposal were set forth in the "Green Book" language released on February 3, 2003.¹ In addition, on February 27, 2003, legislation was introduced in the House of Representatives (H.R. 2) and the Senate (S. 2)

¹ General Explanations of the Administration's Fiscal Year 2004 Revenue Proposals, Department of the Treasury, February 3, 2003, pages 11-22.

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(the "Bills") to implement the proposal.² We recognize the Dividend Exclusion proposal may undergo further changes and refinements over time. We look forward to providing ongoing comments and suggestions.

The New York State Bar Association Tax Section is not taking a position as to whether, from a tax policy perspective, the Dividend Exclusion proposal is desirable. The Report assumes that a dividend exclusion proposal will be enacted and provides technical comments to assist in the proper functioning of the Dividend Exclusion within the context of our existing tax laws.

At the Treasury Department's request, we have focused our attention in the Report primarily on a limited number of issues we believe should be addressed to facilitate administrability of the Dividend Exclusion proposal and to safeguard its application -- to ensure that the rules designed to eliminate the double taxation of corporate income are not in turn used to reduce or eliminate even a single level of taxation of corporate income.

The central feature of the Dividend Exclusion proposal is that, to the extent tax has been imposed at the corporate level (after-tax earnings will make up the excludable dividend amount ("EDA")), corporations will be permitted to pay excludable dividends to shareholders to the extent of EDA. Gains on shares of stock, however, although reduced by adjustments for undistributed EDA, will remain subject to taxation, and shareholders will continue to be composed of a mixture of both taxpayers and tax exempt entities. This combination of factors: (i) the introduction of a new category of exempt income for taxpayers (i.e., excludable corporate dividends); (ii) the significant tax distinction between income derived as excludable dividends and income derived as taxable capital gains; and (iii) the fact that tax exempt

² H.R. 2 (introduced by Chairman Thomas) and S. 2 (introduced by Senators Nickles and Miller).

investors will continue to represent a sizable portion of the shareholding public and generally will not pay tax on dividends or capital gains, could, if left unattended, be responsible for the design of a number of transactions that could undermine the tax policy objectives associated with the Dividend Exclusion proposal.

We recognize the Treasury Department is fully aware of these possibilities and has incorporated into its proposal, and the Bills so reflect, a number of defensive measures designed to address them. The Report, through examples and discussion, further highlights the need for Treasury, as part of this process, to implement practical and administrable rules designed to prevent or mitigate the undesirable tax consequences that otherwise might arise from various types of transactions.

As indicated above, we look forward to providing ongoing comments and suggestions as the Dividend Exclusion proposal proceeds through the legislative process. In this regard, please feel free to contact me if you would like to discuss any of the issues addressed in the Report.

Respectfully submitted,

A handwritten signature in blue ink that reads "A. N. Berg". The signature is written in a cursive style with a large initial "A" and "B".

Andrew N. Berg
Chair

cc: Jeffrey H. Paravano (Senior Advisor to Assistant Secretary)
Eric Solomon (Deputy Assistant Secretary for Regulatory Affairs)
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