

REPORT #618

TAX SECTION

New York State Bar Association

Letter Proposing Changes to Treasury

June 21, 1989

Table of Contents

Cover Letter:i

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June 21, 1989

Leonard 8. Terr, Esq.
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Dear Mr. Terr:

As discussed in the August 11, 1988 Report and December 7, 1988 Supplemental Report of our special ad hoc subcommittee of the Tax Section of the New York State Bar Association concerning Regulation S, our subcommittee recommended the adoption and use of the Regulation S procedures as the test for determining whether arrangements for the issuance of bearer obligations can be "reasonably designed to prevent their sales to U.S. persons." As we understand it, proposed Regulation S would eliminate the certification requirement currently in effect, and we have recommended that the Treasury and the Internal Revenue Service also eliminate certification to allow the consistency of the securities and tax law offering procedures. Our Supplemental Report outlines the specific reasons for our recommendations and points out that certification requirements are inconsistent with market practices in the short-term market and with legal requirements in certain local foreign markets.

However, if the Treasury and Internal Revenue Service should decide to retain certification, then we think it important

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that the requirements conform to current European capital market practices and not disrupt access to local foreign markets. To that end, enclosed is a draft regulation covering certification for your consideration. The regulation has been drafted by the members of our subcommittee as set forth in our original report with the assistance of their securities law colleagues, Messrs. Alan L. Beller, Francis J. Morrison and William J. Williams.

We hope this will be of assistance to you

Very truly yours,

WLB/JAPP
Enclosure

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(a)(i) In General. Except as otherwise provided in subsection (ii), a definitive obligation in bearer from (or, if a definitive obligation is either not issued by the issuer or not requested by the purchaser, an interest in a permanent global security in bearer from issuable in exchange for an interest in a temporary global security) is, in connection with its original issuance,* delivered to, or or edited to the account of, the person entitled thereto only upon receipt by the issuer (or its agent), an underwriter or a selling group member of the certification described in subparagraph (b) below.

(ii) Expiations.

(A) Underwritten and Selling Group Members. Subsection (i) shall not apply in the case of a definitive obligation in bearer from (or in interest in a permanent global security) that, in sanction with its original issuance, is delivered to, or credited to the account of, an underwriter or selling group member directly by the issuer (or its agent).

(B) Clearing Organizations. Subsection (i) shall not apply in the case of a definitive obligation in bearer from (or an interest in a permanent global security) that, in connection with its original issuance, is made available to, or credited to the account of, the person entitled thereto through a clearing organization. In such case, the issuer (or its agent) may issue the definitive bearer obligation to the clearing organization (or the clearing organization any credit the account of its participants with an interest in a paramount global security)

* Consideration should be given to limiting this period to the period during which the SXC offering restrictions restrictions apply.

Only upon delivery by the clearing organization of certification to the effect that the clearing organization has received from such member of the clearing organization to whose account the definitive obligations (or interests in the permanent global security) will be credited the representation described in subparagraph (b) below, A "Clearing organization" is an entity which is in the business of holding obligations for member organization and transferring obligations among such members by credit or debit to the account of a member without the necessity or physical delivery of the obligation.

(C) Overseas Domestic Offerings. Subsection (i) shall not apply, and no certification shall be required, in the case of a definitive obligation in bearer form (or an interest in a permanent global security) that, in connection with its original issuances, is sold in an overseas domestic offering, An "overseas domestic offering" is an offering of non-U.S. dollar denominated debt obligations that is directed primarily to the domestic capital market of a foreign country in accordance with customary local practices and predominantly by underwriters and selling group member that are organized under the laws of that country or are branches or subsidiaries of entities organized under the laws of other jurisdictions that are doing business in that country.

(D) Contiguous Offerings. [In the absence of information regarding the sec's current position on continuous offerings (i.e., medias tera note programs), we are unable to suggest the type of certification, if any, that would be appropriate.]

(b) Certification. The certification that must be received by the issuer (or its agent), an underwriter or selling

group member under subparagraph (a)(i) and the representation that must be received by a clearing organization from a member organization in order for the clearing organization to provide the certification required under subparagraph (a)(ii)(B) Bay be is writing or transmitted by electronic means or otherwise and shall provide that the definitive obligation in dearer form (or interest in the permanent global security) is net being acquired by or on behalf of a United States person, or for offer to resell or for resale to a United States person or any person inside the United States, or, if a beneficial interest in the obligation (or the interest in the permanent global security) is being acquired by a United States person, that such person is a financial institution as defined in Treas. Reg, See, 1.155-12(c)(1)(v) or is acquiring through a financial in the permanent global security) is held by a financial institution that has agreed to comply with the requirements of Section 165(j)(3)(A), (B) or (C) and the regulations thereunder and that is not purchasing for offer to resell or for resale inside the United States. This certification must be

(i) dated ne sera than five (5) days prior to the date it is delivered to the issuer (or its agent), underwriter or selling group member, in the case of certification required by subparagraph (a)(i),

(ii) dated ne sera than fifteen (15) days prior to such date as has been specified as the date the clearing organization presents its certification to the issuer (or its agent), in the case of representation required by subparagraph (a)(ii)(B), and

(iii) retained by the issuer (or its agent), the underwriter, the selling group member or the clearing

organization, as the case may be, for four calendar years after the calendar year in which it is received.