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New York State Bar Association

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Dear Lady and Gentlemen:

I write, on behalf of the New York State Bar Association Tax Section (the "Tax Section"), to comment on the modifications to the temporary regulations on tax shelter disclosure, registration and listing

regulations (Temp. Regs. §§ 1. 6011-4T, 301.6111-2T and 301.6112-1T), released August 2, 2001 (the "New Revisions").

We commend you on your continuing efforts to respond to practitioner and taxpayer concerns in connection with combating abusive tax arrangements. We recognize the New Revisions and the changes made in August, 2000 are designed to make the regulations clearer, more workable and more narrowly targeted to reach their intended subjects (and thereby to eliminate unnecessary burdens on taxpayers and others). While supporting these goals, we do have some comments and suggestions regarding the New Revisions. In addition to the comments expressed below, many of the comments we made in our prior report on the temporary regulations[1] have not yet been addressed and remain of concern to us.

1. The No Reasonable Basis Exception

While we were pleased to see Treasury and the Internal Revenue Service take a formal position on the meaning of this exception, some of our members feel the exception is now too easily satisfied. These members believe the No Reasonable Basis Exception should be satisfied only if the taxpayer reasonably determines the Internal Revenue Service could not put forth any credible challenge to the claimed tax benefits.. These members believe a "reasonable basis" should be interpreted consistent with the common understanding of "reasonable" and not the Section 6662 more likely than not to succeed "reasonable basis" standard. Noting that the Section 6011, 6111 and 6112 regulations require only disclosure and do not determine substantive liability, these members believe unacceptably aggressive transactions are being entered into that

[1] New York State Bar Ass'n Tax Section, Report on the Temporary and Proposed Tax Shelter Regulations, Nov. 16, 2000, 2000-TNT-225-17.

the Internal Revenue Service would like to be, and should be, told about (or able to learn about from promoters' lists) but now will not because taxpayers and promoters will be able to (or will take the position that they were able to) reasonably determine the Internal Revenue Service's strongest potential challenge would not clear the Treas. Regs. § 1.6662-3(b)(3) "reasonable basis" hurdle.

Other members believe the Treas. Regs. § 1.6662-3(b)(3) reasonable standard is not too high a hurdle and, if the Internal Revenue Service's best argument cannot pass that bar, the transaction is probably not abusive and probably would survive a challenge.

2. Are Registration and Listing Requirements Now Intentionally Limited to Marketed Transactions?

Under the revised temporary regulations, a transaction must be registered and/or listed (assuming no exceptions apply) only if it is a "listed transaction" or it satisfies the two-prong "other tax structured transaction" test. The second prong of that two-prong test is that the tax shelter promoter reasonably expects the transaction to be presented "in the same or substantially similar form" to more than one potential participant.[2] As a result, transactions specially designed for a single specific taxpayer (and are not expected to be suitable for or will not be presented to another taxpayer) will escape registration and listing. This was not the case prior to the New Revisions – the "economic substance" test, which was removed by the New Revisions, had no multiple participant/multiple offeree requirement.

The Section 6112 legislative history reveals the legislative drafters intended the lists to be used by the Internal Revenue Service after

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[2] *See* Temp Regs. §301.6111-2T(b)(3).

an improper transaction had been uncovered (in the course of an audit of one taxpayer). The lists would enable the Internal Revenue Service to identify and pursue *all other* taxpayers who entered into the transaction and would thereby facilitate fairness and equity in tax law enforcement. If the Internal Revenue Service intends to use the lists only for multiple participant/multiple offeree cases, then limiting list-maintenance to marketed transactions might be appropriate.

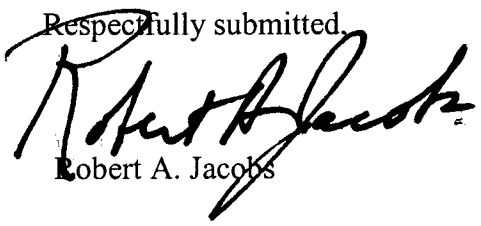
Nevertheless, we remain concerned the current temporary regulations will encourage promoters to modify their structures from taxpayer to taxpayer just enough to claim each transaction is not "in the same or substantially similar form." These games should be closed. The simplest solution would be to remove the second prong of the test, but that would make the "other tax-structured transaction" test too broad: it would apply to any transaction "structured to produce Federal income tax benefits that constitute an important part of the intended results." Instead, we believe Treasury should formally warn promoters (in a published notice, the Preamble to the final regulations or in the final regulations themselves) that whether two transactions are in the "same or substantially similar form" will be interpreted and applied expansively.

3. Effective Date of Changes to Registration Regulations in Applying Them under the Listing Regulations

The changes to the registration regulations (Temp. Regs. § 301.6111-2T) also apply to the listing regulations (Temp. Regs. § 301.6112-1T) that incorporate by reference portions of the registration regulations (including the revised portions). The registration requirement applies when a transaction is offered for sale, whereas the listing requirement applies at the time a transaction is consummated. The New Revisions specify the changes to the registration regulations apply to any

interests offered for sale after August 2, 2001, although they may be relied upon for interests offered for sale after February 28, 2000.[3] There is no specific effective date for the incorporation of these changes into the listing regulations. Presumably, these changes apply to any interests acquired by a participant after August 2, 2001, unless the list-keeper chooses to apply them to interests acquired after February 28, 2000. While this ambiguity may not be relevant in most cases, the effective date of the New Revisions, as applied to the listing regulations, should be clarified.

Respectfully submitted,



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[3] Temp Regs. § 301.6111-2T(h).