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January 7, 2003

The Honorable Pamela F. Olson
Assistant Secretary (Tax Policy)
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Washington, DC 20220

Robert E. Wenzel
Acting Commissioner
Internal Revenue Service
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Washington, DC 20224

Re: Report on Recent Tax Shelter Regulations

Ladies and Gentlemen:

I am pleased to submit the New York State Bar Association's Report No. 1025, which comments on the temporary and proposed tax shelter regulations issued on October 22, 2002 (the "New Regulations"). The New Regulations substantially revise the rules relating to disclosure by taxpayers, and list maintenance by promoters, with respect to potentially abusive tax shelter transactions. The prior disclosure and list maintenance regimes had employed a technically complex set of filters for identifying potentially abusive transactions. In practice, this approach had produced a disappointing paucity of disclosure, due at least in part to the presence of subjective elements that permitted taxpayers and promoters to rationalize nondisclosure. The New Regulations aim for a more objective approach to identifying potentially abusive transactions.

We support the efforts of the Treasury and the IRS to address the shortcomings of the prior tax shelter regulations. As we have noted in our previous submissions on tax shelters, we believe that enhanced disclosure is

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an important element in combating the tax shelter problem. However, the New Regulations cannot, by themselves, solve the tax shelter problem. The solution requires a number of elements, including legislation, more significant sanctions, revisions to the rules of conduct before the IRS (Circular 230) and the commitment of additional resources by Congress and the IRS. It also requires an adjustment in the attitude of some taxpayers toward their tax-paying responsibilities, an adjustment that the New Regulations should encourage.

While we are generally supportive of the New Regulations, we suggest consideration of a number of changes to limit the burdens that will arise from using objective categories that sweep in non-tax-motivated transactions. The recommendations presented in the report include:

1. clarifying the meaning of "transaction" for purposes of the New Regulations;

2. clarifying the meaning of "participation" in a reportable transaction for purposes of the New Regulations;

3. limiting flow-through reporting requirements (for partners, beneficiaries, or shareholders) with respect to reportable transactions entered into by partnerships, trusts and S corporations;

4. clarifying and possibly modifying the application of the New Regulations to foreign corporations and their shareholders;

5. providing a periodic composite summary of Listed Transactions, and more regularly including in published guidance identifying a Listed Transaction a description of "substantially similar" characteristics;

6. modifying the confidentiality safe harbor to make it more workable, including providing a safe harbor for typical M&A confidentiality agreements and clarifying the treatment of "exclusivity" arrangements;

7. clarifying and expanding the exceptions to the contractual protection category;

8. clarifying the meaning of "reasonably expected losses" and providing additional exceptions to the loss category;

9. simplifying the application of the book-tax difference category, and substantially expanding the exceptions to this category;

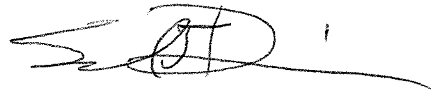
10. providing an exception under the brief holding period category (similar to the provisions of section 901(k)(4)) for certain credits claimed by securities dealers;

11. raising the threshold for fees that trigger the requirement to maintain investor lists to $250,000 unless all taxpayers are individuals; and

12. limiting application of the requirement to maintain investor lists to persons who make material statements regarding the tax consequences of the transaction.

Please feel free to contact the undersigned if you wish to discuss any of our suggestions or any other issues relating to the New Regulations.

Respectfully submitted,



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