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October 23, 2003

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

Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Assistant Secretary Olson and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1042, providing recommendations for analyzing the issuance and exchange of stock subject to restriction under Section 83 in corporate reorganization transactions. We address principally the basic question of how such stock should count for purposes of determining whether a transaction qualifies as a reorganization.

The principal source of confusion in the area results from the provision of Section 83 that treats restricted stock as not having been issued to the employee/shareholder for compensation purposes, notwithstanding that such stock has in fact been issued and is treated as owned by the employee/shareholder for state law purposes. Because restricted stock is often present in corporate combinations and it is important to have certainty as to the tax characterization of transactions, we believe it is in the best interest of

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tax administration to issue guidance regarding the scope of the open transaction model of Section 83. At the same time, however, we recognize the difficulties in issuing guidance that could have collateral effects on other areas of tax law, and, therefore, as a first step, our proposals are limited to the issues relevant to corporate reorganizations.

Because the owners of restricted stock enjoy the indicia of ownership of such stock, we believe that holders of restricted stock should be viewed as shareholders and owners of the corporation for purposes of characterizing a corporate transaction as a reorganization. Therefore, we recommend that restricted stock that has been transferred within the meaning of Section 83 (*i.e.*, the employee has the beneficial ownership of the stock) should be treated as outstanding and owned by the employee for purposes of characterizing a transaction as a reorganization described in Section 368. If our proposal is adopted, this means that restricted stock would be treated as outstanding for purposes of the continuity of interest rules, application of the Section 368(c) control test, the solely for voting stock requirement, and the treatment of restricted stock as qualifying property and not “boot”.

The Tax Section would be pleased to comment further about how restricted stock should be treated as outstanding for purposes of the tax laws more generally. If you find this valuable, or if you would like to discuss the proposals in the Report, please do not hesitate to contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew N. Berg". The signature is written in a cursive, slightly slanted style.

Andrew N. Berg
Chair

cc: Eric Solomon, Deputy Assistant Secretary, Regulatory Affairs,
Department of Treasury

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William F. Sweetnam, Jr., Benefits Tax Counsel, Department of
Treasury

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Gary Wilcox, Deputy Chief Counsel (Technical), Internal Revenue
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William D. Alexander, Associate Chief Counsel (Corporate), Internal
Revenue Service