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Re: Report on FDIC - Assisted Taxable Acquisitions

Gentlemen:

I am pleased to submit the New York State Bar Association Tax Section's Report on the U.S. federal income tax treatment of taxable acquisitions of failed financial institutions in which the Federal Deposit Insurance Corporation (the "FDIC") has provided financial assistance.

In recent years, the number of financial institutions that have been placed into FDIC receivership has increased dramatically as a result of the financial crisis, and the FDIC expects more financial institution failures in the near future. Moreover, FDIC assistance to these institutions and potential acquirers of such institutions has played an important role in fostering stability in the financial system.

Section 597 grants the Department of Treasury wide latitude to promulgate regulations determining the treatment of any transaction in which federal financial assistance ("FFA") is provided. FFA includes any money or other property provided to a bank or domestic building and loan association

by the FDIC. Regulations promulgated under Section 597 address the treatment of a wide range of transactions involving different forms of FFA, including special rules that apply to (i) taxable transfers, (ii) loss guarantee arrangements, and (iii) debt and equity instruments issued to the FDIC.

FDIC-assisted acquisitions are highly structured agreements designed by the FDIC, and taxpayers have virtually no ability to modify these agreements in light of tax considerations or otherwise. Accordingly, our recommendations are designed to provide taxpayers with needed certainty of the tax consequences as to such arrangements. The scope of the Report is deliberately narrow and does not address the myriad of issues that may be present with respect to FFA arrangements other than taxable agency-assisted acquisitions. Our recommendations can be summarized as follows:

1. We agree with the approach embodied in the existing regulations that all taxable assisted acquisitions (whether in the form of asset or stock acquisitions) should be treated as taxable asset acquisitions. Furthermore, we believe regulations should be issued implementing the general principles that (i) an acquirer's basis in the acquired assets is equal to its full purchase price, and (ii) proceeds from the disposition of the acquired assets are first offset by basis and the excess is included in income when recognized.

2. We believe the basis step-up and six year inclusion rules create a lack of symmetry between economic and tax consequences and that the regulations should be amended to eliminate these rules. In this regard, we would propose adopting one of two approaches described in the Report which match basis increases and income inclusions.

3. We believe that the regulations should retain the rule that losses on assets covered by a loss guarantee arrangement should not be allowed below their highest guaranteed value.

4. We believe the regulations should be amended to (i) eliminate the general rule that ignores debt or equity issued to an agency in a taxable acquisition (under general tax principles such debt or equity would be included in the acquirer's purchase price), and (ii) include anti-abuse rules that would (A) disregard debt issued to an agency to the extent that there is no reasonable expectation of full payment at the time of issuance and (B) defer any loss on an acquired asset until the acquirer has either repaid a corresponding amount of the agency debt or included in income a corresponding amount (either by reason of cancellation of indebtedness or otherwise).

We appreciate your consideration of our comments. Please let us know if you would like to discuss these matters further or if we can assist you in any other way.

Respectfully submitted,

Peter H. Blessing
Chair

Enclosure

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