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May 5, 2010

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Re: Report on Ambiguities and Uncertainties in the Original Issue Discount Regulations

Gentlemen:

We are pleased to submit the New York State Bar Association Tax Section's Report No. 1212, concerning ambiguities and uncertainties in the original issue discount regulations.

The Report addresses some of the more common uncertainties regarding the application of the OID regulations to certain types of financial instruments and makes recommendations regarding the guidance that we believe should be issued regarding the tax treatment of such instruments. While we agree with the general framework of the OID regulations, we have encountered in our collective years of practice a number of ambiguities and uncertainties regarding the application of the OID regulations to certain common types of financial instruments. We have also encountered cases in which a literal application of the OID regulations would be inconsistent with the economics of the underlying financial instrument or would lead to a tax result that is inappropriate and was likely unintended by the drafters of the OID regulations. These comments are intentionally narrow in scope and generally do not address special rules.

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The Report recommends that guidance be issued that would provide the following:

A debt instrument should not fail to qualify as a short-term obligation merely because its maturity date may be extended beyond one year due to a market disruption event as long as: (i) the possibility of a market disruption event occurring is remote, (ii) a payment may never be deferred for more than five business days and (iii) no additional interest (or other compensation) is payable in respect of the deferred period.

1. A debt instrument that provides for annual interest payments should not be treated as issued with OID solely because one or more of the annual payments will be deferred beyond one year if the annual interest payment date is not a business day.

2. The pre-issuance accrued interest election should only be made by the issuer of a note and such election, if made, should be binding on holders of the notes.

3. The consideration that is deemed paid for tax purposes in the case of an issuer that issues a note in a qualified reopening in exchange for property should be equal to the fair market value of the note on the date of the reopening rather than the issue price of the note.

4. The special rules governing notes that provide for "alternative payment schedules" should apply to a note if a single payment schedule under the terms of the note is "significantly more likely than not to occur" even if there is an infinite number of possible alternative payment schedules under the terms of the note.

5. The issue price of debt sold for money should generally be determined on the first date on which one or more purchasers agree to acquire a substantial amount of the debt at a fixed price, as opposed to the issue date. In addition, we recommend that the IRS issue guidance regarding the determination of a "substantial amount" for purposes of determining the issue price of a note. We specifically recommend that any such guidance provide that the relative percentage amount of notes that are sold should be taken into account in determining whether the "substantial amount" test is satisfied. In addition, we recommend adopting a safe harbor that would treat 10% of the aggregate principal amount of a debt issuance as constituting a "substantial amount."

6. The comparable yield and projected payment schedule of a contingent payment debt instrument should be determined as of the pricing date for the note rather than on the issue date for the note.

7. The presumption in the VRDI rules under which the value of an initial fixed rate and a subsequent variable rate are treated as intended to approximate each other if the value of the variable rate on the issue date does not differ from the value of the fixed

rate by more than 25 basis points should be determined on the pricing date for the notes as opposed to the issue date for the notes.

8. The "option rule" in the OID regulations should apply to a VRDI after the application of the "fixed rate substitute rule" in the VRDI regulations.

9. Guidance should be issued regarding the appropriate tax treatment of discount loans that have a contingent yield because they have an excess cash sweep feature under which any available cash is required to be used to repay the principal of the loan.

We appreciate your consideration of our recommendations. If you have any questions or comments regarding this Report, please feel free to contact us and we will be glad to discuss or assist in any way.

Sincerely,

Peter H. Blessing
Chair

cc: William E. Blanchard
Senior Technical Reviewer, Branch 3
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