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December 15, 2011

The Honorable Emily S. McMahon
Acting Assistant Secretary
(Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Re: Report on Registered Debt Following the HIRE Act

Dear Ms. McMahon, Mr. Wilkins and Mr. Shulman:

We are pleased to submit New York State Bar Association Tax Section Report No. 1250. The report addresses issues arising out the enactment of the Hiring Incentives to Restore Employment Act (the "HIRE Act") that relate to the issuance of registered debt after March 18, 2012.

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The HIRE Act enacted significant restrictions on U.S. issuers' ability to issue debt securities in bearer form. Section 502 of the HIRE Act, one of many provisions aimed at eliminating tax evasion through cross-border arrangements, effectively eliminates U.S. issuers' ability to issue debt securities in bearer form in the international capital markets. Subject to certain exceptions, U.S. issuers that issue debt securities in bearer form after March 18, 2012 will be disallowed interest deductions with respect to such issuance, even if the distribution of those securities is targeted to non-U.S. investors. The HIRE Act also repealed the applicability of the portfolio interest exemption to bearer-form debt. Thus, for debt securities issued after March 18, 2012, to qualify for the portfolio interest exemption, those securities will be required to be in registered form. The HIRE Act made related changes to the definition of "registered form"; in particular, the changes now clarify that debt securities that are in a dematerialized format will be treated as in registered form, although the new provisions provide no guidance regarding the meaning of the term "dematerialized." Thus, there is a need for immediate guidance on how to interpret these new requirements.

In connection with the foregoing, we recommend the following:

1. In considering the circumstances under which debt will be treated as in registered or bearer form, we believe that, in borderline cases, the rules should tend to operate in a manner that is weighted towards treating the debt security as in registered form.

2. It would be helpful for the Internal Revenue Service to confirm that the amendments made to section 163(f)(3) by the HIRE Act will not be interpreted in a manner that could negatively impact arrangements under which securities are regarded as being in registered form under current law.

3. We believe it would be helpful to provide guidance on the characteristics of an exchange or arrangement that would be viewed as a "dematerialized" system or otherwise as an approved book entry system under sections 149(a)(3) and 163(f)(3). In particular, we believe that an arrangement whereby a debt security is effectively immobilized with a custodial or other depositary arrangement, and where beneficial ownership of the debt security is held and traded only through a book entry system, should be viewed as a "dematerialized" system or otherwise as such an approved book entry system, even if there are circumstances in which the debt security could be converted into definitive form. Under our proposal, securities that were either in a dematerialized system or immobilized in a clearing system would be treated as in registered form before the actual issuance of a definitive security.

4. Guidance should be provided on the extent to which debt securities would be considered issued in registered form even though physical bearer securities can be issued in limited

circumstances. In particular, these circumstances should include (i) the cessation of clearing system operations without a successor, (ii) a default by the issuer, or (iii) a change in tax law that is adverse to the issuer.

5. We generally agree with the apparent conclusion of Notice 2006-99, 2006-2 C.B. 907 (the "Notice") that an express legal agency relationship between an issuer and the party which maintains a book entry system is not required. However, in light of the uncertainty under current law as to whether the Notice can be applied in the absence of an actual and acknowledged agency relationship, the Internal Revenue Service should confirm that no such agency relationship is required.

6. Definitive bearer securities may be required to be issued upon a clearing system shutdown or in certain other limited circumstances. In those circumstances, we recommend the debt security be treated as if it continued to be in registered form, so that no issuer or holder sanctions are triggered.

7. The regulatory paradigm under section 163(f)(2)(B) for foreign-targeted offerings by foreign issuers should be preserved for purposes of section 4701. To make it more useful, the regulations under Treasury Regulations section 1.163-5(c)(2)(i) (C) and (D) should be moved to section 4701.

8. Provisions of Treasury regulations relating to portfolio debt that is not issued in registered form should be updated to reflect the HIRE Act's prohibition on such issuances. For example, consideration should be given to deleting an example in the conduit regulations that is affected by the statutory change.

We appreciate your consideration of the Report and our recommendations.

Sincerely,

Jodi J. Schwartz

cc:

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