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January 23, 2004

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

The Honorable Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Dear Secretary Olson and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1050 on Continuity of Interest and Pre-Closing Stock Value Fluctuation.

This report addresses the question whether the continuity of proprietary interest requirement applicable to reorganizations under Section 368 of the Internal Revenue Code should be determined based on stock values as of the date of the signing of a merger agreement or, as is the customary understanding, as of the date the merger closes.

The current practice for determining whether a merger satisfies the continuity of proprietary interest requirement turns on the value of the acquiring corporation's stock on the date that the merger closes, rather than on the date that the merger agreement is signed. Consequently, in a merger where shareholders of the target corporation receive consideration consisting

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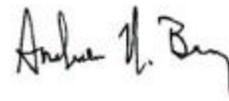
of part-cash, part-stock in the acquiring corporation, the transaction could fail to satisfy the continuity of proprietary interest requirement if the acquiring corporation's stock drops in value between the date that the merger agreement is signed and the date that the merger closes.

As a result of the current practice, considerable taxpayer uncertainty regarding whether a merger that is the subject of a binding written agreement (but that has not yet closed) will qualify as a reorganization. We believe this uncertainty is not necessary in order to achieve the objective of the policies of the continuity of interest doctrine. This doctrine is a judicial rule designed to disqualify transactions that meet the literal requirements of the Code where the underlying objectives of business reorganization are not served. As such, we believe this doctrine can be applied with some flexibility with a view to preserving the underlying objectives of the reorganization provisions, while not impacting other areas of tax law.

The principal recommendation of this report is that continuity of proprietary interest be measured using signing date values (determined immediately prior to the public announcement of the merger agreement) provided that (a) the acquiring corporation and the target corporation have entered into a binding written contract subject to customary closing conditions and (b) the closing of the merger occurs within a commercially reasonable amount of time. Our recommendation relating to the timing of this determination relates solely to the continuity of interest doctrine. It does not extend to other areas of taxation. For example, we are not suggesting any change to the general rule for determining amount realized based upon closing date values.

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.

Respectfully submitted,

A handwritten signature in black ink that reads "Andrew N. Berg". The signature is written in a cursive style with a large, stylized 'B' at the end.

Andrew N. Berg
Chair

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

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