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February 23, 2005

Mr. Eric Solomon
Acting Deputy Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3104 MT
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

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

Dear Acting Deputy Assistant Secretary Solomon and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1080 providing comments on the new disclosure requirements imposed on material advisors by the American Jobs Creation Act of 2004. This report responds to the request for comments in Notice 2004-80, 2004-50 IRB 963 (the "Notice"), including the Notice's specific request for comments on the definition of material advisor and on ways to reduce taxpayer burden and to improve disclosure.

As you know, the Tax Section strongly supports your efforts to focus on tax-motivated transactions as they develop in the marketplace and provide early guidance regarding their tax consequences. We therefore support the general approach taken by the Notice and welcome the opportunity to help you implement the reporting procedures it describes. We also recognize, as you do, the practical difficulties that will be associated with the

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implementation of these new reporting procedures. In this regard, we appreciate and concur with your intention to base new regulations defining a material advisor under Section 6111 of the Code on the approach that is already set out in the current regulations under Section 6112 of the Code. In response to your request in the Notice, however, we are making additional recommendations to maximize the effectiveness of the reporting procedures while minimizing any concerns that they might be unnecessarily burdensome or overbroad.

Under the current regulations, an advisor may be a "material advisor" if the advisor makes a tax statement for the benefit of a taxpayer who the advisor "knows is or reasonably expects to be" required to disclose the relevant transaction as a reportable transaction. This is an important standard, and we think some elaboration would be helpful. We do not think an advisor should be able to turn a blind eye to facts that should lead the advisor to suspect the existence of a reportable transaction, and if such alerting facts do exist, we think the advisor should inquire further of his or her client. We do not think, however, that the advisor should have a general duty of inquiry in the absence of such alerting facts, and we think the regulations should make this clear. Otherwise there would be no definable limit to the investigations that advisors might have to undertake to assure themselves that they had not unwittingly advised on a reportable transaction. For similar reasons, we do not think an advisor should ever be expected to make independent inquiries of persons who are not clients.

The current regulations provide that an advisor is a material advisor only if the advisor makes a "tax statement" with respect to a reportable transaction. This is also an important limitation that should be elaborated. In general, we do not think a "tax statement" should include oral statements, because the burden associated with requiring advisors to report solely on account of oral statements would be great, whereas the benefit to the government would be small. Oral statements are not normally intended to be formally relied upon, and they are often made on a casual basis. It would be difficult, if not impossible, for large law firms, accounting firms and investment banks to track and regulate all of the oral statements made by each of their thousands of members in order to meet their compliance duties. On the other hand, Congress presumably intended to confer material advisor status on those advisors who play a meaningful role in the structuring of a transaction. These advisors normally reduce their advice to writing.

Some, but not most, of our members believe, however, that it might be appropriate to confer material advisor status on an advisor who makes detailed oral statements for the express purpose of persuading, or otherwise inducing, a taxpayer to enter into a transaction -- *i.e.*, on an advisor who is actively promoting a transaction, as opposed to merely documenting it or providing legal advice -- even if the advisor does not make any written statements.

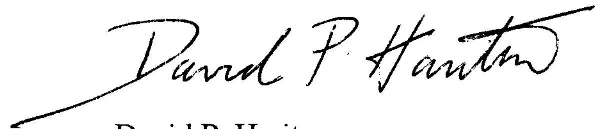
For similar reasons, we think that different standards should apply to written tax statements made by an advisor who actively promotes a transaction as opposed to an advisor who merely assists in the documentation of a transaction or who provides related advice. The latter should not be treated as a material advisor on the basis of written statements that are intended as casual statements or observations, rather than as advice. We think there should be a rebuttable presumption, however, that the written statements of lawyers are intended as advice.

The current regulations do not confer material advisor status on an advisor who does not know, and does not reasonably expect, at the time a transaction is entered into that the transaction will be a reportable transaction. We think the regulations should clarify that such an advisor will not later be treated as a material advisor on the basis of unanticipated subsequent events. We think the regulations should also clarify that an advisor will not be treated as a material advisor in the absence of a clear expectation that the relevant transaction will be reportable. For example, an advisor should not be viewed as "expecting" a taxpayer to incur a loss in a foreign currency merely because the market forward price of the currency is lower than its spot price.

With regard to the minimum fee requirement, we think the regulations should follow the statutory language and provide for a lower fee threshold of $50,000 only when substantially all of the relevant tax benefits are provided to individuals. We also think that filing procedures should clarify (a) that disclosure filings do not need to identify the names of the relevant taxpayers, (b) what associated written materials, if any, must be included in the filing along with a description of the structure of the transaction and its tax benefits, and (c) if any additional written materials must be submitted, how the taxpayer's name should be redacted and the appropriate procedures for omitting privileged materials.

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 you in any way.

Respectfully submitted,



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