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July 26, 2005

Mr. Eric Solomon  
Acting Deputy Assistant Secretary (Tax Policy)  
Department of the Treasury  
Room 3112 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

### Re: Proposed Regulations Regarding Cross-Border Mergers

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. 1094 (the "Report") on proposed Treasury Regulations issued under Sections 367 and 368 of the Internal Revenue Code (the "Proposed Regulations"), which provide rules regarding cross-border mergers and acquisitions.

In the first instance, we want to thank the IRS and Treasury for undertaking this project, which has become increasingly important in light of growing internationalization and investment in publicly traded foreign corporations. The Report generally supports the modified definition of a "reorganization" under the Proposed Regulations, and we believe that certain of the proposed changes to existing Section 367 Regulations are necessary to take into account the expanded definition of "statutory merger or

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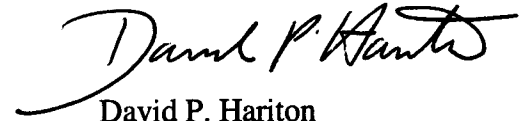
consolidation". We note, however, that certain of the rules as described under the Proposed Regulations add to the complexity of the existing Section 367 Regulations, and we believe these regulations are already overly complex and, in some respects, inconsistent. We therefore believe this might well be an appropriate time to consider a complete restructuring of the Section 367 Regulations.

If the Proposed Regulations are to be finalized we have several specific comments. We disagree with the rule requiring inclusion of the "all earnings and profits amount" in transactions subject to both Section 367(a) and (b). With respect to the indirect stock transfer rules, we believe (i) that where a foreign corporation acquires a domestic corporation's assets and subsequently contributes some of the acquired assets to a controlled foreign subsidiary, a U.S. shareholder should be treated as transferring stock of a foreign corporation to a foreign acquiring corporation and not as transferring stock of a domestic corporation to a foreign corporation, (ii) that the application of Sections 367(a) and (d) to asset reorganizations in which a foreign corporation transfers part of the assets acquired from a domestic corporation to a controlled domestic corporation is unnecessarily punitive, and (iii) that the IRS and Treasury should reconsider whether a triangular B reorganization in which a U.S. shareholder exchanges stock of an acquired corporation for stock of a domestic parent in control of a foreign acquiring corporation should be treated as an indirect stock transfer by the shareholder of the acquired corporation to the foreign corporation.

With respect to the basis and holding period rules under the Proposed Regulations, we generally agree with the tracing approach required with respect to different blocks of stock owned by an exchanging shareholder. We question, however, the application of the special basis and holding period rules to certain triangular reorganizations in which a foreign corporation with a Section 367(b) shareholder is the merging or surviving corporation. While these rules may provide a theoretically correct solution to preserving Section 1248 amounts, in practice, we think they would be onerous to implement.

We appreciate your consideration of our recommendations and comments. Please feel free to contact us if you have any questions regarding this report and, as always, we would be happy to discuss them with you.

Respectfully submitted,



David P. Hariton  
Chair

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