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June 25, 2010

The Honorable Michael Mundaca  
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The Honorable Douglas H. Shulman  
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Re: Recommendations for 2010-2011 Tax Guidance Priority List

Dear Sirs:

In response to Notice 2010-43, the Tax Section of the New York State Bar Association submits the following request for guidance from the Internal Revenue Service and the Treasury Department on the issues listed below during the 2010-2011 guidance plan year.<sup>1</sup> We request that items that are marked by asterisks be treated as higher priority items.

The Tax Section has previously addressed several of the items on this list in its reports. In order to facilitate the government's review of these items, the list includes a reference to a Tax Section report where relevant. The referenced reports are listed in an annex. Reports submitted from 2000 on can be accessed at our website at [www.nysba.org](http://www.nysba.org) (Sections/Tax Section/Tax Section Reports).

<sup>1</sup> This letter may be cited as New York State Bar Association Tax Section, *Recommendations for 2009-2010 Tax Guidance Priority List* (Report No. 1215, June 25, 2010).

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## I. Consolidated Returns

Technical issues regarding the treatment of upstream and sideways restructurings of insolvent subsidiaries, including (i) potential application and implications of successor concepts in applying the rules of Reg. sections 1.1502-13 and 1.1502-80(c); (ii) potential application of look-through rules under the gross receipts test of section 165(g)(3) with respect to intercompany dividends, intercompany interest, and other intercompany transactions; and (iii) the interaction of Treas. Reg. section 1.1502-13(g) and the net positive adjustments factor under Treas. Reg. section 1.1502-36(c)

Guidance regarding the application of section 108(b), including (i) the effect of intercompany reorganizations on the application of the section 1017(b)(2) liability floor and the excess loss account recapture rules. (Treas. Reg. § 1.1502-28(b)(9)); (ii) modifying the ordering rules for attribute reduction attributable to look-through and direct cancellation-of-indebtedness income (Treas. Reg. section 1.1502-28(b)(1)(ii)); and (iii) clarification of the application of Reg. section 1.1502-11(c), particularly in the context of multiple dispositions

Guidance involving section 382 in consolidation, including (i) modification of the grouping rules for subsidiaries which joined the group (or subgroup) within 5 years and had a NUBIG upon joining the group (Treas. Reg. § 1.1502-91(g)(2)(ii) and (iv)); (ii) consolidated rules for qualification under, and the application of, section 382(l)(5); and (iii) consolidated rules for qualification, and determinations of the section 382 limitation, under section 382(l)(6)

Guidance regarding the application of the intercompany transaction rules to an intercompany sale of property subject to mark-to-market under section 475

Guidance on group continuation issues under section 1502 after a corporate transaction

## II. Corporations

\*\*Guidance under section 382, including (i) the treatment of stock held by multiple funds managed by a common investment advisor, (ii) issues arising under sections 382(l)(5) and 382(l)(6) and (iii) the circumstances under which debt will be treated as stock for section 382 purposes or otherwise in a restructuring (Report No. 1163)

\*\*Guidance on the application of section 597 to government assistance provided in connection with failed financial institutions, including FDIC-provided seller financing and loss guarantees (Report No. 1210)

Guidance on provisions in H.R. 4213 (or successor legislation) regarding section 356 (if enacted)

Finalization of the proposed section 336(e) regulations (Report No. 1174)

Finalization of proposed regulations under section 368(a)(1)(F)

Guidance regarding distributions in connection with acquisitions (Report No. 1158)

Guidance providing ordering rules for characterizing tax-free transactions that qualify under multiple provisions (Report to be submitted)

Guidance addressing issues related to triangular reorganizations (Report No. 1164)

Guidance on whether a redemption is an acquisition for section 355(e) purposes (Report No. 1046)

Guidance that provides exceptions to the rules of Treas. Reg. section 1.355-(d)(2)(v) that stock received in a liquidation of a partner's interest in a partnership distribution is a "purchase" for purposes of section 355(d)

Guidance on the capitalization and amortization of acquisition expenses (Report No. 1059)

Guidance on the capitalization and amortization of bankruptcy/reorganization expenses

Reconsideration of the no-net-value regulations (Report No. 1102)

Guidance as to the continuing scope, if any, of Rev. Rul. 59-222 (Report No. 1102)

Guidance to allow elections out of section 368(a)(1)(G)

Guidance related to treatment of liabilities of a disregarded entity, including (i) whether such liabilities are treated as assumed for purposes of section 304 when a disregarded entity is transferred at the same time as a corporation, and (ii) the application of Treas. Reg. section 1.1001-3 to transactions involving disregarded entities

Guidance on the zero basis doctrine as applied to debt instruments, in both the corporate and partnership context (Report No. 1120)

Guidance on the application of section 305, including (i) its application to dividends with caps on the amount of cash available for distribution, (ii) the required nexus between cash and stock distributions, and (iii) reconsideration of the prohibition on taking a conversion feature into account in determining whether stock is preferred

Guidance on issues regarding the reliance on 13Ds and 13Gs for section 382 purposes

Final regulations regarding the hot stock rules under section 355(a)(3)(B) (Report No. 1192)

Guidance terminating the anti-churning rules of section 197(f)(9) in light of the passage of time

### III. Employee Benefits

Clarification of the rule (which is currently effective if there is compliance with the full set of proposed regulations) in the income inclusion segment of the proposed section 409A regulations permitting correction with respect to unvested amounts

Further guidance on section 409A(b) (off-shore funding)

Further guidance on certain issues under section 457A (Report No. 1193)

### IV. Exempt Organizations

What constitutes a "functionally unrelated business" under section 4943

Guidance on private foundation issues for investors in Ponzi schemes (Report No. 1183)

Guidance concerning whether a disregarded entity owned by a charity is disregarded for all exempt organization purposes (e.g., is a donation to a domestic or foreign DE subsidiary of a US charity tax deductible?)

### V. Financial Product and Financial Transactions

\*\* Guidance on the treatment of notional principal contracts under section 871(l), including (i) acceptable ways for a taxpayer that is currently a party to a "specified notional principal contract" to "cleanse" the contract so that payments thereunder on or after September 14, 2010 will not be recharacterized as U.S.-source dividends, and (ii) guidance as to what types of contracts do not have the "potential for tax avoidance" within the meaning of section 871(l)(3)(B)

\*\* Guidance concerning cross-border securities lending (Notice 2010-46)

\*\*Guidance on the treatment of debt-for-debt exchanges, including (i) how to calculate the issue price of newly issued debt and (ii) how to account for cancellation-of-indebtedness income (Report No. 1209)

\*\*Guidance on the allocation of payments between principal and interest when debt is not paid in full. (Report No. 1163)

\*\*Guidance on the accrual of interest and market discount where there is no reasonable expectation of payment, on character mismatches with respect to accrued interest, OID and market discount, and on other market discount issues. (Report Nos. 1163 and 1209)

\*\*Guidance under the AHYDO rules (sections 163(e)(5) and 163(i)), including whether the AHYDO rate should be modified in light of the current economic situation (Report No. 1196)

\*\*Update the regulations under section 1273 determining when a debt instrument is treated as publicly traded (Report Nos. 1066, 1163 and 1209)

\*\*Guidance regarding the characterization of commitment and letter of credit fees by non-bank foreign investors in revolving credit facilities of U.S. borrowers, particularly for withholding tax purposes

\*\*Guidance regarding the characterization of fees for consenting to waivers or modifications of bonds or loans, including for withholding tax purposes

\*\*Guidance on the application of the taxable mortgage pool rules to TALF and legacy securities funds

Guidance on credit default swaps, particularly with respect to upfront payments (Report No. 1095)

Guidance under section 1272(a)(6) on the yield that an investor that makes the election to accrue market discount on the basis of a constant interest rate may use, in particular whether an investor may use the yield (including current prepayment and default assumptions) that it used in making its investment decision

Revenue Ruling or other published guidance affirming or rejecting the result in AM 2007-0014, relating to an issuer of convertible debt hedging the debt with options

Finalization of proposed regulations under section 446 relating to notional principal contracts with contingent nonperiodic payments (Report No. 1062)

Finalization of proposed regulations under section 263(g) (Report No. 997)

Guidance on various ambiguities and uncertainties in the OID rules (Report No. 1212)

Guidance following up on Notice 2008-2, concerning the treatment of prepaid forward contracts (Report No. 1159)

Finalization of proposed regulations under section 1058

## VI. General

\*\*Guidance regarding scope and administration of section 7701(o) and 6662(i), including a review process for imposition of the penalty (Report to be submitted)

\*\*Guidance regarding estimated tax consequences of a Roth IRA (Report No. 1204)

## VII. Gifts, Estates and Trusts

\*\*Guidance (in the absence of express legislation) regarding the allocation of generation-skipping transfer (GST) tax exemption to, and other GST tax consequences of, 2010 direct-skips, taxable distributions and taxable terminations where the subject property continues to be held in trust in 2011

Guidance as to whether an interest in a partnership is intangible personal property in the case of a gift made by a nonresident not a citizen of the United States or in the estate of a nonresident not a citizen of the United States, and, if a partnership interest is intangible personal property, how to determine the situs of such property for estate tax purposes

Guidance under section 2511(c) pursuant to Notice 2010-19

Guidance regarding the gift tax consequences to Roth IRA beneficiaries who consent to a recharacterization of the Roth IRA back to a traditional IRA

Guidance regarding the determination of gross income for purposes of section 642(c) when distributions are made to a trust from a partnership or a trust receives "phantom" income from a partnership

Final regulations under section 67 regarding miscellaneous itemized deductions of a trust or estate (Report No. 1160)

Revenue ruling regarding the consequences under various income, estate, gift and GST tax provisions of using a family owned company as a trustee of a trust (Report Nos. 1111 and 1168)

Guidance under section 2801 regarding the tax imposed on U.S. citizens and residents who receive gifts or bequests from certain expatriates

Guidance in light of responses to IR-2007-127 regarding certain trust distribution committees and general powers of appointment (Report No. 1134)

## VIII. International

\*\*Guidance regarding the FATCA provisions of the HIRE Act relating to withholding tax and reporting on certain payments made to non-U.S. financial institutions (Report No 1199 and Report to be submitted)

\*\*Guidance regarding the treatment of notional principal contracts under section 871(l) (see part IV above)

\*\*Guidance regarding cross-border securities lending (Notice 2010-46)

\*\*Guidance under the trading safe harbor of section 864(b)(2) regarding the extent to which the safe harbor applies to debt workouts, including acquisitions of distressed debt by a foreign investor for the purpose of participating in the recapitalization of the debtor (Report No. 1163)

\*\*Guidance addressing (i) the amount of a section 956 inclusion, including where multiple CFCs guarantee the same loan, or where the value of CFC stock or assets pledged is less than the amount of the loan, and (ii) the effect of a pledge of the stock of a “US holdco” that owns solely stock of CFCs

\*\*Guidance on FBARs, including whether and under what circumstances hedge funds and private equity funds are financial accounts, consideration of waiver of the prior year filing requirements, and clarification of numerous other compliance issues (Notice 2010-23; Announcement 2010-16) (Report No. 1194)

\*\*Guidance on the application of withholding tax rules to certain fees referred to under part V above, Financial Products and Financial Transactions

\*\*Guidance on provision in H.R. 4213 (or successor legislation) relating to matching of foreign tax related income (if enacted); or finalize foreign tax credit regulations relating to technical taxpayer rules and compulsory payments (proposed Treas. Reg. section 1.901-2(e)(5)) (Report No. 1135)

Guidance confirming the scope of, and exceptions to, reporting obligations under section 6038D (e.g., the extent to which these obligations apply to nonresident aliens and beneficiaries of foreign trusts)

Guidance on the application of withholding tax rules to guarantee fees and letter of credit fees in light of *Container Corporation* and H.R. 4213 proposed source rule for guarantee fees

Guidance on when loan origination and related activities might be considered to be an investment activity rather than a trade or business (Report No. 1163)

Guidance under section 367(d) and 721(c) and (d) (Report to be submitted)

Finalize proposed regulations under section 959

Guidance on the source and withholding of cancellation of indebtedness income of foreign persons (Report No. 1170)

Finalize or repropose the proposed section 163(j) regulations on earnings stripping (1991 Report)

Update the regulations under section 892 (Report No. 1157)

Finalize or repropose the proposed PFIC regulations, including guidance on banking and securities businesses, look-through rules, tiered entities and options (Report Nos. 994, 1207)

Finalize proposed regulations on the source of service income (proposed Treas. Reg. section 1.861-4(b)(2)(ii)(G))

Finalize proposed regulations under section 987 (Report No. 1140)

Finalize or repropose the proposed global dealing regulations (proposed Treas. Reg. section 1.482-8)

Guidance on the treatment of government licenses under FIRPTA (Announcement 2008-115) (Report No. 1195)

Guidance under section 7874 (Report No. 1211)

Guidance under U.S. income tax treaties (Report Nos. 1096, 1127 and 1214)

Finalize proposed regulation concerning application of conduit regulations to disregarded entity (Report No. 1188)

#### IX. Partnerships

\*\*Finalize proposed regulations under sections 108(e)(8) and 721 on debt-for-equity exchanges by partnerships (proposed Treas. Reg. sections 1.108-8 and 1.721-1(d)) (Report No. 1184)

Guidance on provision in H.R. 4213 (or successor legislation) on carried interests (if enacted)

Finalize proposed regulations under section 721 on noncompensatory options issued by a partnership (proposed Treas. Reg. section 1.721-2) (Report No. 1048)

Guidance regarding section 704(c) layers relating to partnership mergers and tiered partnerships (Report No. 1202)

Guidance regarding aggregation issues for securities partnerships under section 704(c) (Report to be submitted)

Finalize proposed regulations under section 706 on allocations of income and loss among partners with varying interests during the taxable year (proposed Treasury regulation § 1.706-4) (Report No. 1201)

Guidance on partnership distributions under section 751(b), including (i) guidance on measurement issues, and (ii) guidance on the consequences of a shift in shares of hot assets (Report No. 1122)

Guidance on cancellation of indebtedness income of publicly traded partnerships

Guidance on the extent to which corporate partners are entitled to an 80 percent dividends received deduction with respect to dividends received through a partnership



Guidance on the zero basis doctrine as applied to debt instruments, in both the corporate and partnership context (Report No. 1120)

Finalize or eliminate proposed Treas. Reg. section 1.337(d)-3 (1993 Report)

Guidance terminating the section 197(f)(9) anti-churning rules in light of the passage of time

X. REITs and RICs (Domestic)

Revision of Rev. Proc. 2003-65, relating to mezzanine loans held by a REIT (Report No. 1155)

Consideration of a REIT bankruptcy exception for distributions

Guidance providing relief for inadvertent violations of the preferential dividend rules (unless and until the rules as applied to RICs and REITs are repealed or reformed) (Report No. 1153)

Respectfully submitted,



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Chair

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List of NYSBA Tax Section Reports on Requested Guidance Plan Issues

Report of Ad Hoc Subcommittee on U.S. Activities of Foreign Taxpayers on Regulations Proposed under Section 163(j) (Oct. 24, 1991) (“1991 Report”)

Report of Committee on Corporations on Proposed Regulations Implementing Notice 89-37 (March 3, 1993) (“1993 Report”)

Report No. 994, *Report on Proposals for Guidance with Respect to Passive Foreign Investment Companies* (May 22, 2001)

Report No. 997, *Report on Proposed “Straddle” Regulations* (Sept. 5, 2001)

Report No. 1046, *Report on “Non-Plan Issues”* (Jan. 13, 2004)

Report No. 1048, *Report on the Proposed Regulations relating to Partnership Options and Convertible Securities* (Jan. 23, 2004)

Report No. 1059, *Report on Capitalization of Expenses to Repair, Improve or Rehabilitate Tangible Property and Certain Transaction Costs* (May 7, 2004)

Report No. 1062, *Report on Proposed Notional Principal Contract Regulations* (June 4, 2004)

Report No. 1066, *Report on Definition of “Traded on an Established Market” Within the Meaning of Section 1273* (Aug. 12, 2004)

Report No. 1070, *Report on Source, “Effective Connection” of COD Income in Cross-Border Financings* (Nov. 5, 2004)

Report No. 1095, *Report on Credit Default Swaps* (Sept. 9, 2005)

Report No. 1096, *Letter on Notice 2005-93* (Sept. 22, 2005)

Report No. 1098, *Report on the Proposed Regulations and Revenue Procedure Relating to Partnership Equity Transferred in Connection with the Performance of Services* (October 26, 2005)

Report No. 1102, *Report on Proposed Regulations Regarding Organizations, Reorganizations, and Liquidations Involving Insolvent Corporations* (Jan. 20, 2006)

Report No. 1120, *Report on “Zero Basis”* (Oct. 16, 2006)

Report No. 1122, *Report Responding to Notice 2006-14 Relating to the Treatment of Partnership Distributions under Section 751(b)* (Nov. 28, 2006)

Report No. 1127, *Model Income Tax Convention Released by the Treasury on November 15, 2006* (April 11, 2007)

Report No. 1135, *Report on Proposed Section 901 Regulations Relating to Compulsory Payments of Foreign Taxes* (Oct. 25, 2007)

Report No. 1140, *Report on Proposed Regulations Under Section 987* (Jan. 3, 2008)

Report No. 1153, *Report on the Application of Code Section 562(c) to Regulated Investment Companies and Real Estate Investment Trusts* (April 7, 2008)

Report No. 1155, *Report on Revenue Procedure 2003-65* (May 6, 2008)

Report No. 1157, *Report on the Tax Exemption for Foreign Sovereigns Under Section 892 of the Internal Revenue Code* (June 13, 2008)

Report No. 1163, *Letter to the Honorable Eric Solomon and the Honorable Douglas H. Shulman re: Guidance on Economic Downturn Issues* (Aug. 19, 2008)

Report No. 1174, *Report on Proposed Regulations Implementing Section 336(e)* (Dec. 31, 2008)

Report No. 1180, *Report on a Program to Remedy Documentary Noncompliance by Section 409A Plans in Response to Notice 2008-113* (March 25, 2009)

Report No. 1183, *Report on Private Foundation Investors in Ponzi Schemes* (May 7, 2009)

Report No. 1188, *Report on the Application of Anti-Conduit Regulations to Hybrid Entities and Instruments* (Aug. 27, 2009)

Report No. 1192, *Report on Temporary Regulations Regarding the Hot Stock Rules Under Section 355(a)(3)(B) Tax Report and Letter 1191* (Oct. 2, 2009)

Report No. 1193, *Report on Rules Governing Nonqualified Deferred Compensation Under Section 457A* (Oct. 5, 2009)

Report No. 1194, *Report on the Rules Governing Reports on Transactions with Foreign Financial Agencies (FBARs)* (Oct. 30, 2009)

Report No. 1195, *Report on IRS Announcement 2008-115 on FIRPTA Treatment of Rights Granted by a Government* (Nov. 16, 2009)

Report No. 1199, *Comments on the Foreign Account Tax Compliance Legislation* (Jan. 11, 2010)

Report No. 1201, *Report on Proposed Regulations on Varying Partnership Interests Under Section 706* (Jan. 19, 2010)

Report No. 1202, *Report on the Request for Comments on Section 704(c) Layers Relating to Partnerships Mergers and Tiered Partnerships* (Jan. 22, 2010)

Report No. 1204, *Estimated Tax Consequences of Roth IRA* (Feb. 19, 2010)

Report No. 1207, *Report Commenting on Select Issues with Respect to the Passive Foreign Investment Companies* (March 8, 2010)

Report No. 1209, *Report on Definition of “Traded on an Established Market” within the Meaning of Section 1273* (March 30, 2010)

Report No. 1210, *Report on FDIC-Assisted Taxable Acquisitions* (April 30, 2010)

Report No. 1212, *Report on Ambiguities and Uncertainties in the Original Issue Discount Regulations* (May 5, 2010)

Report No. 1211, *Report on Certain Issues Under Section 7874* (May 3, 2010)

Report No. 1214, *Report on Guidance Under U.S. Income Tax Treaties* (May 28, 2010)