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August 11, 2010

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The Honorable William J. Wilkins
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Re: Report on the Rescission Doctrine

Gentlemen:

We are pleased to submit New York State Bar Association Tax Section Report No. 1216 concerning the rescission doctrine. The enclosed report is intended to assist and encourage Treasury and the Internal Revenue Service (the "Service") to formulate guidance relating to the circumstances under which, even outside the controlled environment of a ruling request, the Service will respect the "rescission" or unwinding of a transaction as sufficient to permit the transaction to be disregarded for tax purposes. Given the frequency with which the doctrine of rescission has been invoked in recent years and the limited (and somewhat confusing) precedential authority available, we believe that more systematic guidance in this area would be extremely beneficial to taxpayers, their advisors and the tax system alike.

The report describes the current state of the law regarding rescission and notes a number of taxpayer and tax policy concerns we believe should be considered in issuing published guidance. In

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view of that discussion, we make the following principal recommendations in the report:

1. We recommend that Treasury and Service clarify the elements of a valid rescission for federal tax purposes by, for example, confirming the practical approach the Service has taken in private letter rulings that the *status quo ante* requirement is met where parties are restored to their prior positions “in all material respects”; addressing the effect that the making or receiving of additional payments in the course of an “unwind” might have in this regard; defining the same taxable year requirement in the event that the parties involved have different tax years; and detailing whether and to what extent a rescission must be identified as such by the parties at the time it is undertaken.
2. We believe that, in providing guidance concerning the elements and effects of a valid rescission, Treasury and the Service should be especially attentive to the doctrine’s application in the context of related party transactions, unilateral actions or transactions, “partial” rescissions and cases where the underlying transaction is later “done over.”
3. We also believe that the rescission doctrine generally should not be available to skirt explicit Congressional or Treasury pronouncements limiting a taxpayer’s ability to unwind an election, action or transaction. At the same time, however, we ask that the Service consider adopting a more flexible approach in providing administrative relief to correct oversights, mistakes and execution errors in connection with various elective regimes, including entity classification elections and Section 83(b) elections.
4. Finally, we recommend that the Service clarify the scope of the rescission doctrine in the compensation context, identifying in particular the extent to which common law remedies may be available to supplement the specific corrections procedures provided in various administrative pronouncements to correct plan document or operation “failures” under Section 409A of the Code.

We appreciate your consideration of our comments. Please let us know if you would like to discuss these matters further or if we can assist you in any other way.

Respectfully submitted,



Peter H. Blessing
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Enclosure

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