NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

TAX SECTION

2010-2011 Executive Committee

PETER H. BLESSING
Chair
Shearman & Sterling LLP
599 Lexington Avenue
11th Floor
New York, NY 10022
212/848-4106
JODI J. SCHWARTZ
First Vice-Chair
212/403-1212
ANDREW W. NEEDHAM
Second Vice-Chair
212/474-1440
DIANA L. WOLLMAN
Secretary
212/558-4055
COMMITTEE CHAIRS:
Bankruptcy and Operating Losses
Stuart J. Goldring
Russell J. Kestenbaum
Compliance, Practice & Procedure
Elliot Pisem
Bryan C. Skarlatos
Consolidated Returns
Lawrence M. Garrett
Edward E. Gonzalez
Corporations
David R. Sicular
Karen Gilbreath Sowell
Cross-Border Capital Markets
Andrew Walker
Gordon Warnke
Employee Benefits
Regina Olshan
Andrew L. Oringer
Estates and Trusts
Amy Heller
Jeffrey N. Schwartz
Financial Instruments
Michael S. Farber
William L. McRae
"Inbound" U.S. Activities of Foreign Taxpayers
Peter J. Connors
David R. Hardy
Individuals
Paul R. Comeau
Sherry S. Kraus
Investment Funds
David H. Schnabel
Marc L. Silberberg
New York City Taxes
Maria T. Jones
Irwin M. Slomka
New York State Taxes
Robert E. Brown
Arthur R. Rosen
"Outbound" Foreign Activities of U.S. Taxpayers
Andrew H. Braiterman
Yaron Z. Reich
Partnerships
David W. Mayo
Joel Scharfstein
Pass-Through Entities
James R. Brown
John Lutz
Real Property
Robert Cassanos
Jeffrey Hochberg
Reorganizations
Deborah L. Paul
Linda Z. Swartz
Securitizations and Structured Finance
Jiyeon Lee-Lim
W. Kirk Wallace
Tax Exempt Entities
Elizabeth T. Kessenides
Richard R. Upton

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE

S. Douglas Borisky
Kathleen L. Ferrell
Marcy G. Geller
Charles I. Kingson
Stephen Land
Robert J. Levinsohn
Lisa A. Levy
Vadim Mahmoudov
Gary B. Mandel
Douglas McFadyen
Charles M. Morgan
David M. Schizer
Peter F. G. Schuur
Ansgar Simon
Eric Sloan
Andrew P. Solomon
Eric Solomon

December 22, 2010

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable Michael Mundaca
Assistant Secretary
(Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Effect of *de Minimis* OID under Reg. § 1.1001-3(e)(2)

Gentlemen:

We are writing to ask for a revision or clarification of Reg. § 1.1001-3(e)(2).[1] Under that regulation, a modification of a debt instrument is a taxable event when the annual yield of the debt varies by more than the greater of 25 basis points or 5% of the annual yield of the unmodified debt.

An issue arises under the regulation when the unmodified debt was issued with original issue discount (OID) that is *de minimis* under Internal Revenue Code § 1273(a)(3). In that case, the literal language of the regulation can cause a taxable event to arise from an artificial deemed increase in yield even when there is only a minimal increase, a

[1] The principal author of this letter is Michael Schler. Helpful comments were received from Douglas Borisky, Dale Collinson, Peter Connors, Matthew Lau, Andrew Needham, Erika Nijenhuis, and David Schnabel. This letter may be cited as New York State Bar Association Tax Section, *Effect of de Minimis OID under Reg. § 1.1001-3(e)(2)* (Report No. 1226, December 22, 2010).

FORMER CHAIRS OF SECTION:

Edwin M. Jones
John E. Morrissey, Jr.
Martin D. Ginsburg
Peter L. Faber
Hon. Renato Beghe
Alfred D. Youngwood
Gordon D. Henderson
David Sachs
J. Roger Mentz
Willard B. Taylor
Richard J. Hiegel
Dale S. Collinson
Richard G. Cohen
Donald Schapiro
Herbert L. Camp
William L. Burke
Arthur A. Feder
James M. Peaslee
John A. Corry
Peter C. Canellos
Michael L. Schler
Carolyn Joy Lee
Richard L. Reinhold
Richard O. Loengard
Steven C. Todrys
Harold R. Handler
Robert H. Scarborough
Robert A. Jacobs
Samuel J. Dimon
Andrew N. Berg
Lewis R. Steinberg
David P. Hariton
Kimberly S. Blanchard
Patrick C. Gallagher
David S. Miller
Erika W. Nijenhuis

decrease, or possibly even no change at all, in the real economic yield of the debt.

We believe this result under the regulation was clearly unintended. Moreover, this result can have significant adverse effects on both issuers and holders of debt. It is also a significant trap for the unwary and can lead to whipsaw against the government.

This is not merely a theoretical issue. We are aware of recent debt modifications where this issue arose. We suspect that there are other cases where this issue has been overlooked because the literal result under the regulation is so counterintuitive.

1. <u>The problem</u>

The problem is best illustrated with a simple example. Suppose a corporation issued 10-year debt on January 1, 2002 that matures on December 31, 2011. Suppose the principal amount is $100, the coupon is 5%, interest is compounded and payable annually on each December 31, and the issue price of the debt to the public was $98. Under section 1273(a)(3), the $2 of discount is *de minimis* OID and the debt is treated as not having OID. The true economic yield to maturity of the debt, taking into account the discount element, is 5.26%.

Suppose that on December 31, 2010, exactly one year before maturity, the debt is modified so as to increase the amount of interest payable at the maturity by a nominal amount (e.g., one penny or even a tenth of a penny). As noted above, under Reg. § 1.1001-3(e)(2), this modification results in a taxable event if the yield on the modified debt exceeds the yield on the original debt by more than the greater of (1) 25 basis points or (2) 5% of the annual yield on the unmodified debt. In the example, the nominal additional payment at maturity clearly does not satisfy this test as an economic matter.

Under the regulation, in comparing the yields on the unmodified and modified debt, the yield on the unmodified debt is defined as "the annual yield on the unmodified instrument (determined as of the date of the modification)". In the example, nothing has happened to change the original yield, and so the result is 5.26%. Therefore, the threshold yield of the modified debt for a taxable event is 105% of 5.26%, or 5.52%.

Under Reg. § 1.1001-3(e)(2)(iii), the yield on the modified debt is equal to the annual yield of a debt instrument "with an issue price equal to the adjusted issue price of the unmodified instrument on the date of the modification" and with payments equal to the payments on the modified debt from the date of the modification. This reference to the "adjusted issue price" of the unmodified debt is what creates the problem.

Section 1272(a)(4) and Reg. § 1.1275-1(b)(1) define "adjusted issue price" as "issue price" increased by any OID includible in income by an original holder of the debt.

In the case of debt issued with *de minimis* OID, there are no income inclusions under section 1272. Therefore, the adjusted issue price of such debt remains unchanged over the life of the debt. In the example, the adjusted issue price of the debt remains at $98 throughout the term.

Therefore, in the example, the yield of the modified debt must be determined by assuming new debt is issued on December 31, 2010, at an issue price of $98, and with a single payment at maturity (exactly one year later) of $100 of principal and $5.01 or ($5.001) of interest. The yield on this debt is about 7.14%. This is far in excess of the threshold under the regulations, and the result is a taxable event. This result makes no sense.

Even more surprising, even if the only change in the debt is a small *decrease* in interest payable at the maturity of the debt, the formula in the regulation for the yield of the modified debt can result in a sufficient deemed *increase* in yield to result in a taxable event. For example, suppose that on December 31, 2010, the only change in the above debt was a decrease in the amount of interest payable at maturity from $5 to $4.99.

The regulation would still assume that the modified debt had an issue price of $98, but now with a single payment of $104.99 in one year. The yield to maturity is virtually identical to the 7.14% yield that arose from the increase in the payment at maturity by a penny. Thus, again, a taxable event is triggered under the regulation. A true decrease in yield is treated as a sufficiently large increase in yield to result in a taxable event.

Perhaps most surprising of all, arguably the regulation can result in a taxable event because of a deemed increase in yield even when there is no change in the payment terms of the debt at all. Suppose that the debt is modified in a way that does not relate to cash flow and that would not itself cause a taxable event under the regulations. For example, suppose the issuer of the debt in the above example merged into an acquiring corporation on December 31, 2010, in a tax free reorganization, the debt became debt of the acquiring corporation, and there is no change in payment terms or payment expectations. The change in obligor on the debt would not itself be a taxable event because of Reg. § 1.1001-3(e)(4)(i)(B).

As another example, suppose that on the same date there was not a merger but there was instead a change to the terms of the debt that is not otherwise a taxable event, with no additional payment to a holder. This could arise in a consent solicitation to remove financial covenants from a debt indenture. If the solicitation is successful, holders who do not consent do not receive a fee but nevertheless have the financial covenants removed from their debt. The change in financial covenants is not itself a taxable event because of Reg. § 1.1001-3(e)(6). Similarly, there might be a ministerial change to a debt covenant that requires trustee but not debtholder consent, with no fee to debtholders.

Reg. § 1.1001-3 is not clear as to whether it requires a recomputation and comparison of yield under Reg. § 1.1001-3(e)(2) when there is no change in cash flow. On the one hand, Reg. § 1.1001-3(b) states that the test is whether the modified debt differs materially from the unmodified debt, and Reg. § 1.1001-3(e)(2)(ii) states that a change in yield is a significant modification if the mathematical test is satisfied. This arguably requires a full comparison of the two debt instruments under all the tests of the regulations, without regard to which terms were actually changed. It would also be anomalous for a penny increase or decrease in cash flow to require a retesting of yield (and possibly a taxable event) while no change in yield would not require a retesting of yield (even though a retest might result in a taxable event).

On the other hand, Reg. § 1.1001-3(e)(1) states that the test for a significant modification is based on "the legal rights or obligations that are altered and the degree to which they are altered." Likewise, Reg. § 1.1001-3(e)(2)(ii) states that a "change in yield" of a debt instrument is a significant modification if the numerical tests are satisfied. It can be argued that an "alteration" or "change in yield" for this purpose is limited to an actual alteration or change in yield, not a deemed alteration or change in yield arising solely because of the uneconomic formula in Reg. § 1.1001-3(e)(2) itself. Nevertheless, if a comparison of yield is required, then on the facts in the second and third preceding paragraphs, there would be an increase in yield resulting in a taxable event, even though there is no change in payment terms or payment expectations.

All of the foregoing results are noneconomic and make no sense. They arise because the regulation takes into account the correct economic yield for the unmodified debt, but it literally treats the modified debt as having an artificially low issue price and therefore an artificially high yield. When the true economic yield of the unmodified debt is compared to the artificially high yield of the modified debt, the result is a mathematical increase in yield that is in excess of the true economic increase in yield. As shown above, the result of even a decrease in true economic yield can be a significant increase in yield under the formula.

The potential magnitude of the problem is greater the longer the maturity of the original debt, and the closer in time to its maturity that the debt is modified. The longer the original maturity of the debt, the greater the dollar amount of OID that might qualify as *de minimis*, and therefore the greater the potential dollar amount of *de minimis* OID that the regulation might incorrectly treat as increasing the yield of the modified debt. The closer in time to maturity that the debt is modified, the shorter the period over which this noneconomic discount is treated as being paid back to the holder, and thus the greater the uneconomic increase in yield on the modified debt.

2. Scope of the problem

The anomalous and uneconomic results illustrated above are bad enough. However, the problem extends even further in a number of respects. First, because these results are so counterintuitive, they are a significant trap for the unwary. An issuer

modifying debt in a way that does not increase the economic yield to holders and that does not itself cause a taxable event to holders would not normally even think to test whether there had been an impermissible increase in yield under the formula in Reg. § 1.1001-3(e)(2). Even an issuer making only a minimal change to the cash flows of the debt might assume the formula was satisfied and not think to apply the literal language of the formula.

Second, this problem affects issuers as well as holders of debt. The test for a taxable event under Reg. § 1.1001-3(e)(2) does not depend upon whether the debt is publicly traded or on the actual public trading price at the time of the modification. Therefore, if the regulation creates an "artificial" taxable event, and the debt is publicly traded and happens to be currently trading at a sufficient discount, the issuer would have cancellation of indebtedness (COD) income. Likewise, holders would have a taxable event and would have "new" debt with OID that might not be *de minimis*.

The discount in trading price, and thus the potential amount of COD and OID, could be significant. For example, the credit quality of the issuer might have declined, or the modification might occur several years before the maturity of the debt at a time when there has been a significant increase in market interest rates. These COD and OID results would arise even if the deemed exchange of debt instruments was a recapitalization that is tax free to holders under section 356.

Third, the literal interpretation of the regulation would in some circumstances prevent a taxable event from arising where the regulation clearly intended a taxable event. Suppose there is a reduction of the true economic yield on the debt of more than 5%, so that the threshold for a taxable event under Reg. § 1.1001-3(e)(2) would normally be satisfied and a taxable event would occur. However, if the yield on the modified debt is artificially increased because of *de minimis* OID, the formula in the regulation might cause the reduction in yield to be less than 5%, with the result of no taxable event.

Fourth, this literal interpretation of the regulation might permit issuers of debt to claim premium deductions that were clearly not intended by the regulation. Consider the above examples where there has not been a material increase in the "real" yield on the debt. If the debt is publicly traded and is trading at a premium at the time of the modification, the issuer might claim a deduction for repurchase premium under Reg. § 1.163-7(c) based on the trading price of the debt at that time.

Finally, this issue can also lead to whipsaw against the government. When there is no material increase in the economic yield of the debt but the regulation literally creates a taxable event, issuers or holders who desire a taxable event can follow the literal language. Issuers or holders who do not desire a taxable event (such as the holders in the preceding paragraph) can take the position that the regulation simply cannot be interpreted literally or that a literal interpretation would be invalid. At least on the fact patterns illustrated in this letter, these positions seem quite plausible if not compelling.

3. Possible interpretations to avoid the problem

Next, consider whether the literal language of the existing regulation can be reasonably interpreted in a manner that avoids this problem. First, note that under Reg. § 1.163-4(a)(1), the issuer deducts OID without regard to the *de minimis* rule, and under Reg. § 1.163-7(b)(2), the issuer has the option of deducting *de minimis* OID on the usual economic accrual basis, on a straight line basis, in proportion to stated interest payments, or at maturity. Consider whether the reference to "adjusted issue price" in Reg. § 1.1001-3(e)(2)(iii) might be to the accreted amount as determined by the issuer, as opposed to the holder's adjusted issue price. If so, the problem in question would not arise.[2]

There are a number of problems with this interpretation. First, Reg. § 1.1001-3 focuses on whether a modification of a debt instrument is a taxable event to the holder of the debt, not the issuer.[3] This approach is consistent with Reg. § 1.1275-1(b)(1), which likewise defines adjusted issue price from the point of view of the holder rather than the issuer. Moreover, while a few other regulations do refer to the "issuer's adjusted issue price",[4] there is no specific definition of this term, and, if anything, the failure of Reg. § 1.1001-3(e)(2)(iii) to use this term might have a negative implication.

On the other hand, arguably Reg. § 1.1001-3(e)(2)(iii) and Reg. § 1.1275-1(b) should not be interpreted too literally here. In fact, there are a number of regulations that specifically deal with the tax treatment of the issuer of debt but that (incorrectly) specifically refer to the adjusted issue price as defined in Reg. § 1.1275-1(b).[5] Thus, the

---

[2] In fact, it would still arise if the issuer elected to deduct the entire amount of *de minimis* OID at the maturity of the debt. However, we believe this election is rarely if ever made.

[3] See Reg. § 1.1001-3(a)(1), stating that the regulation provides rules for determining whether a modification results in an exchange for purposes of Reg. § 1.1001-1(a).

[4] See Reg. § 1.163-7(e)(5), stating that adjustments to OID deductions on account of a qualified reopening "are taken into account in determining the issuer's adjusted issue price under § 1.1275-1(b)"; Reg. § 1.1275-1(b)(2), stating that in the case of a bond issued at a premium, the issue's amortization of the premium reduces the issuer's adjusted issue price.

[5] See, e.g., Reg. § 1.163-7(e)(5) noted above (referring to the "issuer's adjusted issue price" but referring to Reg. § 1.1275-1(b)); Reg. §§ 1.61-12(c)(2)(ii), 1.61-12(c)(2)(iii) and 1.163-7(c) (stating that upon the issuer's repurchase of a debt, the amount of the issuer's cancelation of indebtedness income or premium deduction is based on the difference between the repurchase price and the debt's adjusted issue price within the meaning of Reg. § 1.1275-1(b)); Reg. § 1.249-1(c) (stating (incorrectly) that the issuer's deduction of premium on the repurchase of convertible debt is based on the adjusted issue

drafters of the regulations may have simply not focused in many cases on the fact that the adjusted issue price of debt may differ from the points of view of the issuer and the holder. Arguably this is a justification for taxpayers to interpret a reference to adjusted issue price in the regulations in a manner that reaches the correct economic result in the particular situation, without regard to the literal language of Reg. § 1.1275-1(b)(1).

This line of reasoning would result in interpreting the reference to adjusted issue price in Reg. § 1.1001-3(e)(2)(iii) as applying from the issuer's point of view. However, this argument, although sensible, is contrary to the literal language of the regulations. Therefore, this argument is not sufficient to give taxpayers comfort today that Reg. § 1.1001-3(e)(2)(iii) does not give rise to the uneconomic results discussed in this letter.

Next, note that Reg. § 1.1001-3(e)(2)(ii) states that the unmodified debt is treated as having a yield equal to its yield on the date of modification. Arguably the "yield" for this purpose should assume that the unmodified debt was issued on the modification date for the actual adjusted issue price of the debt on that day. In fact, that would be the result for debt with more than *de minimis* OID. This interpretation would solve the problem by creating an uneconomically high deemed yield on the unmodified debt that would offset the effects of the existing uneconomically high deemed yield on the modified debt.

However, it is quite difficult to interpret the term "yield" for the unmodified debt in this counter-factual manner for debt with *de minimis* OID. Thus, we do not believe taxpayers today could obtain much comfort from this interpretation. Moreover, we do not believe that the regulation should be revised to adopt this "solution" to the problem. The regulation currently provides for an incorrect economic calculation of yield on the modified debt. It should not be revised to create yet another incorrect economic calculation on the unmodified debt. Two wrongs do not make a right, and this *ad hoc* approach is likely to result in more difficulties in the future. Moreover, the 5% safe harbor is based on the yield of the unmodified debt, and so this change would increase the scope of the safe harbor slightly, for no policy reason.

4. Proposed revisions

In light of the foregoing, we believe that Reg. § 1.1001-3(e)(2) should be revised, or interpreted by a Revenue Ruling, in two ways. First, it should be clarified to state that the test for a significant change in yield in Reg. § 1.1001-3(e)(2) does not apply if there is no change in the timing or amount of cash flow on the debt. This would avoid the need for unnecessary calculations of yield, and eliminate the worst aspects of the potential trap for the unwary in the existing regulation.

---

price within the meaning of Reg. § 1.1275-1(b), notwithstanding Code § 249(b), which (correctly) defines adjusted issue price for purposes of § 249(a)) as being the issuer's accreted amount.

However, this clarification is not nearly sufficient. The regulation would still determine the yield of the modified debt in a very uneconomic manner. As a result, this clarification would not solve the problem illustrated by many of the examples in this letter where a minimal change in cash flow literally results in a taxable event.

Therefore, we believe that in addition, Reg. § 1.1001-3(e)(2)(iii) should be revised to provide a special rule when the unmodified debt was issued with *de minimis* OID. In that situation, the issue price of the modified debt should be determined by increasing the adjusted issue price of the unmodified debt by either (1) the OID that would have accreted on the unmodified debt without regard to the *de minimis* rule, or (2) if the issuer elects the straight line or pro rata methods of accruing *de minimis* OID in Reg. § 1.163-7(b)(2), in a manner consistent with that election. Alternative (2) might be either optional or mandatory for an issuer that has made one of those elections in Reg. § 1.163-7(b)(2).[6]

The first alternative will provide for the economically correct yield on the modified debt, and therefore the economically correct comparison between the unmodified and modified debt. The second alternative will not be quite as accurate, but it will be reasonably close, and it will avoid the need for an issuer to calculate the economic accrual of *de minimis* OID solely for purposes of Reg. § 1.1001-3.[7]

---

[6] In the rare case where the issuer elected under Reg. § 1.163-7(b)(2) to deduct the entire amount of *de minimis* OID at the maturity of the debt, we would require that one of the other alternatives be used for purposes of the Section 1001 regulation. A foreign or tax-exempt issuer would not have had the occasion to make the election referred to in alternative (2), and could either be required to apply the rule in alternative (1) or else could be permitted at the time of the modification to elect one of the methods in alternative (2).

[7] Likewise, for debt issued at a premium, Reg. § 1.1001-3(e)(2)(iii) should be clarified to say that the adjusted issue price is reduced by the issuer's amortization of bond premium. Failure to apply such reduction would artificially understate the yield of the modified debt. This would understate the circumstances when there should be a taxable event arising from an increase in economic yield under the economic principles of the regulation. In fact, the artificial understatement of yield on the modified debt could cause the triggering of a taxable event under Reg. § 1.1001-3(e)(2) as a result of a deemed decrease in yield in excess of the threshold. This would be very unfair to taxpayers if the threshold for yield reduction would not have been exceeded on the basis of the higher actual economic yield of the modified debt. It is true that, as noted above, Reg. § 1.1275-1(b)(2) states that the issuer's adjusted issue price on a bond issued at a premium is reduced by amortized premium. However, Reg. § 1.1001-3(e)(2)(iii) does not refer to the issuer's adjusted issue price, and as noted above appears to look at

We urge that these interpretations of the regulation be made promptly. Once this issue becomes more widely known, issuers will feel obligated to disclose the risk (or likelihood) of a taxable event in these situations in disclosure documents provided to debt holders. Different issuers will likely take different positions, and the varying disclosures and the general uncertainty of the outcome will create confusion in the market.[8]

5. Retroactivity

We also urge that these interpretations of the regulation be made retroactive to all open years. We do not believe that the literal results in the existing regulation were intended. Retroactive interpretations would conform to the original intent and would reach the correct economic results for past debt modifications. There is no reason that issuers or holders who reported in the correct economic manner in the past should be subjected to the uneconomic result of the existing regulation. Moreover, prospective modifications of the regulation could create a negative implication for the past, which is not in the interest of either the Government or taxpayers.

If these retroactive interpretations are adopted, it will be necessary to consider issuers and holders who reported a taxable event in the past based on a literal reading of the regulations. We do not believe that such taxpayers should be required to file amended returns or be subject to audit risk for past periods. Therefore, we believe the Service should issue a Revenue Procedure stating that it will not challenge the position taken by taxpayers in the past reporting a taxable event based on the literal language of the regulation.[9]

---

adjusted issue price from the holder's point of view. Thus, clarification would be appropriate.

[8] Note that a similar issue arises under Reg. § 1.1275-2(j) and Reg. § 1.1272-1(c)(6). Under those regulations, for purposes of sections 1272 and 1273, debt is treated as retired and reissued on a modification date for an amount equal to the adjusted issue price of the unmodified debt on that date. Thus, if the original debt was issued with *de minimis* OID, the modified debt will be treated as being issued at a price below the economically correct price. The modified debt may therefore be treated as having "real" OID that exceeds the "real" OID that should exist or that instead should be *de minimis*. However, these situations do not involve the unjustified creation of a taxable event, and therefore we believe that first priority should be given to resolving the issue described in the text of this letter.

[9] Under this approach, a taxpayer who reported a taxable event would still be able to file an amended return claiming the modification was not a taxable event, based on the retroactive interpretation. If such returns are permitted but not mandatory, different parties to the same transaction in the past might take different positions. For example, all

We will be happy to assist the Treasury and the Service in the development of a solution to this problem.

Sincerely,

Peter H. Blessing
Chair

cc: William E. Blanchard
Senior Technical Reviewer, Branch 3
Internal Revenue Service

Stephen Larson
Associate Chief Counsel (Financial Institutions and Products)
Internal Revenue Service

Emily McMahon
Deputy Assistant Secretary (Tax Policy)
Department of the Treasury

Mark S. Perwien
Special Counsel of Associate Chief Counsel – Financial Institutions and Products
Internal Revenue Service

Clarissa C. Potter
Deputy Chief Counsel (Technical)
Internal Revenue Service

Lon B. Smith
National Counsel to the Chief
Counsel for Special Projects

---

parties might have originally reported a taxable event based on advice of the issuer, and some but not all parties could now file an amended return claiming there was no taxable event. While this situation is not ideal, we believe it will rarely arise in practice because few taxpayers reported a taxable event in the past in these circumstances. In addition, as long as each taxpayer files consistently on its own return for all periods, as would normally be required by the duty of consistency, the differences in result for different taxpayers are primarily timing differences.

Jeffrey Van Hove
Acting Tax Legislative Counsel
Department of the Treasury

Karl T. Walli
Senior Counsel – Financial Products
Department of the Treasury