NEW YORK STATE BAR ASSOCIATION
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November 12, 2012

The Honorable Mark Mazur
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Department of the Treasury
1500 Pennsylvania Avenue, NW
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Steven Miller
Acting Commissioner
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The Honorable William J. Wilkins
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Re: Comments on Final "Publicly Traded" Regulations under Section 1273 of the Code

Dear Messrs. Mazur, Miller and Wilkins:

This letter[1] of the Tax Section of the New York State Bar Association comments on the final regulations (the "Final Regulations") issued on

[1] The letter may be cited as NYSBA Tax Section Report No. 1276, "Comments on Final Regulations on the Definition of Public Trading under Section 1273 and Related Issues" (November 12**,** 2012). The principal drafter of this letter is Jiyeon Lee-Lim. Significant comments were made by Craig Horowitz. Helpful comments were received from Douglas Borisky, Peter J. Connors, Michael S. Farber, Marcy G. Geller, Edward E. Gonzalez, John T. Lutz, Andrew W. Needham, Erika W. Nijenhuis, Amanda H. Nussbaum, Robert H. Scarborough, Michael L. Schler and David R. Sicular. This letter reflects solely the views of the Tax Section of the NYSBA and not those of the NYSBA Executive Committee or the House of Delegates.

September 13, 2012 governing the determination of when property is treated as "traded on an established securities market" (or "publicly traded") for purposes of establishing the issue price[2] of a debt instrument under Section 1273(b)(3) of the Code.[3] The Final Regulations also amend the rules governing "qualified reopenings" of debt instruments.

The determination of when property is publicly traded under the Final Regulations is generally much clearer and simpler than under the prior regulations. In addition, we expect that the expansion of the "qualified reopening" rules to include a broader range of debt offerings will benefit the financial markets. We appreciate this long awaited guidance. Because a few aspects of the Final Regulations remain unclear, however, we recommend that the Treasury Department ("Treasury") address them to avoid unnecessary confusion.

A. Comments on the New "Publicly Traded" Definition

1. Meaning of "Price Quote"

Under Treasury Regulations §1.1273-2(f)(1), property is treated as publicly traded if, at any time during the 31-day period ending 15 days after the issue date (the "testing period"), there is a "sales price," or at least one "firm quote" or "indicative quote," for the property. A price quote that meets certain conditions is a firm quote.[4] A price quote that is not a firm quote is an indicative quote.[5]

The term "price quote" is not defined in the Final Regulations. Because the existence of a price quote for property within the testing period would cause property to be treated as publicly traded, the precise meaning of the term is important. Based on its commonly understood meaning, a quote to buy or sell clearly constitutes a price quote, as does an average of quotes to buy or sell. Less clear, however, is whether a price quote also includes a valuation (or an estimate of such value) of a debt instrument.

Under the Final Regulations, a firm quote or indicative quote is deemed to exist when such quote is "available from at least one broker, dealer or pricing service (including a price

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[2] T.D. 9599. The New York State Bar Association has submitted three prior reports on the definition of "traded on an established securities market" under Section 1273. *See* NYSBA Tax Section Report No. 1237, "Proposed Regulations on the Definition of Public Trading" (April 6, 2011); NYSBA Tax Section Report No. 1209, "Definition of 'Traded on an Established Market' within the Meaning of Section 1273 and Related Issues" (March 30, 2010); NYSBA Tax Section Report No. 1066, "Definition of 'Traded on an Established Securities Market' within the Meaning of Section 1273" (August 12, 2004).

[3] Unless indicated otherwise, all "section" references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §" references are to the Treasury regulations promulgated under the Code, both as in effect on the date of this letter.

[4] A "firm quote" is a price quote that is "substantially the same as the price for which the person receiving the quoted price could purchase or sell the property." In order for a price quote to be a firm quote, the identity of the person providing the quote must be reasonably ascertainable. Treas. Reg. §1.1273-2(f)(3).

[5] Treas. Reg. §1.1273-2(f)(4).

provided only to certain customers or to subscribers)" for the property.[6] Brokers and dealers are likely to provide a quote to buy and sell. However, a pricing service may provide a valuation that is based solely upon an analysis of available market data (such as, in the case of a debt instrument, the market rate of interest for comparable debt instruments of issuers with similar credit ratings) that may bear no relationship to actual quotes to buy or sell.

If such a valuation is considered a price quote, property could be deemed to be publicly traded even if there is no actual or potential trading activity in the property. We do not believe this is what Treasury intended. The definition of price quote should be limited to an actual quote to buy or sell the property. A valuation of a debt instrument that is derived from actual quotes to buy or sell during the testing period should also qualify as a price quote. In this regard, we believe that a valuation provided by a pricing service should be presumed to be based on actual quotes to buy or sell if the pricing service providing the valuation generally relies on such quotes in arriving at its valuations, unless it is apparent that the valuation is based solely on other information during the testing period.

To resolve these ambiguities and avoid unnecessary confusion, we recommend that Treasury clarify that a mere valuation or other estimate not derived from actual quotes to buy or sell during the testing period is not a price quote and that a price quote cannot exist unless someone is providing an actual quote to buy or sell the property.

2. Determination of Fair Market Value with Respect to Publicly Traded Property

Once property is treated as publicly traded, its fair market value is "*presumed* to be equal to its sales price or quoted price."[7] If there are multiple quotes and/or prices, a taxpayer may use any reasonable method to determine fair market value. The Final Regulations further provide that if there are only indicative quotes and the indicative quote (or an average of such quotes) materially misrepresents the fair market value of the property, the taxpayer may use any method that provides a reasonable basis to determine the fair market value of such property.[8] The Final Regulations are silent, however, on what taxpayers may do in the event that an actual sales price or firm quote materially misrepresents the fair market value of the property. Because fair market value is merely presumed to be equal to the sales price or quoted price, we believe that taxpayers should be permitted to rebut this presumption by using any reasonable method to establish fair market value in these cases as well.

We note that not only an indicative quote, but even an actual sales price or firm quote may also materially misrepresent the fair market value of the property. For example, a broker or dealer who is only willing to buy may provide a firm quote that is well below the fair market value of the property. By the same token, a broker or dealer who is only willing to sell may

[6] Treas. Reg. §1.1273-2(f)(3).

[7] Treas. Reg. §1.1273-2(f)(5)(i) (emphasis added).

[8] Treas. Reg. §1.1273-2(f)(5)(ii).

provide a firm quote that is well above the fair market value of the property.[9] In addition, even if a price quote or sale transaction accurately reflects the fair market value of the property as of the date of the price quote or sale transaction, it could materially misrepresent the fair market value of the property as of the issue date if the issue date and the date of the price quote or sale transaction are not the same.

Because the Final Regulations only establish a presumption of fair market value in such cases, we interpret them to permit taxpayers to rebut such presumption even if an actual sales price or price quote during the testing period qualifies as a sales price or firm quote. We recommend that Treasury confirm this interpretation.

3. Duty of Issuer to Inquire about Existence of Public Trading

Treasury Regulations §1.1273-2(f)(3) provides that "[a] price quote is considered to be available whether the quote is initiated by a person providing the quote or *provided at the request of the person receiving the quote*."[10] Under Treasury Regulations §1.1273-2(f)(9), an issuer is required to exercise reasonable diligence to determine, among other things, the existence of firm or indicative quotes. It is not entirely clear whether this obligation is limited to determining whether a price quote to or from a third party is available or whether the issuer must attempt to originate a price quote from a broker, dealer or pricing service that would otherwise not exist.

Many loans in the market in excess of the small issue exception have only one borrower and one lender. A typical example is a shareholder loan to a wholly-owned subsidiary. Many other loans in the market have only a handful of lenders. Because loans of this kind almost never trade, it is very likely that no price quote will be available. If such a loan undergoes a significant modification, we do not believe that the Final Regulations require the issuer to approach one or more pricing services to request a price quote. The issuer should instead be permitted to treat the loan as not publicly traded so long as it attempts to confirm that no broker or dealer or pricing service provides any price quote.

This question is also tied to the first issue discussed above, i.e., whether the meaning of "price quote" includes all valuations of the property. If Treasury concludes that even a valuation that is not based on any actual quotes to buy or sell is a price quote, such interpretation, combined with the issuer's obligation to determine if a price quote can be generated, may mean that any property susceptible of valuation is publicly traded (subject to the small debt issue exception). We do not believe Treasury intended this construction. At a minimum, an issuer should not be required to pay a pricing service to generate a price quote.

We believe that the issuer's obligation to determine the existence of a price quote should be limited to exercising reasonable diligence to search available information to determine whether a price quote exists (including making inquiries with investment banks or financial

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[9] If a principal purpose for the existence of any sale or price quotation is to materially misrepresent the value of property, that sale or price quotation is disregarded. Treas. Reg. §1.1273-2(f)(5). However, low firm bid quotes and high firm ask quotes are frequently made by investors, dealers and traders based purely on economic grounds.

[10] Emphasis added.

advisors involved in the transaction, if any). We do not believe the issuer is required approach a pricing service to determine whether a price quote can be generated for the issuer when no such quote already exists.[11]

We recommend that Treasury confirm that the scope of the issuer's diligence obligations does not extend beyond searching available information to determine whether a pre-existing price quote is available.

4. Issuer's Obligation to Report the Publicly Traded Determination

a. Issuer's reporting obligation only when the publicly traded determination is relevant

Treasury Regulations §1.1273-2(f)(9) provides that: "[f]or purposes of this section, an issuer must determine whether property is publicly traded on an established securities market and, if so, the fair market value of the property."[12] We recommend that Treasury confirm that the obligation of an issuer under Treasury Regulations §1.1273-2(f)(9) applies only when the determination is relevant for U.S. federal income tax purposes. While this will generally be the case if the debt instrument is issued in exchange for property and either the issuer or the holders are United States persons, there are many exceptions.

For example, if a new debt instrument is issued in exchange for an old debt instrument but if either a substantial portion of the new debt instrument is also sold for cash to unrelated parties or the new debt instrument being issued is part of a qualified reopening of an outstanding debt instrument, the issue price of the new debt instrument would be determined based on the cash purchase price or the issue price of the re-opened debt instrument, as the case may be. In such a case, there would be no need for the issuer to determine the publicly traded status of either the old or new debt instrument to establish the issue price of the new debt instrument.

If the issuer is not a United States person and the new debt instrument issued in exchange for property is not sold or resold in the United States, the publicly traded status of the new debt instrument is usually irrelevant. We acknowledge, however, that such status may be relevant under certain circumstances (e.g., the new debt instrument trades into the United States after the offering or is held by a passive foreign investment company with U.S. shareholders). Nevertheless, under Treasury Regulations §1.1275-3(d), the information reporting requirement that normally applies to a debt instrument issued with OID does not apply if the issue is not offered for sale or resale in the United States in connection with its original issue, such as debt securities issued under Regulation S of the Securities Act of 1933. Given the similar

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[11] This view is consistent with comments made by Mark Perwien, IRS Special Counsel to Associate Chief Counsel (Financial Institutions and Products), at a Practising Law Institute conference on corporate tax strategies in New York on October 12, 2012. Amy S. Elliott & Lee A. Sheppard, *PLI Panel Considers Debt-or-Equity questions*, Tax Notes Today, October 15, 2012.

[12] We also note that the issuer's determination of fair market value for purposes of Section 1273 is solely for tax purposes and that many issuers state that such determinations may not be relied upon for any other purpose in their offering documents and other public filings.

jurisdictional issues that imposing the reporting obligations of Treasury Regulations §1.1273-2(f)(9) is likely to present in these offerings, we believe a similar exemption should apply to a foreign issuer that sells or resells a debt instrument in exchange for property solely to foreign investors.

Similar offerings by domestic issuers do not present the same jurisdictional issues even though they are also exempt from the OID reporting requirement under Treasury Regulations §1.1275-3(d). Because financial intermediaries and holders may need such information in order to determine the issue price of the debt instrument, we believe that domestic issuers should be required to comply with the information reporting requirements under Treasury Regulations §1.1273-2(f)(9).

Accordingly, we recommend that Treasury confirm that the obligation of an issuer to make available the publicly traded status and the fair market value of property under Treasury Regulations §1.1273-2(f)(9) applies only when such information has relevance for U.S. federal income tax purposes, and that if a debt instrument issued by a foreign person is not offered for sale or resale in the United States, the publicly traded status and/or the fair market value determination should be deemed to have no relevance for U.S. federal income tax purposes.

b. Alternative means for making information public

Treasury Regulations §1.1273-2(f)(9) provides that "the issuer is required to make [the publicly traded] determination as well as the fair market value of the property … available to holders in a commercially reasonable fashion, including by electronic publication, within 90 days of the date that the debt instrument is issued." While not specifically stated, we believe that "a commercially reasonable fashion" in this context includes providing the required information through an agent bank, an underwriter or other financial intermediary involved in the relevant transaction.

We recommend that Treasury confirm that the issuer may, at its option, make the required information available through a financial intermediary so long as the issuer announces its intention to do so to the holders.

In addition, Treasury should consider whether an issuer that files IRS Form 8281 with respect to a debt instrument and notifies holders that the information will be available by publication from the IRS should be deemed to have satisfied the requirement under Treasury Regulations §1.1273-2(f)(9) with respect to such debt instrument. Under Treasury Regulations §1.1275-3(c), if a debt instrument is publicly offered and is issued with OID, the issuer is required to file IRS Form 8281 within 30 days of the issuance. Among other things, this form includes the issue price of the debt instrument. Although IRS Publication 1212 then disseminates the OID information collected from these forms, actual publication may not occur within the 90 day period within which the issuer must make the publicly traded status and fair market value of the debt instrument available to holders. We believe that issuers who file IRS Form 8281 should nevertheless be deemed to have satisfied the requirements under Treasury Regulations §1.1273-2(f)(9) because it would vastly simplify and facilitate the compliance process. In addition, even if the debt instrument is neither publicly offered nor issued with OID

and thus is not subject to Treasury Regulations §1.1275-3(c), we believe it is reasonable to treat any issuer that files this form as having satisfied the requirements of Treasury Regulations §1.1273-2(f)(9). If an issuer is permitted to file IRS Form 8281 to satisfy the requirement whether or not the filing is otherwise required, Treasury and the Internal Revenue Service will need to ensure that such information is made available in IRS Publication 1212 or in some other publication.

5. Effective Date

The Final Regulations relating to the publicly traded definition apply to "a debt instrument issued on or after" November 13, 2012. This effective date rule raises at least two technical ambiguities.

First, if an existing debt instrument with a principal amount of less than $100 million was treated as publicly traded under the prior regulations and is later significantly modified on or after the effective date of the Final Regulations, the effective date rule could be literally read to mean that the issue price of the "new" debt instrument would be its fair market value because it was deemed to have been issued for publicly traded property (i.e., the existing debt instrument) even though it is not itself publicly traded under the small issue exception.

Second, effective date ambiguities also arise in applying the qualified reopening rules. Under Treasury Regulations §1.1275-2(k)(3)(ii)(A) and -2(k)(iii)(A), one of the conditions for a qualified reopening is that:

> "[T]he original debt instruments are publicly traded (within the meaning of §1.1273-2(f)) as of the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date)."

Suppose an original debt instrument was issued before November 13, 2012. In such case, even if the reopening occurs after November 13, 2012, the effective date rule could be read literally to mean that the revised publicly traded definition under the Final Regulations would not apply in determining whether the original debt instrument is publicly traded and that the publicly traded status of the original debt instrument would still have to be tested under the prior regulations. If this interpretation is correct, the definition of the term "publicly traded" under the prior regulations would continue to apply to <u>all</u> future reopenings of any debt instrument originally issued before November 13, 2012.

We do not believe this was intended. Rather, we believe that the effective date rule should be interpreted to mean that the revised definition of the term "publicly traded" applies to the original debt instrument so long as the additional debt instrument is issued on or after the November 13, 2012 effective date, regardless of when the original debt instrument was issued. We note that this interpretation is consistent with the explanation of the effective date in the preamble to the Final Regulations, which states that the reason for the 60 day delay was to minimize the effect on pending transactions.

To avoid any unnecessary ambiguity, we recommend that Treasury clarify that the revised publicly traded definition applies in making a determination on or after November 13, 2012 of whether any property is traded on an established securities market.

B. Comments on Qualified Reopening Rules

1. Cash Issuance to Unrelated Parties

In order to satisfy the requirements of a "qualified reopening" under the prior regulations, among other conditions, an original debt instrument had to be publicly traded (the "publicly traded condition"). The Final Regulations liberalize this rule and provide that the original debt instrument need not be publicly traded so long as the additional debt instruments are issued for cash to persons unrelated to the issuer for an arm's length price (the "cash issuance condition").[13]

In applying the cash issuance condition, there is some ambiguity as to whether, if the issuer sells a portion of the additional debt for cash to a related party, all of the additional debt instruments or only the portion thereof sold to unrelated parties will satisfy the cash issuance condition. For reasons explained below, we believe an issuer should be treated as satisfying the cash issuance condition with respect to all of the additional debt instruments so long as a substantial amount of the additional debt instruments is sold for cash to unrelated parties.

The purpose of the publicly traded requirement for a qualified reopening under the prior regulations was to ensure that the pricing of the additional debt instruments (and the yield test based on such pricing) reflected their true fair market value. The Final Regulations eliminate this requirement if the cash issuance condition is met. If the additional debt instruments are sold for cash to unrelated parties, the cash purchase price will establish the true fair market value of, and the correct yield on, the additional debt instruments. So long as a sufficient amount of the additional debt instruments is sold for cash to unrelated parties for an arm's length price, the fair market value and the yield of the additional debt instruments can be objectively and accurately established.

Under Treasury Regulations §1.1273-2(a), the issue price of a debt instrument is determined based on the amount of cash paid for the debt instrument so long as a "substantial amount" of the issue is sold for cash, whether or not the rest of the debt is issued at a different price, issued for other property or issued to a related party. We believe this "substantial amount" standard should also apply to the cash issuance condition under the qualified reopening rules.

Accordingly, we recommend that the cash issuance condition be deemed satisfied with respect to all of the additional debt instruments if at least a "substantial amount" of the additional debt instruments is sold for cash to unrelated parties.

2. Debt Denominated in Foreign Currency

[13] Treas. Reg. §1.1275-2(k)(iv) and (v).

We recommend that Treasury clarify that in applying the cash issuance condition under Treasury Regulations §§1.1275-2(k)(iv) and (v) to a reopening of a foreign currency-denominated instrument, the foreign currency in which the debt instrument is denominated qualifies as "cash" for this purpose.

We note that Treasury Regulations §1273-2(c)(1) provides that for purposes of such section, nonfunctional currency is "property," unless Treasury Regulations §1.988-2(b)(2) provides otherwise. Treasury Regulations §1.988-2(b)(2)(ii) provides that a nonfunctional currency "in which an instrument is denominated (or by reference to which payments are determined) shall be considered money" for purposes of Sections 483, 1273(b)(5) and 1274. Treating the foreign currency in which the debt instrument is denominated in as cash for purposes of applying the cash issuance condition would be consistent with such treatment.

3. Heading, "Non-publicly traded debt issued for cash," under Section 1.1275-2(k)(3)(iv)

The heading of Treasury Regulations §1.1275-2(k)(3)(iv), "Non-publicly traded debt issued for cash," suggests that an issuer may satisfy the cash issuance condition only where the publicly traded condition is not met. However, nothing in the actual text of the regulations limits its application to non-publicly traded debt. Nor should there be any reason to prevent any publicly traded debt instruments from qualifying under the cash issuance condition solely because they are publicly traded. If the original debt instruments are publicly traded and, at the same time, the additional debt instruments are issued for cash to unrelated parties, the issuer should be able to rely on either the publicly traded requirement or the cash issuance condition so long as the other requirements of the qualified reopening rule are satisfied. To eliminate this ambiguity, we recommend that the heading of Treasury Regulations §1.1275-2(k)(3)(iv) be amended.

4. Clarifying the application of the 110%/ 100% yield test and the *de minimis* OID test

We recommend that Treasury clarify that (a) in every case where an issuer relies on the publicly traded condition, the 110%/100% yield test or *de minimis* OID test (as applicable) should be applied on the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date) by reference to the fair market value of the original debt instruments on such date and (b) in every case where an issuer relies on the cash issuance condition, the 110%/100% yield test or *de minimis* OID test should be applied on the reopening date by reference to the actual cash price of the additional debt instruments. The purpose of the publicly traded condition (as articulated by Treasury in the preamble to the 2001 final regulations) is to provide the issuer with the certainty at the beginning of the reopening process as to whether qualified reopening treatment will apply. This certainty is needed regardless of whether the issuer is relying on the 110%/100% yield test or on the *de minimis* OID test. In contrast, the cash issuance condition should look to the actual OID and yield of the additional debt instruments as of the reopening date (as if the additional debt instruments were a stand alone issue) to serve as a baseline for the qualified reopening treatment in situations where no (or only the permitted amount of) OID is converted to market discount.

To clarify the foregoing, we recommend the following changes to clause (k)(3)(iii)(B) and to paragraphs (k)(3)(iv) and (k)(3)(v).

First, in describing the 110% yield test for additional debt instruments satisfying the cash issuance condition, Treasury Regulations §1.1275-2(k)(3)(iv) provides that:

> "on the date on which the price of the additional debt instruments is established *(or, if earlier, the announcement date)*, the yield of the additional debt instruments (based on their cash purchase price) is not more than 110% of the yield on the original debt instruments..."[14]

The reference to the pricing or announcement dates in this context for debt instruments issued for cash should be replaced with the reopening date.

Second, in describing the 100% yield test, Treasury Regulations §1.1275-2(k)(3)(v) provides:

> "[T]he yield of the additional debt instruments (based on *their fair market value* or cash purchase price, whichever is applicable) is not more than 100 percent of the yield of the original debt instruments on their issue date…". (emphasis added)

When an issuer is relying on the publicly traded condition, the term "their fair market value" should be replaced with "the fair market value of the original debt instruments."

Finally, the *de minimis* test for debt instruments satisfying the publicly traded condition should be applied by reference to the fair market value of the original debt instruments on the earlier of the pricing or announcement dates.

Appendix A provides two possible approaches to revising the Final Regulations with respect to qualified reopenings. Version 1 would modify paragraphs (k)(3)(ii) through (k)(3)(v) of the Final Regulations to reflect the foregoing recommendations. Version 2 is substantively the same as Version 1 but reorganizes the existing four paragraphs into two new paragraphs: one for reopenings within six months and one for reopenings after six months.

We appreciate your consideration of our recommendations.

Respectfully submitted,

Andrew W. Needham
Chair

[14] Emphasis added.

Enclosures

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Appendix A - Version 1 (Redlined against Text of Final Regulations)

Modified version of Treas. Reg. §1.1275-2(k)(3)(ii) through (v) incorporating our recommendations:

(3) *Qualified reopening*.—(i) *Definition*.—A qualified reopening is a reopening of original debt instruments that is described in paragraph (k)(3)(ii), (k)(3)(iii), (k)(3)(iv), or (k)(3)(v) of this section. In addition, see paragraph (d)(2) of this section to determine if a reopening of Treasury securities is a qualified reopening.

(ii) *Reopening within six months*.—A reopening is described in this paragraph (k)(3)(ii) if —

(A) The original debt instruments are publicly traded (within the meaning of §1.1273-2(f)) as of the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date);

(B) The reopening date of the additional debt instruments is not more than six months after the issue date of the original debt instruments; and

(C) On the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date), the yield of the original debt instruments (based on their fair market value) is not more than 110 percent of the yield of the original debt instruments on their issue date (or, if the original debt instruments were issued with no more than a *de minimis* amount of OID, the coupon rate).

(iii) *Reopening with de minimis OID*.—A reopening (including a reopening of Treasury securities) is described in this paragraph (k)(3)(iii) if–

(A) The original debt instruments are publicly traded (within the meaning of §1.1273-2(f)) as of the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date); and

(B) The additional debt instruments ~~are~~would be issued with no more than a *de minimis* amount of OID (determined without the application of this paragraph (k)) if the additional debt instruments were issued (on the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date)) for cash equal to the fair market value of the original debt instruments on such date.

(iv) ~~*Non-publicly traded*~~*Certain additional debt instruments issued for cash*.—A reopening is described in this paragraph (k)(3)(iv) if a substantial amount of the additional debt instruments ~~are~~is issued for cash to persons unrelated to the issuer (as determined under section 267(b) or 707(b)) for an arm's length price and either the requirements in paragraphs (k)(3)(ii)(B) and (k)(3)(ii)(C) of this section for a

reopening within six months are satisfied or the requirements in paragraph (k)(3)(iii)(B) of this section for a reopening with *de minimis* OID are satisfied. For purposes of this paragraph (k)(3)(iv), the yield test of paragraph (k)(3)(ii)(C) of this section~~, the yield test is satisfied if, on the date on which the price of the additional debt instruments is established (or, if earlier, the announcement date),~~ will be deemed satisfied if the yield of the additional debt instruments on the reopening date (based on their cash purchase price) is not more than 110 percent of the yield of the original debt instruments on their issue date (or, if the original debt instruments were issued with no more than a *de minimis* amount of OID, the coupon rate). For purposes of this paragraph (k)(3)(iv), the *de minimis* OID test of paragraph (k)(3)(iii)(B) of this section will be deemed satisfied if, based on their cash purchase price, the additional debt instruments are issued with no more than a *de minimis* amount of OID (determined without the application of this paragraph (k)).

(v) *100 Percent yield test for reopening after six months.*—A reopening is described in this paragraph (k)(3)(v) if the additional debt instruments are issued more than six months after the issue date of the original debt instruments and either the requirements in paragraphs (k)(3)(ii)(A) and (k)(3)(ii)(C) of this section are satisfied or a substantial amount of the additional debt instruments ~~are~~is issued for cash to persons unrelated to the issuer (as determined under section 267(b) or 707(b)) for an arm's length price and the requirements in paragraph (k)(3)(ii)(C) of this section are satisfied. For purposes of ~~the preceding sentence~~this paragraph (k)(3)(v), the yield test in paragraph (k)(3)(ii)(C) of this section ~~is~~will be deemed satisfied if either (1) the requirements of paragraph (k)(3)(ii)(A) of this section are satisfied and, on the date on which the price of the ~~additional~~original debt instruments is established (or, if earlier, the announcement date), the yield of the ~~additional~~original debt instruments (based on their fair market value~~ or cash purchase price, whichever is applicable~~) is not more than 100 percent of the yield of the original debt instruments on their issue date (or, if the original debt instruments were issued with no more than a *de minimis* amount of OID, the coupon rate) or (2) the yield of the additional debt instruments on the reopening date (based on their cash purchase price) is not more than 100 percent of the yield of the original debt instruments on their issue date (or, if the original debt instruments were issued with no more than a *de minimis* amount of OID, the coupon rate).

Appendix A - Version 2

Suggested language for a new Treas. Reg. §1.1275-2(k)(3)(ii) and (iii) that would replace existing Treas. Reg. §1.1275-2(k)(3)(ii) through (v):

(ii) *Reopening within six months*. A reopening is described in this paragraph (k)(3)(ii) if the reopening date is not more than six months after the issue date of the original debt instruments and either (A) or (B) below is satisfied:

(A) (1) The original debt instruments are publicly traded (within the meaning of §1.1273-2(f)) as of the date on which the price of the additional debt instruments is established or, if earlier, the announcement date (the "reopening testing date"); and

(2) Either (a) the yield of the original debt instruments on the reopening testing date (based on their fair market value) is not more than 110 percent of the yield of the original debt instruments on their issue date (or, if the original debt instruments were issued with no more than a *de minimis* amount of OID, the coupon rate) or (b) the additional debt instruments would be issued with no more than a *de minimis* amount of OID (determined without the application of this paragraph (k)) if the additional debt instruments were issued on the reopening testing date for cash equal to the fair market value of the original debt instruments on such date.

(B) (1) A substantial amount of the additional debt instruments is issued for cash to persons unrelated to the issuer (as determined under section 267(b) or 707(b)) for an arm's length price; and

(2) Either (a) the yield of the additional debt instruments on the reopening date (based on their cash purchase price) is not more than 110 percent of the yield of the original debt instruments on their issue date (or, if the original debt instruments were issued with no more than a *de minimis* amount of OID, the coupon rate) or (b) the additional debt instruments are issued with no more than a *de minimis* amount of OID (determined without the application of this paragraph (k)).

(iii) *Reopening after six months*. A reopening is described in this paragraph (k) (3) (iii) if the reopening date is more than six months after the issue date of the original debt instruments and either sub-paragraph (k)(3)(ii)(A) or sub-paragraph (k)(3)(ii)(B) would be satisfied if "100 percent" were substituted for "110 percent" in such sub-paragraph.