



# NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

## TAX SECTION

### 2012-2013 Executive Committee

#### ANDREW W. NEEDHAM

Chair  
Cravath, Swaine & Moore LLP  
825 Eighth Avenue  
New York, NY 10019  
212/474-1440

#### DIANA L. WOLLMAN

First Vice-Chair  
212/558-4055

#### DAVID H. SCHNABEL

Second Vice-Chair  
212/909-6336

#### DAVID R. SICULAR

Secretary  
212/373-3082

#### COMMITTEE CHAIRS:

##### Bankruptcy and Operating Losses

Stuart J. Goldring  
Deborah L. Paul

##### Compliance, Practice & Procedure

Elliot Pisem  
Bryan C. Skarlatos

##### Consolidated Returns

Lawrence M. Garrett  
Edward E. Gonzalez

##### Corporations

Karen Gilbreath Sowell  
Linda Z. Swartz

##### Cross-Border Capital Markets

S. Douglas Borisky  
Andrew Walker

##### Employee Benefits

Eric Hillers  
Andrew L. Oringer

##### Estates and Trusts

Alan S. Halperin  
Laura M. Twomey

##### Financial Instruments

Michael S. Farber  
William L. McRae

##### "Inbound" U.S. Activities of Foreign

##### Taxpayers

Peter J. Connors  
Yaron Z. Reich

##### Individuals

Robert E. Brown  
Sherry S. Kraus

##### Investment Funds

Marcy G. Geller  
Joel Scharfstein

##### New York City Taxes

Maria T. Jones  
Irwin M. Slomka

##### New York State Taxes

Paul R. Comeau  
Arthur R. Rosen

##### "Outbound" Foreign Activities of

##### U.S. Taxpayers

Andrew H. Brailterman  
David R. Hardy

##### Partnerships

David W. Mayo  
Eric Sloan

##### Pass-Through Entities

James R. Brown  
John T. Lutz

##### Real Property

Robert Cassanos  
Lisa A. Levy

##### Reorganizations

Peter F. G. Schuur  
Gordon Warnke

##### Securitized and Structured

##### Finance

Jiyeon Lee-Lim  
W. Kirk Wallace

##### Tax Exempt Entities

Elizabeth T. Kessenides  
Richard R. Upton

## MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE

|                     |                     |                    |               |
|---------------------|---------------------|--------------------|---------------|
| Lee E. Allison      | Stephen B. Land     | Amanda H. Nussbaum | Philip Wagman |
| Janel A. Andolina   | Matthew Lay         | David M. Schizer   |               |
| Steven A. Dean      | Robert J. Levinsohn | Stephen E. Shay    |               |
| Kathleen L. Ferrell | Vadim Mahmoudov     | Ansgar A. Simon    |               |
| Joshua M. Holmes    | Gary B. Mandel      | Andrew P. Solomon  |               |
| Charles I. Kingson  | Charles M. Morgan   | Eric Solomon       |               |

November 13, 2012

The Honorable Mark Mazur  
Assistant Secretary (Tax Policy)  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Steven Miller  
Acting Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

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

## Re: Report on Temporary and Proposed Regulations under Section 988(d) of the Code

Dear Messrs. Mazur, Miller and Wilkins:

I am pleased to submit the attached report of the Tax Section of the New York State Bar Association, which comments on the recently issued temporary and proposed regulations under Section 988(d) (the "Temporary Regulations"). The purpose of the Temporary Regulations is to prevent taxpayers from claiming a foreign currency loss by partially "legging out" of an "integrated economic transaction" even though the loss remains fully hedged by an offsetting unrealized foreign currency gain.

The Temporary Regulations and their preamble provide the following example of such a transaction: A taxpayer with the U.S. dollar as its functional currency issues a fixed-rate debt instrument denominated in a foreign currency and, on the same date, enters into two swap contracts, a foreign currency/dollar currency swap and a fixed-for-floating dollar interest rate swap, which together result in the transformation of the fixed-rate,

## FORMER CHAIRS OF SECTION:

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

Messrs. Mazur, Miller and Wilkins

November 13, 2012

Page 2

foreign currency borrowing into a synthetic floating-rate dollar borrowing. The taxpayer then disposes of the interest rate swap when the underlying foreign currency debt is in a loss position and takes the position under the prior Section 988(d) regulations that the disposition allows it to claim a foreign currency loss on the debt instrument without reporting the offsetting gain on the currency swap.

We agree that this result is inconsistent with the purposes of Section 988(d) and the economic substance of the transaction. As discussed in the attached report, however, we do not believe a court would allow the loss in question even under the prior Section 988(d) regulations. Accordingly, although we do not believe that promulgation of the Temporary Regulations was strictly necessary to challenge the taxpayer's position in these transactions, we appreciate the need for greater certainty in this complex area of the law and support the efforts by Treasury and the IRS to clarify and improve the integration rules of Section 988(d).

More broadly, we question whether the approach taken by the Temporary Regulations (and by the prior Section 988(d) regulations) is optimal, particularly in light of (i) the meaningfully different approach to similar issues taken by Regulations Section 1.1275-6 and (ii) the resulting potential for divergent tax treatment of economically similar or identical transactions. We therefore recommend that Treasury and the IRS modify the Temporary Regulations to conform to the approach to leg-outs taken by Regulations Section 1.1275-6, which we view as simpler and more consistent with economic reality. While it is a more complex undertaking, we also recommend that Treasury and the IRS give serious consideration to aligning the approaches taken by the two integration regimes more generally.

The report also includes a number of other technical comments and recommendations. 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,



Andrew W. Needham  
Chair

Enclosures

cc: Erik Corwin  
Deputy Chief Counsel (Technical)  
Internal Revenue Service

Sheila Ramaswamy  
Office of Associate Chief Counsel (International)  
Internal Revenue Service

Messrs. Mazur, Miller and Wilkins

November 13, 2012

Page 3

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

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

Steven Musher  
Associate Chief Counsel (International)  
Internal Revenue Service

Mark S. Perwien  
Senior Counsel to Chief Counsel (Financial Institutions and Products)  
Internal Revenue Service

Danielle Rolfes  
International Tax Counsel  
Department of the Treasury

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

Lisa Zarlenga  
Tax Legislative Counsel (Regulatory Affairs)  
Department of the Treasury