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July 2, 2009

Mr. Michael Mundaca
Deputy Assistant Secretary –
International Tax Affairs
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

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

Re: Recommendations for 2009-2010 Tax Guidance Priority List

Dear Sirs:

In response to Notice 2009-43, 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 2009-2010 guidance plan year.[1] We request that items that are marked by asterisks be treated as higher priority items.

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1 This letter may be cited as New York State Bar Association Tax Section, *Recommendations for 2009-2010 Tax Guidance Priority List* (Report No. 1185, July 2, 2009).

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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 (Sections/Tax Section/Tax Section Reports). We are currently preparing reports on several other items on this list.

I. Corporations

**Guidance under section 108(i), including the application of section 108(i) to partnerships, the application of section 108(i) in the consolidated return context, the meaning of "trade or business" for real estate investments, and whether the qualified real estate exception applies where real estate is owned by a disregarded entity and debt is issued by an upper-tier entity that pledges the equity of the disregarded entity. (Report No. 1182)

**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

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

Guidance on section 355(e) and redemptions (Report No. 1046)

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 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 302 basis rules in consolidated groups

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

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

Guidance under section 197, including consideration of termination of the anti-churning rules

II. Employee Benefit Issues

Additional guidance under section 457A

Finalization of the proposed income-inclusion regulations under Section 409A

Continued development of a voluntary corrections program under Section 409A, particularly regarding documentary compliance. (Report No. 1180)

III. Financial Product and Financial Transaction Issues

**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 No. 1163)

**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, how to determine the yield of VRDIs and CPDIs, how to determine the maturity of installment or variable maturity notes, determining the base rate for foreign currency notes, and the effect of remote contingencies that actually take place.

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

**Guidance on the use of REMICs to acquire mortgages that have defaulted or are at risk of defaulting, including where a purpose of the transaction is to permit a foreign investor to participate economically in restructuring activity without being treated as engaged in the conduct of a U.S. trade or business

**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, particularly 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 guidance taxpayers may rely upon with respect to the hedging of convertible bonds with a bond hedge, and related warrant transaction

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)

Finalization of proposed regulations under section 1058

IV. International Issues

**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 under the trading safe harbor of section 864(b)(2) regarding the extent to which the safe harbor applies to loan origination, and guidance on when loan origination and related activities are considered to be an investment activity rather than a trade or business (Report No. 1163)

**Guidance under section 956, including (i) the renewal of Rev. Proc. 2008-26/Notice 2009-10 (relief on definition of readily marketable securities for purposes of section 956) and Notice 2008-91/Notice 2009-10 (section 956 relief for short term loans), (ii) guidance addressing 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 (iii) guidance on 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.

**Guidance on the application of withholding tax rules to certain fees referred to under *Financial Products and Financial Transactions* above.

**Finalize foreign tax credit regulations relating to technical taxpayer rules and compulsory payments (proposed Treasury regulation § 1.901-2(e)(5)) (Report No. 1135)

**Finalize the temporary transfer pricing regulations on services (temporary Treasury regulation § 1.482-9T)

**Finalize the temporary regulations under section 883(c) (temporary Treasury regulation § 1.883-3T)

**Finalize the temporary regulations under section 882 (Treasury regulation § 1.882-5T)

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

Guidance on the impact of the Fifth Circuit's decision in *Tidewater Inc. v. United States* on sections 954(c), 1297 and related rules

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

Guidance on cross-border securities lending transactions, to replace or clarify Notice 97-66

Finalize the proposed regulations on the source of service income (proposed Treasury regulation § 1.861-4(b)(2)(ii)(G))

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

Finalize or repropose the proposed global dealing regulations (proposed Treasury regulation § 1.482-8)

Guidance on the treatment of government licenses under FIRPTA (Announcement 2008-115)

Guidance on whether debt backed by deeply distressed real property is an interest other than solely as a creditor for FIRPTA purposes

Proposed regulations addressing section 1445(b)(9) nonforeign affidavits

Finalize the proposed regulations under section 959

Guidance regarding the definition of intellectual property for section 367(a)

V. Partnerships

**Guidance under section 108(i), described above under *Corporations*

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

Finalize proposed regulations under sections 721 and 83 on partnership equity issued for services (proposed Treasury regulation §§ 1.721-1(b) and 1.83-3) (Report No. 1098)

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

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)

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 Treasury regulation § 1.337(d)-3 (1993 Report)

VI. REIT and RIC Issues (Domestic)

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

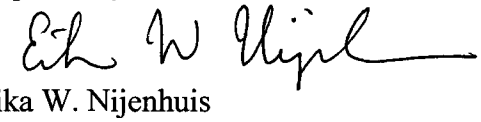
Consideration of a REIT bankruptcy exception for distributions

Guidance providing relief for inadvertent violations of the preferential dividend rules (Report No. 1153)

VII. Tax Exempts

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

Respectfully submitted,



Erika W. Nijenhuis
Chair

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. 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. 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. 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. 1182, *Report on the Cancellation of Indebtedness and AHYDO Rules of Sections 108(i) and 163(e)(5)(F)* (April 27, 2009)

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

Report No. 1184, *Report On Proposed Regulations Under Sections 108(e)(8) and 721 on Partnership Debt-for-Equity Exchanges* (June 2009)

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