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March 17, 2000

The Honorable Bill Archer
Chair
House Ways & Means Committee
1236 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

On November 9, 1999, Representative Richard E. Neal introduced H.R. 3283, which would amend section 1032 to provide that a corporation generally does not recognize gain or loss with respect to (i) an option, forward or futures contract that relates to the corporation's stock or (ii) any other contract or position to the extent the gain or loss reflects or is determined by reference to changes in the value of the corporation's stock (or distributions on the corporation's stock). However, if a corporation acquires its stock as "part of a plan (or series of related transactions)" pursuant to which the corporation also enters into a forward contract with respect to its stock then, under H.R. 3283, the corporation would be required to treat the difference between (i) the amount to be received under the forward contract and (ii) the fair market value of the stock on the date the corporation entered into the forward contract as original issue discount on a debt instrument acquired on such date (and which is accrued over the term of the forward contract). A "plan" is presumed to exist for this purpose if the corporation enters into the forward contract within the 60-day period beginning on the date that is 30 days before the date that the corporation acquires its stock. The corporate taxpayer may rebut the presumption by establishing that entering into the forward contract and acquiring its stock were not pursuant to a plan or series of related transactions.

We support H.R. 3283. As Representative Neal noted in his introductory statement, the bill reflects the recommendations of our June 16, 1999 report on section 1032. We believe the bill will reduce the potential for abuse and government whipsaw and provide corporate taxpayers with increased legal certainty, and we believe it is preferable to the Administration's proposal

(reintroduced as part of the fiscal year 2001 budget revenue proposals) to tax a corporation on the "time value element" in a forward sale on its own stock. We have a few comments on H.R. 3283.

First, we had suggested that a corporation should not be required to include original issue discount with respect to the acquisition and forward sale of its stock if the forward sale occurs outside the 60-day period described above. We continue to believe a corporation that enters into a forward contract more than 30 days before or after a stock buyback could not effectively achieve a time value of money return on the two transactions, and therefore a safe harbor for transactions more than 30 days apart will avoid controversies and provide taxpayers with legal certainty. Second, we had suggested that for forward sales occurring within the 60-day period, the corporate taxpayer could avoid the OID accrual by demonstrating that the acquisition and forward sale did not have "a principal purpose" of achieving a tax-free time value return. We continue to believe that this standard is more easily applied and less vague than the "plan or series of related transactions" test of H.R. 3283.

Regardless of which test ultimately is adopted, we urge that the legislative history to H.R. 3283 contain a number of examples illustrating situations where the test would apply, and situations where it would not. We also urge that corporate taxpayers be permitted to rebut the presumption by a preponderance of the evidence, rather than the clear and convincing standard used in the proposed regulations under section 355(e). The legislative history also should confirm that H.R. 3283 applies equally to cash-settled and physically-settled positions.

Finally, we reiterate our recommendation that the legislative history to H.R. 3283 make clear that no inference is intended with respect to transactions entered into prior to the date of enactment (which is the bill's effective date).

Respectfully submitted,

Robert A. Jacobs

cc: The Honorable Jonathan Talisman
Jeffrey Maddrey
The Honorable Charles O. Rossotti
The Honorable Charles B. Rangel
The Honorable William V. Roth, Jr.
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