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August 12, 2004

Mr. Gregory F. Jenner
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

The Honorable Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Dear Acting Assistant Secretary Jenner and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1066 on the definition of public trading within the meaning of Section 1273.

The definition of public trading under Section 1273 plays an important role in determining the issue price of a debt instrument. Generally, unless a debt instrument is issued for cash, the issue price of the debt instrument could be significantly different depending on whether either the debt instrument or the property for which the debt instrument is issued is publicly traded. The issue price of a debt instrument, in turn, is critical in determining, among other things, the amount of cancellation of indebtedness income (if an outstanding debt obligation is discharged with a new debt obligation), the amount of gain or loss (if the consideration received includes a debt instrument), and the amount of original issue discount with respect to the debt instrument. In addition, there are other instances where the existence of public trading is a prerequisite for qualifying for special treatment.

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The trading market for debt instruments has developed significantly since the current regulations were issued about a decade ago. Almost all bond trading occurs on the over-the-counter market through privately negotiated transactions, the prices of which are generally not reported publicly. With the advent of new and constantly evolving systems for trading and disseminating information regarding debt instruments, the definition of public trading contained in the regulations no longer properly reflects prevailing market conditions and does not adequately fulfill its intended purpose. In addition, the regulations are unclear in many respects and are consequently subject to varying interpretations as applied to particular trading platforms.

Our main recommendation is to amend the definition of public trading so that property is deemed publicly traded for purposes of Section 1273 if price quotes are readily available from dealers, brokers or other market makers, without regard to whether the pricing information is reported on any quotation medium. Second, if the concept of quotation medium is retained, we recommend that the Treasury and the IRS publish detailed guidelines upon which taxpayers and practitioners can rely to determine whether a particular system will qualify as a quotation medium. We also make several other recommendations to make the definition of publicly traded more reflective of current market practice.

We appreciate your consideration of our recommendations. If you have any questions or comments regarding this report, please feel free to contact us and we will be glad to discuss or assist in any way.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'L. Steinberg', with a stylized flourish at the end.

Lewis R. Steinberg
Chair

cc: Eric Solomon, Deputy Assistant Secretary, Regulatory Affairs,
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