



TAX SECTION

2011-2012

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Honorable Douglas H. Shulman
Commissioner
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Re: Report on Proposed Regulations on the Definition of Public Trading

Gentlemen:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1237 on the proposed regulations (the "Proposed Regulations") issued on January 6, 2011 interpreting when property is treated as "publicly traded" for purposes of determining the issue price of a debt instrument.

Our first principal recommendation is that the Treasury provide relief from cancellation of debt income ("CODI") recognized in a debt-for-debt exchange. We recommend the Treasury

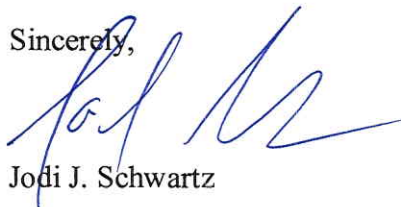
do so either by exercising its authority under Section 446(b)¹ to permit amortization of CODI over the term of the new debt instrument, or by exercising its authority under Section 1275(d) to define the issue price of the new debt instrument as the lesser of the issue price determined under the principles of Section 1274 and the adjusted issue price of the old debt instrument. Due to the direct link between the definition of public trading and the measurement of CODI, the breadth of the definition has always been a very significant issue for an issuer involved in a debt-for-debt exchange. While the new definition of public trading under the Proposed Regulations has the advantage of being clear and straight-forward, it would make it more likely for an issuer of an illiquid debt instrument to recognize CODI in a debt-for-debt exchange. Adopting either of the recommended measures would alleviate concerns related to the recognition of phantom CODI in connection with a debt restructuring.

We also believe that it is critical to provide for certain procedural standards and presumptions in order for taxpayers to be able to comply with the new rule. Information regarding trades, quotes or prices of the debt instrument is frequently kept private by the parties involved in the transaction and is generally not released to the public. As a result, issuers and holders would often not have easy access to information that they need in order to apply the new definition, such as the existence of sales prices or quotes (or the lack thereof), the volume of trades and the actual prices or quotes themselves. Therefore, we recommend that the final regulations provide that the issue price determined by the issuer based on information reasonably available to the issuer at the time of the determination of the issue price is respected.

Regarding the definition of public trading itself, we think that its scope needs to be clarified and limited in a few respects in order to be consistent with the statute and Congressional intent underlying the statute. We also have a few additional technical changes that we would like to recommend with respect to the qualified reopening rules that would be amended under the Proposed Regulations.

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.

Sincerely,



Jodi J. Schwartz

cc:

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Stephen Larson
Associate Chief Counsel (Financial Institutions and Products)
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¹ All Section references are to the Internal Revenue Code of 1986, as amended.

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