NEW YORK STATE BAR ASSOCIATION
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July 13, 2012

The Honorable Emily S. McMahon
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Douglas H. Shulman
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: **Prop. Reg. §1.1502-91(g)(7): Determining Section 382 Net Unrealized Built-in Gain and Loss of a Consolidated Group**

Dear Ms. McMahon, Mr. Shulman and Mr. Wilkins:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1269 on Prop. Reg. §1.1502-91(g)(7): Determining Section 382 Net Unrealized Built-in Gain and Loss of a Consolidated Group. The report strives to inform the decision-making of Treasury and the Service regarding whether to finalize Prop. Reg. §1.1502-91(g)(7) in its current form by illuminating policy choices that must be addressed, identifying technical issues to consider, and proposing an alternative approach to address the legitimate concerns that animate Prop. Reg. §1.1502-91(g)(7).

Under the current regulations, the determination of whether a loss group (or subgroup) has a net unrealized built-in gain ("NUBIG") or net unrealized built-in loss ("NUBIL") for purposes of section 382(h) is based on the aggregate amount of the separately computed NUBIG and NUBIL of each member that is included in the loss group (or subgroup) (an "included subsidiary"). Any unrealized gain or loss with respect to the stock (or intercompany obligations) of an included subsidiary is disregarded for purposes of the separate computations. As a result, NUBIG or NUBIL will not be comprehensively measured if and to the extent that (i) unrecognized stock gain or loss is not duplicated in the unrecognized gain or loss in the subsidiary's assets, and (ii) the unduplicated gain or loss on the stock remains disregarded in determining NUBIG or NUBIL.

To improve the measurement of NUBIG and NUBIL, the proposed regulations would require a loss group (or subgroup) to redetermine its consolidated NUBIG or NUBIL for unduplicated gain or loss recognized on the disposition of shares of a member of a loss group or subgroup.

We believe that the proposed regulations respond to legitimate concerns about inaccurate results reached under the current regulations (Reg. §1.1502-91(g)), and we agree that Treasury and the Service should address these concerns. However, we do not recommend that Treasury and the Service adopt Prop. Reg. §1.1502-91(g)(7) in its current form. The proposed regulations would add a further layer of complexity to an already very complex area of tax law. In addition, the proposed regulations raise significant technical issues, with the effect that, while the proposed regulations cure certain inaccuracies, they would introduce others.

A majority of our members believe that Treasury and the Service should adopt a more targeted anti-abuse approach in lieu of finalizing Prop. Reg. §1.1502-91(g)(7) in its current form or adopting any similar set of rules that broadly would require a redetermination of NUBIG or NUBIL for unduplicated gain or loss recognized on the disposition of shares of a member of a loss group or subgroup. In particular, we recommend that Treasury and the Service adopt a narrower set of rules targeting certain transaction structures that could occur in the marketplace and that most clearly gain an unwarranted advantage under the current rules.

A significant minority of our members believe that Treasury and the Service should adopt the proposed regulations after remedying various technical issues addressed in the attached Report.

We appreciate your consideration of our recommendations.

Respectfully submitted,

Andrew W. Needham
Chair

Enclosure

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