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July 21, 2009

The Honorable Douglas Shulman  
Commissioner  
U.S. Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, D.C. 20224

Mr. Michael F. Mundaca  
Assistant Secretary for Tax Policy  
U.S. Treasury Department  
Office of Tax Policy  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2009-43)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

Re: **2009-2010 Guidance Priority List (Notice 2009-43)**

Dear Sirs,

We are writing to respectfully request that the Internal Revenue Service (“IRS”) and Department of Treasury include on its 2009-2010 Guidance Priority List a reexamination of the regulations under section 597. Further, we respectfully request that the IRS and Treasury issue prompt guidance on the treatment of loss guarantees under the section 597 regulations.

[A Reexamination of the Section 597 Regulations is Necessary in Light of the Current Financial Crisis](#)

We believe that the current regulations under section 597 do not appropriately address the tax consequences of current forms of government assistance being provided to banks. Under the regulations, certain transactions, including certain stock sales, involving the acquisition of a distressed bank will be treated as deemed asset sales if “federal financial assistance” is provided in connection with the transaction.<sup>1</sup> All built-in losses in the acquired bank’s assets are eliminated as a result of this deemed asset sale.

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<sup>1</sup> Treas. Reg. § 1.597-5(a)(1).

Although the regulations may have been appropriate following the savings and loan (“S&L”) crisis, when the regulations were drafted, the forms of government assistance being used and the types of transactions being structured in the current financial crisis are often different than those used in the S&L crisis. For example, the regulations should be examined in light of current forms of government assistance, such as FDIC-provided guarantees and FDIC-provided seller financing. Further, the treatment of TARP assistance, which was addressed in Notice 2008-101, could be included in the regulations.

The current financial crisis also merits a reexamination of the deemed asset sale rule in the regulations. In general, the regulations are designed to match assistance income, which is treated as received by a target distressed bank, with offsetting deductions and losses. As such, the deemed asset sale was designed to trigger losses in the same entity and at the same time as the assistance income was realized. When government assistance, such as a loss guarantee, does not result in any income inclusion to the distressed bank, however, the deemed asset sale provision appears less essential.

#### Prompt Guidance is Needed to Address the Treatment of Loss Guarantees

In addition to a reexamination of the section 597 regulations in general, we request that the Treasury and IRS provide prompt guidance on the treatment of loss guarantees. Transactions involving FDIC-brokered loss guarantees are likely to continue to occur in the near term. Guidance regarding the tax treatment of these deals would help address inequities among institutions bidding on FDIC-assisted deals, some of which may currently bid less on transactions involving loss guarantees because of the uncertain tax consequences.

We therefore respectfully request that the Treasury and IRS issue a Notice providing that: (1) a loss guarantee provided by the FDIC does not constitute “federal financial assistance” under section 597; (2) any loss guarantee payment that is not made before or at the time of a stock acquisition is not considered “in connection” with a stock acquisition and therefore does not trigger the deemed asset sale rules of Treas. Reg. § 1.597-5(b); and (3) any loss guarantee payment shall be treated as gross income to the recipient under section 61. Further, we respectfully request that the Notice state that the Treasury and IRS intend to amend the regulations under section 597 and invite taxpayers to submit written comments on the regulations under section 597.

#### Conclusion

A reexamination of section 597 in light of the current economic crisis and providing prompt certainty about the treatment of loss guarantees under section 597 should be a priority for the IRS and Treasury. We appreciate your consideration of this issue. Please feel free to contact me if you have any questions, or would like to arrange a meeting to discuss the Proposed Regulation

Sincerely,

A handwritten signature in black ink that reads "Fran Mordi". The signature is written in a cursive, slightly slanted style.

Fran Mordi

cc:

The Honorable Michael S. Barr  
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