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August 21, 2008

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

The Honorable Donald Korb
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

RE: *Proposed IRS Settlement Initiative for LILO and SILO Transactions*

Dear Commissioner Shulman and Chief Counsel Korb:

This letter concerns the proposed settlement initiative (the Initiative), which was offered by the Internal Revenue Service (the Service) on August 5, 2008, to more than 45 taxpayers who have been identified as participants in sale-in, lease-out (SILO) and/or lease-in, lease-out (LILO) transactions. The American Bankers Association appreciates the Service's effort to settle these SILO/LILO disputes efficiently and expeditiously and is willing to work with the Service on behalf of the industry to achieve an optimal resolution of the issue.

The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.3 trillion in assets and employ more than two million men and women.

We understand that the Service believes that the Initiative is the most effective way to resolve this issue quickly and efficiently, and therefore, congratulate the Service for extending the time provided to taxpayers to accept or reject the Initiative. However, we would like to note that there are several definitional concerns in the Initiative that still need to be addressed. If not addressed, it will be difficult for the Service to achieve the results intended under this program, despite the additional time provided by the Service. Outlined below are some of the problems we have identified. We hope that the Service will carefully consider them. We understand that the Service believes that the Initiative is the most effective way to resolve this issue quickly and efficiently. However, we would like to note that there are several

definitional concerns in the Initiative, which we believe will make it difficult for the Service to achieve the results intended under this program. Outlined below are some of the problems we have identified. We hope that the Service will carefully consider them.

ABA Concerns

1. Definitional issues included in the Initiative require additional information and clarification. For instance, the definitions discuss a Deemed or Actual Termination Gain, but there is no discussion of Termination Losses. Thus, it is unclear how Termination Losses would be treated, i.e., whether or not such losses would be fully deductible. The ABA requests that the Service clarify that such losses would be fully deductible. If a taxpayer is not allowed to deduct losses incurred at the conclusion of the transaction and is required to recognize Termination Gains (as indicated in the Initiative), there would be permanent differences that will have negative impacts on the taxpayer.
2. The Initiative requires that taxpayers agree to use their “best efforts” to terminate the lease, without providing any guidance or clarification as to how the Service will evaluate such best efforts. The ABA requests that the Service provide clarification on what would constitute “best efforts” under the Initiative.
3. To the extent a taxpayer is required to pay a breakage fee to terminate a lease, the Initiative does not address the impact of such breakage fee. For instance, would such a fee be deductible? In addition, how would such breakage fee impact the Service’s evaluation of a taxpayer’s “best efforts”? For instance, does the Service expect “best efforts” regardless of the breakage fees?
4. The Initiative does not address future tax consequences in the case of leases that do not terminate prior to the December 31, 2010, date.
5. The Initiative does not provide the mechanics that should be used to calculate original issue discount (OID). OID is relevant for years after 2008, assuming the lease is not terminated in 2008. There is some confusion as to whether the taxation of Actual or Deemed Termination Gain precludes accrual of OID (which presumably refers to the annual growth in the equity collateral).
6. In the interest of resolving this issue quickly, the ABA requests that the Service modify the Initiative in order to “delink” LILOs from SILOs. The Initiative does not define either type of transaction clearly. In general, the definition of what constitutes a LILO transaction is clear to most taxpayers.

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That is not the same case for SILOs. The term has been used more broadly by the IRS than by taxpayers. Thus, the general reference to the term within the Initiative without clarification of what it includes is problematic for taxpayers. Uncertainty in this area will likely frustrate the analysis for some taxpayers. In this regard, additional guidance is requested from the IRS as to what constitutes a SILO transaction.

We believe that if the government eliminates the requirement that a taxpayer must accept to resolve both its LILO and SILO transactions as part of the terms of the offer, many taxpayers who are willing to work with the government on resolving the issue would be more inclined to do so quickly with respect to the LILOs (provided that the Service provides the requested clarification and additional time). Any questions or issues regarding what constitutes a SILO transaction can be addressed separately between the government and the taxpayer after the LILO settlement issues have been finalized. This way significant progress can be made with respect to settling the LILO transactions.

ABA requests that the Service address these issues, since it would be extremely difficult for taxpayers to make a determination on whether to accept or reject the offer where there are so many questions that require answers or clarification from the Service. Furthermore, after such guidance has been provided, we request that the Service provide a new 60-day deadline for taxpayers either to accept or reject the offer. We also request that the Service provide reasonable flexibility with respect to the time frame provided for taxpayers to prepare the required documentation.

We would welcome an opportunity to discuss this with you further. Please feel free to contact me at 202-663-5317 or fmordi@aba.com.

Sincerely,



Francisca N. Mordi

cc: Frank Y. Ng
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