Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:
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LEGEND:

Transferee =

Merger Sub =

Parent =

Transferor =

Partnership 1 =

Partnership 2 =

Limited Liability Company =

Exchange =

Bank =

State X =

Business A =

Business B =

a =

b =

c =

d =

e% =

f% =

g% =

Date 1 =

Date 2 =

Dear

This responds to a letter, dated November 10, 2000, requesting rulings as to the federal income tax consequences of a proposed transaction. Additional information was received in letters dated February 5, March 14, April 13, May 7, May 22, May 23, May 29, May 30, June 4, and June 5, 2001.

The information submitted indicates that Transferee is a State X corporation formed solely for the purpose of consummating the proposed transaction. Transferee uses the accrual method of accounting and files its returns on a calendar year basis. Transferee will have a shares of authorized stock, of which b will be shares of Preferred Stock, c will be shares of Class A Common Stock, and d will be shares of Class B Common Stock. Class A shares will have one vote per share and Class B shares will have one-half vote per share. Class A stock will be listed on Exchange.

Merger Sub, a State X corporation, was a wholly-owned subsidiary of Transferee. Merger Sub was organized by Transferee solely for the purpose of consummating the transaction and conducted no business or operations except those necessary to facilitate the transaction.

Parent is a publicly traded State X corporation that is the common parent of a consolidated group. Parent has one class of common stock and one class of preferred stock. Parent uses the accrual method of accounting and files its federal consolidated income tax return on a calendar year basis. Parent, directly and indirectly through its subsidiaries, engages in Business A.

Transferor is a State X limited liability company formed solely for the purpose of consummating the transaction. Transferor has elected to be treated as a partnership for Federal income tax purposes. Transferor is an accrual method, calendar year taxpayer. Prior to the proposed transaction, the interests in Partnership 1, Partnership 2 and Limited Liability Company were contributed to Transferor by its partners, members and shareholders. After such contribution, Transferor owned, directly or indirectly, all of the interests in Partnership 1, Partnership 2 and Limited Liability Company. Transferor will be engaged in Business B through the continued operation of Partnership 1, Partnership 2 and Limited Liability Company.

In order to accomplish what are represented to be valid business purposes, the taxpayers have proposed and partially consummated the following transactions:

(i) Transferee formed a wholly-owned, transitory subsidiary, Merger Sub, solely for the purpose of effecting the transaction;

(ii) On Date 1, Merger Sub merged with and into Parent pursuant to an Agreement and Plan of Merger (the "Merger"), with Parent surviving. Parent's shareholders exchanged their stock in Parent for an equal amount of Class A common stock of Transferee, representing e% of Transferee's voting common stock. The stock of Transferee acquired upon its formation was redeemed at the time of the Merger.

(iii) On Date 2, one business day after the Merger, Transferor contributed its interests in Partnership 1, Partnership 2, and Limited Liability Company (the "Property") to Transferee, in exchange for Transferee voting common stock (the "Contribution"). Transferor received f% of Transferee's voting common stock and in accordance with a loan agreement between one of the partnerships and Bank, Bank received g% of Transferee's voting common stock.

(iv) After consummation of the Merger and Contribution, Parent will merge with and into Transferee (the "Upstream Merger") under State X law.

Section 3.01(23) of *Rev. Proc. 2000-3, 2000-1 I.R.B. 103, 105* provides that the Internal Revenue Service will not rule on the qualification of a transaction as a reorganization under 368(a)(1)(A). Although *Rev. Proc. 2000-3* provides a general no-rule policy concerning section 368(a)(1)(A), the Service will rule on collateral issues when the consequences of qualification are not adequately addressed by a statute, regulation, decision of the Supreme Court, tax treaty, revenue ruling, revenue procedure, notice, or other authority published in the Internal Revenue Bulletin. The taxpayer indicates that there is no guidance as to whether a corporation transferring property via a merger under section 368(a)(1)(A) by reason of section 368(a)(2)(E) followed by an upstream merger, is a "transferor" within the provisions of section 351(a).

The taxpayer has made the following representations in connection with the Merger and the Upstream Merger:

(a) To the best of the knowledge and belief of Parent and Transferor, and without regard to resolution of the requested rulings below, the state law merger of Merger Sub with and into Parent in exchange for stock of Transferee (the Merger), viewed independently of the proposed Upstream Merger, constitutes a reorganization under section 368(a)(1)(A) by reason of section 368(a)(2)(E).

(b) To the best of the knowledge and belief of Parent and Transferor, and without regard to resolution of the requested rulings, the state law merger

of Parent with and into Transferee (the Upstream Merger), viewed independently of the Merger, would qualify under section 332.

(c) To the best of the knowledge and belief of Parent and Transferor, and assuming a favorable resolution of the requested rulings, if the Merger had not occurred and Parent had merged directly into Transferee, such merger would have qualified as reorganization under section 368(a)(1)(A).

(d) The Merger and the Upstream Merger, if treated as steps in an integrated plan, will, except with respect to the subissues identified, otherwise satisfy the requirements applicable to qualification as a reorganization, such as business purpose, continuity of business enterprise, and continuity of proprietary interest.

(e) All other transactions undertaken contemporaneously with, in anticipation of, in conjunction with, or in any way related to, the Merger, the Contribution, and the Upstream Merger have been fully disclosed.

(f) Transferee has no plan or intention to sell or otherwise dispose of any of Parent's assets received in the proposed Upstream Merger, except for dispositions in the ordinary course of business, or transfers described in section 368(a)(2)(C) or the regulations thereunder.

(g) Following the transactions, Transferee will continue Parent's core historic business or use a significant portion of its historic business assets in its business. For this purpose, Transferee will be treated as conducting the business and holding the assets of related entities, as described in section 1.368-1(d)(4).

(h) The Upstream Merger will occur within 30 days of receipt of the requested rulings.

The following additional representations have been made in connection with the Contribution:

(i) No stock or securities will be issued for services rendered to or for the benefit of Transferee in connection with the proposed transaction.

(j) No stock or securities will be issued for indebtedness of Transferee that is not evidenced by a security or for interest on indebtedness of Transferee which accrued on or after the beginning of the holding period of Parent or Transferor for the debt.

(k) All rights, title and interests for each copyright, in each medium of exploitation, will be transferred to Transferee.

(l) Neither Parent nor Transferor will retain any significant power, right, or continuing interest, within the meaning of section 1253(b) of the Code, in any franchises, trademarks or trade names being transferred.

(m) The transfers are not the result of the solicitation by a promoter, broker, or investment house.

(n) Parent and Transferor will not retain any rights in the property being transferred to Transferee.

(o) The value of the Transferee stock to be received in exchange for accounts receivable will be equal to the net value of the accounts transferred, i.e., the face amount of the accounts receivable previously included in income less the amount of the reserve for bad debts.

(p) With respect to the larger transaction, shareholders of Parent will receive, in exchange for their stock of Parent, stock of Transferee equal, in the aggregate, to a number of shares having a value, as of the date of the exchange, of at least 50% of the value of all of the formerly outstanding stock of Parent as of the same date.

(q) Transferee has no plan or intention to redeem or acquire, and to the best of its knowledge and belief no related person of Transferee has any plan or intention to acquire, for consideration other than a proprietary interest in Transferee, shares of Transferee's stock transferred in the transaction.

(r) Any debt relating to the stock being transferred that is being assumed (or to which such stock is subject) was incurred to acquire such stock and was incurred when such stock was acquired, and both Parent and Transferor are transferring all of the stock for which the acquisition indebtedness being assumed (or to which such stock is subject) was incurred.

(s) The adjusted basis and the fair market value of the assets to be transferred by Parent and Transferor to Transferee will, in each instance, be equal to or exceed the sum of the liabilities to be assumed by Transferee plus any liabilities, if any, to which the transferred assets are subject.

(t) The liabilities of Parent and Transferor to be assumed by Transferee were incurred in the ordinary course of business and are associated with the assets to be transferred.

(u) There is no indebtedness between either Parent or Transferor and Transferee, and there will be no indebtedness created in favor of Parent or Transferor as a result of the transaction.

(v) The transfers and exchanges occurred under a plan agreed upon before the transaction in which the rights of the parties were defined.

(w) All exchanges occurred on approximately the same date, with the Contribution occurring one business day after the Merger pursuant to the same integrated transaction. The Upstream Merger will occur within 30 days of receipt of the requested rulings.

(x) There is no plan or intention on the part of Transferee to redeem or otherwise reacquire any stock to be issued in the proposed transaction.

(y) Taking into account the transfer of Transferee stock to Bank; any issuance of additional shares of Transferee stock; any issuance of stock for services; the exercise of any Transferee stock rights, warrants, or subscriptions; a public offering of Transferee stock; and the sale, exchange, transfer by gift, or other disposition of any of the stock of Transferee to be received in the exchange, Parent and Transferor will be in “control” of Transferee within the meaning of section 368(c).

(z) Parent and Transferor will each receive stock, securities or other property of Transferee approximately equal to the fair market value of the property transferred by it to Transferee.

(aa) Transferee will remain in existence and retain and use the property transferred to it in a trade or business.

(bb) There is no plan or intention by Transferee to dispose of the transferred property other than in the normal course of business operations.

(cc) Transferee will pay or assume only those expenses incurred by each party in connection with the transactions in accordance with the guidelines established in Revenue Ruling 73-54, 1973-1 C.B. 187.

(dd) Transferee will not be an investment company within the meaning of section 351(e)(1) and section 1.351-1(c)(1)(ii) of the regulations.

(ee) Neither Parent nor Transferor is under the jurisdiction of a court in a title 11 or similar case (within the meaning of section 368(a)(3)(A)) and the common stock received in the exchange will not be used to satisfy the indebtedness of such debtor.

(ff) Transferee will not be a “personal service corporation” within the meaning of section 269A of the Code.

(gg) To the best of the knowledge and belief of Transferor and Parent, and assuming the favorable resolution of the requested rulings, the transfer by Transferor to Transferee, together with the merger of Parent with and into Transferee, is a transaction that will qualify under section 351.

Section 351 does not apply unless the transferor or transferors hold at least 80 percent of the stock of the transferee corporation after the transfer. In the present case, after the transfer of Property by Transferor, Transferor will hold less than 80 percent of the common stock of Transferee. Accordingly, standing alone, Transferor’s transfer of assets would not qualify for non-recognition treatment under section 351.

If Merger Sub, a transitory entity, is disregarded in the reverse triangular merger, Parent, through the Merger and Upstream Merger, in substance, has transferred property to Transferee in exchange for Transferee stock. Solely for purposes of determining whether the 80 percent requirement has been met so as to qualify Transferor for treatment under section 351, Parent will be considered a “transferor” as described in section 351, and accordingly, Parent’s ownership of Transferee common stock will be included in the computation. The combined ownership of Transferor and Parent of Transferee, so computed, exceeds 80 percent.

Accordingly, based solely on the information submitted and the representations set forth above and provided that (i) the Merger, the Contribution, and the Upstream Merger are treated as steps in an integrated plan pursuant to the step transaction doctrine and (ii) the Merger and the Upstream Merger otherwise qualify as statutory mergers under applicable state law but for the rulings below, we hold as follows:

(1) For federal income tax purposes, the Merger and the Upstream Merger will be treated as if Transferee directly acquired Parent’s assets in exchange for Transferee stock and Transferee’s assumption of Parent’s liabilities through a “statutory merger” of Parent with and into Transferee, as that term is used in section 368(a)(1)(A). *(See Rev. Rul. 67-274, 1967-2 C.B. 141,* and *Rev. Rul. 72-405, 1972-2 C.B. 217).*

(2) The deemed transfer by Parent of its assets to Transferee in the statutory merger and the transfer by Transferor of Property to Transferee in exchange for Transferee stock will be considered an exchange for purposes of section 351(a) of the Code. (*See Rev. Rul. 76-123, 1976-1 C.B. 95* and *Rev. Rul. 68-357, 1986-2 C.B. 144*). Transferee will not be considered a continuation of Parent (*see Rev. Rul. 76-123, 1976-1 C.B. 95).*

(3) No gain or loss will be recognized by Transferor upon the transfer of the Property to Transferee solely in exchange for stock of Transferee and the assumption of liabilities (section 351(a)).

(4) No gain or loss will be recognized by the Transferee upon the receipt of the Property from Transferor solely in exchange for Transferee stock (section 1032(a)).

(5) The basis of the Transferee stock to be received by Transferor will be the same as the basis of the Property exchanged therefor, reduced by the liabilities assumed by Transferee or to which such Property was subject (sections 358(a)(1) and 358(d)).

(6) The holding period of the Transferee stock to be received by Transferor will include the period during which the Property exchanged therefor was held, provided such Property was held as a capital asset by Transferor on the date of the exchange (section 1223(1)).

(7) The basis of the Property of Transferor to be received by Transferee will be the same as the basis of such Property in the hands of Transferor immediately prior to the exchange (section 362(a)).

(8) The holding period of the Property of Transferor to be received by Transferee will include the period during which such Property was held by Transferor (section 1223(2)).

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Although no ruling was requested as to the continuation of the Parent group, it appears from the information submitted that the transaction qualifies as a reverse acquisition under section 1.1502-75(d)(3) and as a result, the Parent group is required to continue filing a consolidated return.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. We express no opinion as to the treatment of the contribution of the interests in Partnership 1, Partnership 2, and Limited Liability Company to Transferor by its partners, members, and shareholders as described above. Further, we express no opinion as to whether or not the Merger qualifies under section 368(a)(1)(A) by reason of section 368(A)(2)(E); whether the Upstream Merger qualifies as a statutory merger; whether, viewed independently of the Merger, the Upstream

Merger would have qualified under section 332; or whether the step transaction doctrine applies to these transactions.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

A copy of this letter must be attached to any income tax return to which it is relevant.

Sincerely,
Associate Chief Counsel (Corporate)
by: Edward S. Cohen
Chief, Branch 2