Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Date:
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TY:

Legend

Parent =

Sub 1 =

Sub 2 =

Sub 3 =

Sub 4 =

Sub 5 =

FS1 =

Target =

Target Sub =

Company =

Acquiring =

FSub1	=	
FSub2	=	
FSub3	=	
Business A	=	
Date B	=	
Date C	=	
Country D	=	
a	=	
b	=	
c	=	
d	=	
e	=	
f	=	
g	=	
h	=	

This is in response to your letter, dated June 8, 2001, requesting a private letter ruling that based on your representations, the proposed transaction will qualify for an exception to the general rule of section 367(a)(1) of the Internal Revenue Code of 1986, as amended (the Code). Additional information was provided in letters dated August 21, 2001, September 25, 2001, and October 1, 2001.

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 the rulings, it is subject to verification upon examination.

Parent is a domestic corporation and is the common parent of an affiliated group of corporations filing a consolidated federal income tax return. Parent and its subsidiaries are engaged in various businesses including Business A through Target Sub.

Sub 1 is a wholly-owned indirect subsidiary of Parent that owns all of the stock of Sub 2 and Sub 4. Sub 4 owns all of the stock of Sub 5. Sub 2 owns all of the voting common stock of Target and all of the stock of FS1, which has elected to be treated as a disregarded entity under Treas. Reg. 301.7701-3(c) for U.S. tax purposes and wil be ignored for the purposes of the ruling letter. Target owns all of the stock of Target Sub. Parent owns the nonvoting preferred stock of Target, and Sub 3, an indirect wholly-owned subsidiary of Parent owns the voting preferred stock of Target. Sub 1 holds a a promissory note (the "Note") issued by Target evidencing loans made from time to time by Sub 1 to Target. It is represented that the Note is debt and not equity for Federal income tax purposes.

Company, a Country D corporation that is publicly traded, is engaged in Business A. Company is a b indirect shareholder of FSub1, a c indirect shareholder of FSub2, and a d indirect shareholder of FSub3. Company has outstanding Class A Shares, Class B Shares, and Shares. Fiduciary Depositary Receipts ("FDR's") are widely held and have been publicly traded. The Company FDRs have been issued in the usual and customary form, and the holders have full dividend rights and voting rights and the right to exchange each FDR for one Class A Share.

Acquiring was formed on Date B by Company. Nominees acting for Company presently own f Class A shares and g Class B shares which are the only shares of Acquiring stock outstanding. Acquiring has authorized two classes of stock, Class A Shares and Class B Shares, and it intends to authorize Class C Common Shares and Class C Preferred Shares prior to the transaction. Acquiring also intends to issue Class A Shares in the form of Depository Shares ("D Shares") with full dividend rights and voting rights and the right at any time to exchange each D Share for one Class A Share.

The Transaction will be effectuated in two steps pursuant to a business agreement ("Agreement") entered into among Sub 2, Target, Company, and Acquiring and dated as of Date C. In Step 1 Acquiring will make an offer (the "Exchange Offer") to exchange (1) Acquiring Class A Shares for Company Class A Shares, (2) Acquiring D Shares for Company FDRs, and (3) Acquiring B Shares for Company B Shares. In Step 2 a newly-formed transitory domestic subsidiary of Acquiring will merge ("the Merger") with and into Target. After the Merger, Target will remain in existence as a wholly-owned subsidiary of Acquiring. In the Merger, (1) Sub 2 will contribute to Acquiring all of the outstanding common stock of Target, (2) Parent and Sub 3 will contribute to Acquiring all of the outstanding preferred stock of Target, (3)Acquiring will exchange e in cash and shares of newly issued Acquiring Class C Common Stock for the common stock of Target, and (4) Acquiring will exchange newly issued Class C Preferred Stock for the preferred stock of Target.

In a separate transaction occurring on the same date as the Merger, Sub 4 will sell to Company all of the common stock of Sub 5 for cash. In another separate transaction occurring on the same date as the Merger, Sub 1 will sell the Note to Company for a in cash. Company and Acquiring will borrow under a bank credit facilities agreement (the “Facilities Agreement”) to fund the cash portion of the Merger consideration and the purchase price of the Sub 5 stock and the Note. The amounts borrowed under the Facilities Agreement will be transmitted shortly before Closing to bank accounts established by Company and Acquiring and then transmitted to Sub 1, Sub 2, and Sub 4 at Closing.

The exchange of Target shares by U.S. persons is subject to section 367(a) of the Code, which provides that where no exception applies, the transfer of appreciated property (including stock) by a U.S. person to a foreign corporation in a transaction that would otherwise qualify as a nonrecognition exchange is treated as a taxable transfer. In the case of a section 367(a) transaction in which a U.S. person transfers domestic stock to a foreign corporation, the U.S. transferor will qualify for nonrecognition treatment only if the requirements of Treas. Reg. section 1.367(a)-3(c)(1) are satisfied.

Among the requirements of Treas. Reg. section 1.367(a)-3(c)(1) is the requirement that the U.S. target company must satisfy the reporting requirements of Treas. Reg. section 1.367(a)-3(c)(6). The Taxpayer represents that Target will comply with the reporting requirements of Treas. Reg. section 1.367(a)-3(c)(6). Another requirement is that each U.S. transferor who is a 5-percent shareholder of the transferee foreign corporation immediately after the exchange enter into a 5-year gain recognition agreement as provided in section 1.367-(a)-8. The Taxpayer represents that each U.S. shareholder that is a 5-percent shareholder of Acquiring after the Merger will enter into a five-year gain recognition agreement with respect to Target stock it exchanged in the form provided in Treas. Reg. section 1.367(a)-8.

Among the remaining requirements of section 1.367(a)-3(c)(1) is the requirement that U.S. persons transferring U.S. target stock must receive, in the aggregate, 50-percent or less of both the total voting power and total value of the stock in the transferee foreign corporation (taking into account the attribution rules of section 318 of the Code, as modified by the rules of section 958(b) of the Code). The Taxpayer represents that U.S. transferors of Target stock will receive, in the aggregate, actually or constructively, 50-percent or less of both the total voting power and total value of all shares of Acquiring stock outstanding after the Merger. Another requirement is that U.S. persons who are officers or directors of the U.S. target corporation, or who are 5-percent shareholders of the U.S. target corporation, must own, in the aggregate, 50-percent or less of each of the total voting power and the total value of the stock in the transferee foreign corporation (taking into account the attribution rules of section 318 of the Cod, as modified by the rules of section 958(b) of the Code). The Taxpayer represents that U.S. persons who are officers, directors, or 5-percent target shareholders of Target will own in the aggregate, actually or constructively, 50-percent or less of each of the total voting power and total value of all shares of Acquiring outstanding immediately after the Merger.

The active trade or business test of Treas. Reg. section 1.367(a)-3(c)(3) must be satisfied. The active trade or business test consists of three elements. The first element provides that the transferee foreign corporation (or any qualified subsidiary or qualified partnership as defined under section 1.367(a)-3(c)(5)(vii) and (viii) must have been engaged in the active conduct of a trade or business outside the United States, within the meaning of sections 1.367(a)-2T(b)(3), for the entire 36-month period immediately preceding the exchange of U.S. target stock. Acquiring, will not have been engaged in an active trade or business for the entire 36-month period prior to the exchange nor will it have owned any qualified subsidiaries or partnerships so engaged. A transferee foreign corporation may satisfy the test, however, by acquiring at the time of, or prior to, the exchange a trade or business that has been active for the preceding 36 months. This rule does not apply to the acquisition of a trade or business of a U.S. target company. See Treas. Reg. section 1.367(a)-3(c)(3)(ii)(A). Thus, Acquiring will be treated as satisfying the test if it acquires a 36-month active trade or business of Company or one of Company's qualified subsidiaries or qualified partnerships.

The Taxpayer represents that Company will have been engaged in the active conduct of a trade or business outside the United States (the "Acquiring Business"), within the meaning of Treas. Reg. section1.367(a)-2T(b)(2) and (3), for the entire 36-month period immediately preceding the Merger. Acquiring will have obtained shares of Company representing at least 80% of the total vote and value of Company at the time of, or prior to, the Merger. Taxpayer represents that the principal purpose of such acquisition is not to satisfy the active trade or business test. Taxpayer represents that Company will be a qualified subsidiary of Acquiring for purposes of the active trade or business test. The second element of the active trade or business test provides that at the time of the exchange, neither the transferors nor the transferee foreign corporation (or any qualified subsidiary or qualified partnership engaged in the active trade or business) will have the intention to substantially dispose of or discontinue such trade or business. The Taxpayer represents that neither the shareholders of Target, nor Acquiring (including its qualified subsidiaries or qualified partnerships), will have any plan or intention to substantially dispose of, or discontinue, the Acquiring Business.

The third element of the active trade or business test is the substantiality test as defined in Treas. Reg. section 1.367(a)-3(c)(3)(iii). Under the substantiality test, the transferee foreign corporation must be equal or greater in value than the U.S. target corporation at the time of the U.S. target stock exchange (see section 1.367(a)-3(c)(3)(iii)(A). Pursuant to Treas. Reg. section 1.367(a)-3(c)(3)(iii)(B)(1) the value of the transferee foreign corporation is reduced by the amount of any asset acquired outside the ordinary course of business by such corporation or any of its qualified subsidiaries or qualified partnerships within the 36-month period preceding the exchange to the extent that (i) at the time of the exchange such asset produces or is held for the production of passive income, as defined in section1297(b) or(ii) such asset was acquired for the principal purpose of satisfying the substantiality test (commonly referred to as the "stuffing" rule). In addition, pursuant to Treas. Reg. section 1.367(a)-3(c)(3)(iii)(B)(3) the value of the transferee foreign corporation is reduced by the value of assets received within the 36-month period prior to the acquisition if such assets were owned by the U.S. target company or an affiliate. Taxpayer represents that, at

Closing, none of Acquiring, Company, or any of their qualified subsidiaries or qualified partnerships, if applicable, will hold any assets that were acquired for the principal purpose of satisfying the substantiality test of Teas. Reg. section 1.367(a)-3(c)(3)(iii). Taxpayer represents that as of the closing, the fair market value of Acquiring will include assets producing, or held for the production of, passive income as defined in section1297(b) (formerly section 1296(b), which assets were acquired outside the ordinary course of business within the 36-month period preceding the Merger, only to the extent that such assets were acquired in a transaction (or series of related transactions) which was not undertaken for a purpose of satisfying the substantiality test. The Taxpayer further represents that the acquisition of the Note and the Sub 5 stock constitute business-motivated acquisitions of assets from a target affiliate as part of a single integrated transaction that will not be undertaken for a purpose of satisfying the substantiality test.

If all of the assets acquired during the past were excluded when determining the value of the Taxpayer, it would not meet the substantiality test. The Taxpayer requests a ruling under section 1.367(a)- 3(c)(9) that there will be substantial compliance with the active trade or business test.

Under Treas. Reg. section 1.367(a)-3(c)(9), the Service may, in limited circumstances, issue a private letter ruling to permit the taxpayer to qualify for an exception to section 367(a)(1), if the taxpayer is unable to satisfy all of the requirements of the active trade or business test but is in substantial compliance with such test and meets all of the other requirements of section 1.367(a)-3(c)(1).

Based solely on the information submitted and on the representations set forth above, and provided the Note constitutes debt and not equity, it is held as follows:

> The transfer of Target shares by US persons for shares of Acquiring will qualify for an exception to § 367(a)(1) under Treas. Reg. § 1.367(a)-3(c)(1) and (9).

No opinion is expressed as to the tax treatment of the transaction under other provisions of the Code and regulations, and no opinion is expressed about the tax treatment of any conditions existing at the time of, or effects resulting from the transactions that are not specifically covered by this ruling. In particular, no opinion was requested and no opinion is provided as to whether the transaction will qualify for nonrecognition treatment under sections 351 or 368 of the Code. Further, no opinion is expresses as to whether FS1 is a disregarded entity under Treas. Reg. section 301.7701-3(c). No opinion is expressed as to the reporting requirements of U.S. persons exchanging stock under section 6038B and the regulations thereunder.

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.

It is important that a copy of this letter be attached to the federal income tax return of the taxpayer involved for the taxable year in which the transaction covered by this ruling letter is consummated.

Sincerely,
Michael H. Frankel
Senior Technical Reviewer, Branch 4
Office of Associate Chief Counsel
(International)