Internal Revenue Service

Number: **201010009**
Release Date: 3/12/2010

Index Number: 382.12-06, 382.12-08

Department of the Treasury
Washington, DC 20224

[Third Party Communication:
Date of Communication: Month DD, YYYY]
Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:CORP:01
PLR-128082-09
Date:
December 04, 2009

LEGEND:

Parent =

Sub1 =

Sub2 =

Receiver =

Buyer =

Entity 1 =

Entity 2 =

Year 1 =

Year 2 =

Series A =

Series B =

Series C =

Series D =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Dates A =

District X =

W =

X =

Y Trust =

X Company =

Company LLC =

Exchange Event =

N =

O =

P =

Q =

Certain Persons =

Dear :

We respond to your letter dated June 4, 2009, and subsequent correspondence in which you requested rulings as to certain federal income tax consequences of the transactions discussed below.

The rulings contained in this letter are based on facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the materials submitted in support of the request for rulings. Verification of the information and other data may be required as part of the audit process.

FACTS

Parent is the common parent of an affiliated group of corporations ("Parent Group" or "Taxpayer") that join in filing a consolidated return on a calendar year basis, using an accrual method of accounting, for federal income tax purposes. Year 1 was the first

taxable year in which Parent Group was a loss group within the meaning of §1.1502-91(c) of the Income Tax Regulations with respect to testing dates in Year 2.

Parent has, or at various times since the beginning of Year 1 had, outstanding a single class of common stock ("Common") and several classes of preferred stock—Series A, Series B, Series C, and Series D. Series A was issued Date 1 (which is in Year 2) and is convertible at the option of the holder into shares of Common at the then applicable conversion rate. The initial conversion rate entitled each share of Series A to be converted into W shares of Common, with cash issued in place of any fractional share of Common. None of Series A has yet been converted. Series B and C were issued Date 2 and mandatorily converted to Common on Date 3. Series D was issued Date 4. Collectively, unless otherwise stated, Parent's Common and Series A, B, C and D are hereinafter referred to as "Parent Stock".

On Date 4, Parent and its wholly-owned subsidiary, Sub1, commenced voluntary cases under chapter 11 of title 11 of the United States Code ("Bankruptcy Code") in the United States Bankruptcy Court for the District X ("Bankruptcy Court"). The bankruptcy filing was precipitated by the appointment of the Receiver as receiver for Parent's direct wholly-owned subsidiary, Sub2, and the Receiver's immediate sale of substantially all the assets of Sub2 to Buyer.

Series C was issued on Date 2, pursuant to an investment agreement with Entity 1 and other unrelated investors. Series B was also issued Date 2 pursuant to concurrent securities purchase agreements with a number of unrelated institutional investors, including Entity 2. Also on Date 2, some of the same investors acquired Common or warrants to acquire Common, pursuant to the terms of said agreements. Both Series B and C were participating and were mandatorily convertible on the final day of the calendar quarter in which—(i) requisite shareholder approvals had been received, and (ii) in the case of the preferred Series C, any requisite regulatory approval had been given. Said conversions occurred on Date 3. The issuance of Series B and C, along with Common and warrants to acquire Common on Date 2 in connection with the investment and securities purchase agreements is referred to herein as the "Private Placement."

The purpose of the Private Placement was to raise additional capital that Parent could use, at Parent's discretion to maintain Sub2's capital ratios at well above target levels. Potential investors were approached by Parent after discussions with its financial advisors, based on their financial ability and likely level of interest in completing a transaction with Parent in the near term. After receiving presentations from management and limited written due diligence materials, some of the potential investors submitted preliminary indications of interest and elected to proceed with on-site due diligence. However, none of the investors proposed to commit the full amount of capital that Parent needed, so Parent explored additional investments from other major institutional investors. After negotiations, Parent determined to proceed with the Entity 1 proposal because it represented the greatest value and the most favorable terms. In connection with its determination to proceed with Entity 1, Parent's financial advisors

approached a number of institutional investors for equity investments upon similar terms. Ultimately, this resulted in the investments made by the investors in the Private Placement. The terms of each of the investment and securities purchase agreements were such that, as a condition to closing, the aggregate amount of proceeds to be raised in the Private Placement would have to equal or exceed $X.

Entity 1 and Entity 2 were the only investors to file a U.S. Securities and Exchange Commission Schedule 13D or 13G as a result of the Private Placement. In its Schedule 13D filing, Entity 1 stated that its investment was not motivated by an intent to exercise control, directly or indirectly, over the management, policies or business operations of Parent. Entity 2's Schedule 13G filing contained the certification that securities referred to therein were not acquired and or held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect. Moreover, Parent states that it has no knowledge of any such intent by any of the investors in the Private Placement.

Series D was issued on Date 4 in exchange for so-called "trust preferred securities," in accordance with the terms of the documents governing such securities. The trust preferred securities were issued by special purpose entities (either Y Trusts or an X Company) on Dates A (all of which dates were before Date 1). The holders of the trust preferred securities were treated for federal income tax purposes as directly owning preferred partnership interests in an underlying limited liability company, Company LLC. Company LLC's assets consisted of various debt securities, some of which were acquired from Sub2 and from certain Sub2 affiliates. An affiliate of Sub2 held all of the common partnership interest in Company LLC.

Upon the occurrence of an Exchange Event, the holders of trust preferred securities would, pursuant to the terms of the governing documents, have their respective trust preferred securities automatically exchanged for a like amount of Series D, as governed by the terms of the respective underlying documents. Parent would become the holder of the trust preferred securities. An Exchange Event occurred, becoming effective on Date 4.

Series D is non-voting (except in the case of specified dividend arrearages), non-convertible and non-participating, thus such series would appear to be stock described in §1504(a)(4) of the Internal Revenue Code (excludable under §1.382-2(a)(3) as stock for purposes of determining shifts in ownership under section 382), so long as the redemption and liquidation rights do not exceed the issue price except for a reasonable premium. Taxpayer states that there are interpretational and factual uncertainties as to whether the latter requirement is satisfied.

On Date 5, Parent filed a motion with the Bankruptcy Court seeking an order (the "Stock Trading Order") imposing trading restrictions on Parent Stock and options to acquire such stock. The restrictions were intended to prevent an ownership change of the Parent Group and thereby to protect the value of the Parent Group's net operating loss

carryovers and other tax attributes. The restrictions require advance notice of, and the right to object with respect to, any transfers that have the propensity for creating an owner shift in Parent under section 382. The Stock Trading Order provides that transfers of Parent Stock that do not comply with the required procedures shall be null and void *ab initio* as an act in violation of the automatic stay under sections 362 and 105(a) of the Bankruptcy Code. The Stock Trading Order was approved by the Bankruptcy Court and entered on Date 6, effective as of Date 5.

The restrictions relate to acquisitions and dispositions of Parent Stock involving a "Substantial Equityholder," which generally refers to a person who owns (or would own)—(i) a number of shares of Common representing approximately N percent of Parent's Common outstanding, (ii) O percent of the total number of shares of Series A preferred stock outstanding, or (iii) N percent of the total number of shares of Series D outstanding. Ownership for this purpose takes into account the constructive ownership rules of section 382 and the regulations thereunder.

Under the Stock Trading Order, any person intending to acquire Parent Stock must notify Parent and the Bankruptcy Court at least P days in advance if the proposed acquisition would either (i) cause such person to become a Substantial Equityholder, or (ii) in the case of a person who is already a Substantial Equityholder, increase the amount of Parent Stock owned by such person. Similarly, any Substantial Equityholder intending to dispose of Parent Stock must notify Parent and the Bankruptcy Court at least P days in advance of the proposed disposition.

Pursuant to the procedures set forth in the Stock Trading Order, Parent may object to any proposed transfer of Parent Stock on the grounds that such transfer may adversely affect the Parent Group's ability to utilize tax attributes as a result of an ownership change of Parent. Parent must file any objection within Q days of receiving notice of the proposed transfer. If Parent so objects, any proposed transfer is not effective unless approved by the Bankruptcy Court.
To the extent a transaction is effected in violation of the Stock Trading Order (a "Prohibited Transaction"), Parent intends to enforce the provisions of the order rendering the transaction null and void as follows (the "Terms of Enforcement"): Parent will seek either to rescind the transaction (that is, to unwind the entire transaction) or—

(i) In the case of a prohibited acquisition (a "Purported Acquisition"), Parent will seek to compel the acquirer ("Purported Acquirer") to dispose in an arm's length transaction of the number of shares or percentage of Parent Stock acquired in excess of the number of shares or percentage that would have been permitted under the Stock Trading Order, with any excess proceeds from such sale transferred to one or more section 501(c)(3) organizations unrelated to the Purported Acquirer. For this purpose, "excess proceeds" are (1) in a case where net proceeds (i.e., the amount realized on the compelled disposition, less the costs of sale) exceed the basis of the shares disposed of, the amount of such excess, plus the amount of any distributions made on said shares while held by the Purported Acquirer, and (2) in a case where the net proceeds are less than the basis of the shares disposed of, the amount of any distributions made on said shares while held by the Purported Acquirer, but only to the extent that the sum of such

distributions plus the net proceeds realized on the compelled disposition exceed the Purported Acquirer's basis in the shares disposed of. If the Purported Acquirer received the stock acquired in the Purported Acquisition by means of gift or inheritance, its basis for this purpose shall be the fair market value of said stock at the time received.

(ii) In the case of a prohibited disposition (a "Purported Disposition"), Parent will seek to compel the transferor ("Purported Transferor") to reacquire the number of shares sold in violation of the Stock Trading Order in an arm's length transaction, with any excess proceeds realized from the sale and reacquisition transferred to one or more section 501(c)(3) organizations unrelated to the Purported Transferor. For this purpose, "excess proceeds" are the excess, if any, of the net proceeds received in the Purported Disposition over the sum of (1) the net amount paid for the reacquired shares, plus (2) the amount of any distributions made on the reacquired shares during the period beginning with the Purported Disposition and ending on the date of reacquisition (other than distributions received by the Purported Transferor on such shares).

On Date 7, Taxpayer learned that Certain Persons had violated or potentially violated the Stock Trading Order as the result of the acquisition of Parent Stock. Taxpayer promptly issued letters to said Certain Persons in furtherance of the Stock Trading Order, requiring compliance with the Terms of Enforcement. Each of said acquisitions has since been unwound in compliance with the Terms of Enforcement.

REPRESENTATIONS

Taxpayer makes the following representations:

1. There were and are no classes of stock of Parent outstanding that constitute "stock" within the meaning of section 382(k)(6) and §1.382-2(a)(3) at any time during the period beginning with the Year 1 taxable year and ending with Date 8, other than the Parent common stock, Series A, B and C, and (potentially) Series D.

2. Parent has not made any distributions on its stock since Date 1, other than stated dividends on its preferred stock and the customary dividends on its common stock.

3. Regarding the conversion of Series B and Series C shares into shares of Common, the fair market value of the stock of Parent exchanged was approximately equal to the fair market value of the stock of Parent received in exchange therefor. It is contemplated that, in the case of any conversion of Series A shares into shares of Common, the fair market value of the stock of Parent exchanged will be approximately equal to the fair market value of the stock of Parent received in exchange therefor.

4. Regarding the payment of cash in lieu of fractional shares of Common upon a conversion of Series A:

(a) The purpose of the cash payment is to spare the Parent Group the expense and inconvenience of issuing and transferring fractional shares. These cash payments will not be separately bargained-for consideration.

(b) The fractional share interests of each shareholder will be aggregated, and no shareholder will receive cash in an amount equal to or greater than the value of one share of Common valued as of the date of the conversion.

5. Parent has no knowledge of any intent by Entity 1, Entity 2, or any of the other investors in the Private Placement to acquire or hold Parent stock for the purpose of or with the effect of changing or influencing the control of Parent or as a participant in a transaction having that purpose or effect.

6. To the best of the Taxpayer's knowledge, the amount of tax liability on any of Taxpayer's federal income tax returns filed to date would not be affected by whether or not Taxpayer takes into account the effect of fluctuations in the relative values of different classes of stock for purposes of determining owner shifts and ownership changes under section 382.

7. The restrictions contemplated by the Stock Trading Order are legal, valid, binding, and enforceable against present and future holders of Parent Stock under applicable law, except as such enforceability may be limited by equitable principles. Parent intends to vigorously challenge and pursue, by all available means, any violations of the Stock Trading Order in accordance with the Terms of Enforcement described above.

RULINGS

For purposes of the following rulings, the Hold Constant Principle is defined as follows:

> On any testing date, in determining the ownership percentage of any 5-percent shareholder, the value of such shareholder's stock, relative to the value of all other stock of the Taxpayer, shall be considered to remain constant since Date 1 or if acquired thereafter such later date (each of such dates being referred to hereinafter as an "Acquisition Date"); and the value of such shareholder's stock relative to the value of all other stock of the Taxpayer issued subsequent to an Acquisition Date shall also be considered to remain constant since that subsequent date.

Based solely on the information submitted and representations made, we hold as follows:

1. Taxpayer may apply a method employing the Hold Constant Principle (the "Method") to determine the increase in percentage ownership of each of its 5-percent shareholders on each of its testing dates on or after Date 1 (and to identify which such testing dates are change dates) for purposes of section 382, provided that—(i) Taxpayer takes a return position consistent therewith on its tax return for its first taxable year in which the application of the Method would affect the amount of its tax liability, and (ii) if employment of the Method does not result in an ownership change during said first taxable year, Taxpayer continues to apply the Method thereafter through the testing

date on which the Method first results in an ownership change. Thereafter, Taxpayer may continue to apply the Method, under the same terms and conditions. See section 382(l)(3)(C).

2. The conversion of shares of Series A, Series B, or Series C into shares of Common shall, for purposes of determining the percentage interest represented by the shares under the Hold Constant Principle, be disregarded and the exchanging shareholder shall be considered to have acquired the newly issued stock as of the date it acquired the stock exchanged therefor. Common issued to public shareholders pursuant to the conversion shall be allocated to Parent's direct public groups in the same proportion as such groups were treated as having surrendered the converted shares.

3. In the case of a conversion of shares of Series A into shares of Common in which cash is received by the converting shareholder in lieu of a fractional share of Common, Parent may disregard any shift in ownership occurring as a result thereof for purposes of applying section 382.

4. The investors (or any combination thereof, treating each of Entity 1 and Entity 2 as separate persons) who received Parent Stock or warrants in the Private Placement will not be treated as a group of persons who have a formal or informal understanding among themselves to make a coordinated acquisition of stock within the meaning of §1.382-3(a)(1)(i).

5a. Unless Ruling 5c applies, a person acquiring Parent Stock in a Prohibited Transaction will not be treated as having acquired ownership of that stock for purposes of section 382 and the regulations thereunder, provided the Purported Acquirer or the Purported Transferor has complied with the Terms of Enforcement.

5b. Provided Ruling 5c does not apply and that Parent has taken prompt action to enforce the Stock Trading Order as per the Terms of Enforcement, and is continuing to seek such enforcement as of the end of a taxable year of Parent, the Parent Stock transferred in violation of the Stock Trading Order will not be treated as having been acquired by any person for purposes of section 382 and the regulations thereunder.

5c. If a court or other adjudicative body issues a final order declaring the restrictions in the Bankruptcy Court's Stock Trading Order unenforceable *ab initio*, then, for purposes of section 382 and the regulations thereunder, the ownership of Parent Stock acquired as the result of a Prohibited Transaction shall be treated as having been acquired on the date actually acquired, unless the transaction was unwound.

5d. The acquisitions by Certain Persons on Date 7, which were subsequently unwound in accordance with the Terms of Enforcement, will not be taken into account for purposes of applying section 382.

CAVEATS

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. In particular, no opinion is expressed as to whether or not—(i) Taxpayer had a testing date on any given date, (ii) Taxpayer had an ownership change on any testing date, (iii) Series D (or any other stock of Parent issued before, on, or after Date 1) should be treated as stock for purposes of section 382, (iv) any exchange of stock pursuant to a conversion represented a value for value exchange, or (v) any warrants or options should have been treated as exercised under §1.382-4(d). One or more rulings given in this letter deal with issues that may be addressed in subsequent published guidance. See section 11 of Rev. Proc. 2009-1, 2009-1 I.R.B. 1, 47-51, regarding the circumstances, including published guidance, which may result in the revocation or modification of a ruling letter.

PROCEDURAL STATEMENTS

This ruling letter is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, any taxpayer filing its return electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of this ruling letter.

In accordance with the power of attorney on file in this office, a copy of this ruling letter will be sent to your authorized representative.

Sincerely,

Mark S. Jennings
Branch Chief, Branch 1
Office of Associate Chief Counsel (Corporate)

cc: