Office of Chief Counsel
Internal Revenue Service
memorandum

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subject: Notice of Taxpayer's withdrawal of letter ruling request.

INTRODUCTION

Pursuant to Section 7.07(2) of Rev. Proc. 2010-1, 2010-1 I.R.B 29, this writing notifies you that the Taxpayer in the case described below withdrew its letter ruling request under Section 7.07(1) of Rev. Proc. 2010-1.

This writing is Chief Counsel Advice. It may not be used or cited as precedent. It may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

LEGEND

Taxpayer =

Fund A =

Fund B =

Fund C =

Fund D =

Fund E =

Fund F =

LLC =

Date1 =

Date2 =

Date3 =

Date4 =

Date5 =

x =

y =

ISSUE

Whether the Funds should be treated as an entity within the meaning of Treas. Reg. § 1.382-3(a)(1) because the amount of Taxpayer stock the Funds sought to acquire was based on an aggregate amount that required each Fund to coordinate its individual acquisitions (or non-acquisitions) with the rest of the Funds.

FACTS

Taxpayer is the U.S. parent of an affiliated group of foreign and domestic corporations. Taxpayer and its domestic subsidiaries join in filing consolidated returns. On Date1, Taxpayer and certain of its domestic subsidiaries filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code.

Certain acquirers of Taxpayer's common stock are six private investment funds (Fund A - Fund F) (the Funds). The Funds have varying amounts of overlapping beneficial ownership, and are managed by a common group of individuals that acts through several entities and LLC, which the group of individuals owns. During Date2 and Date3, the Funds began acquiring shares of Taxpayer common stock.

On Date4, the Funds sought to acquire, in the aggregate, up to x additional shares of Taxpayer's common stock. The number of additional shares the Funds sought to acquire was calculated for the group as a whole and was not the result of adding together the amounts each Fund could acquire separately. Taxpayer was concerned the Funds' ownership in the aggregate would cause the Funds to be treated as a 5-percent shareholder under section 382 of the Internal Revenue Code (the Code), which could jeopardize Taxpayer's use of its net operating losses. No facts were presented to establish whether or not the Funds' acquisitions, if the Funds were treated as a 5-percent shareholder, would have caused Taxpayer to have an ownership change within the meaning of section 382(g) of the Code. Based on the facts presented in Taxpayer's submission we had no reason to address this question.

On Date5, Taxpayer agreed the Funds could acquire additional shares, provided each Fund would own y shares or less, and the ownership of each Fund would be treated separately and not aggregated for section 382 purposes (the Agreement). If the ownership were aggregated for section 382 purposes, however, the Agreement treated the acquisition by the Funds in excess of y as void *ab initio*. Unless waived by Taxpayer, the Funds would be required to sell any shares held in excess of y. The number of shares to be sold by the Funds would have been calculated for the group as a whole because the group's ownership would have been aggregated.

After the Agreement was reached, the Funds acquired additional shares. The Funds' aggregate ownership was in excess of y shares of Taxpayer common stock but each Fund separately owned less than y shares. We were not presented with any facts

to determine whether or not the Funds have, or will have, sold shares in excess of y, or whether or not Taxpayer has, or will have, waived such requirement.

LEGAL AUTHORITY AND ANALYSIS

Section 382(g) provides that there is an ownership change if, immediately after any owner shift involving a 5-percent shareholder or any equity structure shift, the percentage of the stock of the loss corporation owned by one or more 5-percent shareholders has increased by more than 50 percentage points, over the lowest percentage of stock of the loss corporation (or any predecessor corporation) owned by such shareholders at any time during the testing period.

Section 382(k)(7) provides that the term "5-percent shareholder" means any person holding 5 percent or more of the stock of the corporation at any time during the testing period.

Treasury Regulation § 1.382-2T(g)(1) provides that the term "5-percent shareholder" means an individual or a public group; and under § 1.382-2T(f)(13), a public group includes a group of individuals, entities, or other persons. An entity is defined in § 1.382-3(a)(1).

Specifically, § 1.382-3(a)(1)(i) provides that an entity is any corporation, estate, trust, association, company, partnership or similar organization. An entity includes a group of persons who have a formal or informal understanding among themselves to make a coordinated acquisition of stock. A principal element in determining if such an understanding exists is whether the investment decision of each member of a group is based upon the investment decisions of one or more other members.

In this case, no Fund had its own acquisition limit within which to operate. To avoid exceeding the maximum ownership limit in the Agreement, each Fund had to know how much Taxpayer common stock the other Funds were acquiring (or not acquiring). The failure of each Fund to calculate its own, separate ownership limit made coordination between the Funds, regarding the acquisition of Taxpayer common stock, necessary.

CONCLUSION

Based on the facts above, with respect to the acquisition and ownership of Taxpayer common stock, the Funds are treated as an "entity" within the meaning of § 1.382-3(a)(1). Pursuant to the Agreement between Taxpayer and the Funds, unless Taxpayer subsequently waived the requirement, it is possible the acquisition of Taxpayer's shares in excess of y may be treated as void *ab initio*.

If you choose to examine these transactions, you may discover that the Funds sold Taxpayer common stock in excess of y pursuant to the Agreement, or that Taxpayer waived the requirement to sell such stock. If you decide the owner shift in stock of Taxpayer to the Funds is material to determining whether an ownership change occurred, you may call , , for further advice.