

Internal Revenue Service

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Person to Contact:

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Legend

Acquirer =

Target =

Subsidiary =

Foundation =

a =

b =

c =

d =

e =

f =

g =

h =

i =

j =

k =

State X =

State Y =

State Z =

Business P =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Dear :

We respond to your letter dated November 20, 1998 requesting that we rule on a significant sub-issue present in a proposed transaction. See section 3.01(24) of Rev. Proc. 99-3, 1998-1 I.R.B. 106. Additional information was submitted in letters dated February 26, 1999, April 20, 1999, May 25, 1999, and June 1, 1999. The information submitted is summarized as follows.

Acquirer is a publicly held, calendar year taxpayer organized in State Y that is engaged in Business P and whose stock has been publicly traded on the New York Stock Exchange since Date 1. Although Acquirer is authorized to issue both common and preferred stock, no shares of preferred stock have been issued. However, Acquirer has a shares of common stock outstanding as of Date 4. From Date 2 to Date 3, the average daily volume of Acquirer common stock traded on the New York Stock Exchange was approximately b.

Target is a State Z corporation that is engaged in Business P whose authorized capital stock consists of Class A convertible common stock (Class A stock), Class B convertible preferred stock (Class B Stock), common stock, blank preferred stock and series A preferred stock (Series A Preferred). However, as of Date 4, Target had issued and outstanding c shares of Class A Stock and d shares of Class B Stock, and warrants to purchase series A Preferred which will be exercised before the merger is executed.

Subsidiary is a State Y corporation formed exclusively for the proposed transaction. Its authorized capital stock consists of e shares of common stock, all of which is owned by Acquirer.

Foundation is a State X non-profit corporation and a major shareholder of Acquirer. Foundation holds no stock in Target nor will it receive any Target stock in the merger described below.

On Date 5, Target, Acquirer, and Subsidiary entered into a merger agreement whereby Target will merge into Subsidiary (Merger). In the Merger, each holder of Class A stock and Series A Preferred have the right to receive, at his/her election in certain circumstances, either (i) a certain number of shares of Acquirer common stock, (ii) a certain amount per share of cash, or (iii) a combination thereof. Additionally, each holder of Class B stock will receive a certain number of Acquirer common stock. The amount of common stock to be issued in the Merger by Acquirer to Target's shareholders will be determined pursuant to a formula set forth in the merger agreement which will take into account the average closing trading price over a 20 day period. Nevertheless, the formula will ensure that at least 55% of the total merger consideration will consist of Acquirer common stock with the remaining amount being paid in cash. Currently, the relative value of Target in comparison to the value of Acquirer is less than 10%.

On Date 6, a date prior to and unrelated to the merger agreement, Acquirer's Board of Directors approved a stock repurchase program authorizing Acquirer to repurchase up to i shares of Acquirer common stock on the open market (Repurchase Plan). The Repurchase Plan was intended to help Acquirer offset the dilutive effects on its earnings as a result of stock issuances under its employee stock option and employee stock purchase plans as well as permit Acquirer to repurchase its common stock if, depending on market fluctuations, it deemed such purchases to be in the best interest of the stockholders. Additionally, Acquirer currently plans to raise \$k by issuing convertible debentures. Because the issuance of the debentures will increase Acquirer's fully diluted outstanding shares, Acquirer plans to repurchase its shares in the amount of j shares from Foundation in order to offset any related potential dilution to its earnings per share.

At the time the merger agreement was executed on Date 5, Acquirer's Board of directors amended the Repurchase Plan by increasing the amount of stock Acquirer may repurchase in the open market to f. This increase was intended to help Acquirer offset the dilutive effect on its earnings to be caused by the issuance of common stock in the Merger.

Acquirer did not make any repurchases, pursuant to the Repurchase Plan, prior to entering into the merger agreement. However, since entering into the merger agreement, Acquirer has repurchased g shares of its common stock in the open

market. Acquirer expects to make additional repurchases of its common stock pursuant to the Repurchase Plan after the consummation of the Merger.

The repurchases will be made on the open market on the New York Stock Exchange through a broker. Because of the mechanics of an open market purchase, Acquirer will not know the identity of the sellers nor will the sellers know the identity of the buyers.

The following representations have been made in connection with the proposed transaction:

- 1) The Merger will satisfy the statutory requirements of Section 368(a)(1)(A) and (a)(2)(D) and will satisfy the continuity of interest requirement of Treasury Regulation section 1.368-1(b) and (e) (continuity of interest requirement) not taking into account the effect of Acquirer's repurchase of its stock on the open market after the Merger.
- 2) Acquirer has no plan or intention of repurchasing Acquirer's common stock that will be issued to the Target's shareholders in the Merger. However, Acquirer stock may be repurchased through a broker on the New York Stock Exchange.
- 3) Acquirer's plan to repurchase shares of Acquirer stock subsequent to the Merger was not undertaken at the request of Target or the Target shareholders, and actual purchases by Acquirer of its stock following the Merger will not be made at the request of Target or the Target shareholders.
- 4) To the best knowledge of Acquirer, there is no plan or intention on the part of the stockholders of Target to utilize Acquirer's repurchase plan to have Acquirer redeem the shares of Acquirer common stock issued to them in the Merger.
- 5) Any repurchases by Acquirer of its stock on the open market at the same time that a former Target stockholder may be selling such stock on the open market would be purely coincidental.

Based solely on the facts submitted and the representations made above, it is held as follows:

The purchase by Acquirer of its common stock following the Merger pursuant to the Repurchase Plan adopted by Acquirer will not cause the Merger to fail the continuity of interest requirement.

No opinion is expressed about the tax treatment of the proposed transaction under other provisions of the Code and regulations or about the tax treatment of any conditions existing at the time of, or effects resulting from, the proposed transaction that

are not directly covered by the above rulings.

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

A copy of this letter should be attached to the federal income tax returns of the taxpayers involved for the taxable year in which the transaction covered by this ruling letter is consummated.

Sincerely,

Assistant Chief Counsel (Corporate)

By:

Alfred Bishop
Chief, Branch 1