

## Internal Revenue Service

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May 21, 2008

### Legend

Oldco =

Newco =

Acquiror =

LLC 1 =

LLC 2 =

LLC 3 =

Sub 1 =

Sub 2 =

Type 1 Membership =

Type 2 Membership =

Business A =

Business B =

Date A =

a =

b =

c =

d =

e =

f =

g =

h =

i =

State Y =

Dear \_\_\_\_\_ :

This letter responds to your March 13, 2008 request for rulings on certain federal income tax consequences of a proposed transaction. The information submitted in that request and in later correspondence is summarized 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 the appropriate party. This office has not verified any of the materials submitted in support of the request for rulings. Verification of the information, representations, and other data may be required as part of the audit process.

### **Summary of Facts**

Oldco is a non-stock, not-for-profit corporation, which files a consolidated federal income tax return as a Subchapter C corporation. Oldco is engaged in Business A through LLC 1. Oldco directly owns a% of LLC 1. The remaining b% of LLC 1 is owned by Sub 1, a wholly owned subsidiary of Oldco.

Oldco has issued and outstanding c Type 1 Memberships and d Type 2 Memberships (together the "Oldco Memberships"). Each Oldco Membership entitles the member to elect directors and to vote on any other matter at any meeting of Oldco members, and to share with other then-existing members in any liquidating distribution in the event of any voluntary or involuntary liquidation, dissolution, or winding up of Oldco's affairs as provided for in Oldco's organizational documents. Additionally, the holders of the Type 1 Memberships are entitled to access certain facilities of Oldco.

Acquiror is a widely-held publicly-traded corporation. Acquiror is engaged in Business B through its various subsidiaries. Acquiror currently has approximately e shares of Acquiror Common Stock that are issued and outstanding.

For valid business reasons, Oldco and Acquiror have agreed to merge. Pursuant to a plan of merger dated as of Date A (the "Merger Agreement"), Oldco and its subsidiaries will engage in a series of transactions, including the demutualization of Oldco. These transactions and the merger of Oldco and Acquiror will occur on or about the same date.

### **Proposed Transaction**

To achieve their business objectives, Oldco and Acquiror have agreed to consummate the following steps (collectively the "Proposed Transaction"):

- (i) Sub 1 will merge with and into Oldco (the "Sub 1 Merger").

(ii) Oldco will merge into Newco, a for-profit stock corporation, wholly owned and created by Oldco in anticipation of the merger (the “Demutualization Merger”). In the Demutualization Merger, the Oldco Memberships will be converted into shares of Newco common stock (“Newco Common Stock”) as follows: each issued and outstanding Type 1 Membership will be converted into the right to receive a number of shares of Newco Common Stock that is the same as the number of shares of common stock of the Acquiror (“Acquiror Common Stock”) worth approximately \$f (calculated using the volume-weighted average price of Acquiror Common Stock during the g consecutive trading days immediately preceding the Acquiror/Oldco Merger (as defined below) (the “Pre-Closing Period”); and each issued and outstanding Type 2 Membership will be converted into the right to receive a number of shares of Newco Common Stock that is the same as the number of shares of Acquiror Common Stock worth approximately \$h (calculated using the volume-weighted average price of Acquiror Common Stock during the Pre-Closing Period).

(iii) Simultaneously with the Demutualization Merger, LLC 1, which after step (i) above will be a disregarded entity for federal income tax purposes, will merge into LLC 2, a newly created limited liability company that is a disregarded entity for federal income tax purposes.

(iv) Immediately after the Demutualization Merger, Newco will merge into LLC 3, a newly created limited liability company wholly-owned by Acquiror that is disregarded for federal income tax purposes (the “Acquiror/Oldco Merger”). In the Acquiror/Oldco Merger, each share of Newco Common Stock will be converted into one share of Acquiror Common Stock (the “Initial Consideration”), however, cash will be paid in lieu of issuing fractional shares of Acquiror Common Stock. In addition, under specified circumstances, the former Oldco members will be entitled to receive additional shares of Acquiror Common Stock (the “Contingent Consideration”) upon the sale of certain assets held by Oldco and its subsidiaries (the “Unwanted Assets”). Because there exists uncertainty regarding the fair market value of the Unwanted Assets, the parties to the Merger Agreement agreed to provide for the Contingent Consideration, the amount of which will be determined by reference to (x) the net proceeds from the sale of the Unwanted Assets (as determined pursuant to the Merger Agreement) if such sale occurs within a specified time period of not more than approximately i years and certain other conditions are satisfied, and (y) the volume-weighted average price of Acquiror Common Stock over a measurement period specified in the Merger Agreement.

The terms of the Contingent Consideration are intended to comply with the guidelines established in § 2.01 of Revenue Procedure 84-42, 1984-1 C.B. 521. Specifically, pursuant to the Merger Agreement: (1) all Acquiror Common Stock will be issued within five years of the Acquiror/Oldco Merger; (2) the uncertainty regarding the value of the Unwanted Assets constitutes a business reason for not issuing all the

Acquiror Common Stock immediately; (3) the maximum number of shares of Acquiror Common Stock which may be issued as contingent consideration is stated; (4) at least 50% of the maximum number of shares of Acquiror Common Stock which may be issued pursuant to the Acquiror/Oldco Merger is issued at the effective time of the merger; (5) the Merger Agreement prohibits assignment of the Contingent Consideration; (6) the right to Contingent Consideration can give rise to the receipt only of additional shares of Acquiror Common Stock; (7) the issuance of the Contingent Consideration is dependent on a successful sale of the Unwanted Assets (i.e., an event the occurrence or non-occurrence of which is not within the control of shareholders); (8) such stock issuance will not be triggered by the payment of additional tax or reduction in tax paid as a result of a Service audit of the shareholders or the corporation; and (9) the mechanism for the calculation of the Contingent Consideration to be issued is objective and readily ascertainable.

(v) Following the above-described transactions, Acquiror may transfer all of the membership interests in LLC 3 to Sub 2, a direct wholly-owned subsidiary of Acquiror.

### **Representations**

The following representations are made by Oldco with respect to the Sub 1 Merger:

(a) Oldco, on the date of the adoption of the Merger Agreement, and at all times until the effective time of the Sub 1 Merger, will be the owner of at least 80% of the single outstanding class of Sub 1 stock.

(b) No shares of Sub 1 stock will have been redeemed during the three years preceding the adoption of the Merger Agreement.

(c) All distributions from Sub 1 to Oldco pursuant to the Merger Agreement will be made within a single taxable year of Sub 1.

(d) Sub 1 will retain no assets following the Sub 1 Merger.

(e) The stock of Sub1 will be cancelled and Sub 1 will cease to exist at the effective time of the Sub 1 Merger.

(f) Sub 1 will not have acquired assets in any nontaxable transaction at any time, except for acquisitions occurring more than 3 years prior to the adoption of the Merger Agreement.

(g) No assets of Sub 1 have been, or will be, disposed of either by Sub 1 or Oldco, except for (i) dispositions in the ordinary course of business, or (ii) dispositions occurring more than three years prior to the adoption of the Merger Agreement.

(h) The Sub 1 Merger will not be preceded or followed by the reincorporation in, or transfer or sale to a recipient corporation (Recipient) of any of the businesses or assets of Sub 1 if persons holding, directly or indirectly, more than 20% in value of the Sub 1 stock also hold, directly or indirectly, more than 20% in value of the stock in Recipient. For purposes of this representation, ownership will be determined by application of the constructive ownership rules of § 318(a) as modified by § 304(c)(3).

(i) Prior to the adoption of the Merger Agreement, no assets of Sub 1 will have been distributed in kind, transferred or sold to Oldco, except for (i) transactions occurring in the normal course of business and (ii) transactions occurring more than three years prior to the adoption of the Merger Agreement.

(j) The fair market value of the assets of Sub 1 will exceed its liabilities both at the date of the adoption of the Merger Agreement and immediately prior to the effective time of the Sub 1 Merger.

(k) There is no intercorporate debt existing between Oldco and Sub 1 and none has been cancelled, forgiven or discounted, except for transactions that occurred more than three years prior to the adoption of the Merger Agreement.

(l) Oldco is not an organization that is exempt from federal income tax under § 501 or any other provision of the Code.

(m) All other transactions undertaken contemporaneously with, in anticipation of, in conjunction with, or in any way related to, the Sub 1 Merger have been fully disclosed.

The following representations are made by Oldco with respect to the Demutualization Merger.

(n) The fair market value of the Newco Common Stock received by each Oldco member will be approximately equal to the fair market value of the Oldco Membership surrendered in the Demutualization Merger.

(o) Immediately following consummation of the Demutualization Merger, the Oldco members will own all outstanding shares of Newco Common Stock and will own such stock solely by reason of their ownership of the Oldco Memberships immediately prior to the Demutualization Merger.

(p) At the time of the Demutualization Merger, Oldco will not have outstanding any warrants, options, convertible securities or any other type of right pursuant to which any person could acquire membership interests in Oldco.

(q) Immediately before the Demutualization Merger, Newco will not be engaged in any business activity and will hold no assets, except for nominal assets necessary for the purpose (i) of paying incidental expenses and (ii) for maintaining Newco's status under State Y law.

(r) Immediately after the Demutualization Merger, Newco will hold all of the assets held by Oldco immediately prior to the Demutualization Merger except for the assets used to pay expenses incurred in connection with the Demutualization Merger. No assets will be distributed in the Demutualization Merger. Assets used to pay expenses will constitute less than one percent of the fair market value of the net assets of Oldco immediately prior to the Demutualization Merger.

(s) Newco has no plan or intention to reacquire any of its stock issued in the transaction.

(t) The liabilities of Oldco assumed by Newco were incurred by Oldco in the ordinary course of its business and are associated with the assets transferred.

(u) Oldco Members will pay their respective expenses, if any, incurred in connection with the transaction.

(v) Oldco is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of § 368(a)(3)(A).

(w) None of the compensation received by any Oldco member who is also an employee of Oldco ("member-employee") will be separate consideration for, or allocable to, any of their Oldco Memberships; none of the shares of Newco Common Stock received by any member-employee will be separate consideration for, or allocable to, any employment agreement; and the compensation paid to any member-employee will be for services actually rendered and will be commensurate with amounts paid to third parties bargaining at arm's length for similar services.

The following representations are made by Oldco and Acquiror with respect to the Acquiror/Oldco Merger. For purposes of these representations, "Acquiror Unit" shall mean Acquiror and all disregarded entities the assets of which are treated as owned by Acquiror for federal income tax purposes, and "Newco Unit" shall mean Newco and all disregarded entities the assets of which are treated as owned by Newco for federal income tax purposes.

(x) The fair market value of the Acquiror Common Stock received by each shareholder of Newco will be approximately equal to the fair market value of Newco Common Stock surrendered in the exchange.

(y) At least 40% of the proprietary interest in Newco will be exchanged for shares of Acquiror Common Stock and will be preserved (within the meaning of § 1.368-1(e)).

(z) Neither Acquiror Unit nor any person related to Acquiror Unit (within the meaning of § 1.368-1(e)(3)) has any plan or intention to reacquire any Acquiror Common Stock issued in the transaction in exchange for any consideration other than Acquiror Common Stock.

(aa) Acquiror Unit has no plan or intention to sell or otherwise dispose of any of the assets of Newco acquired in the transaction, except for dispositions made in the ordinary course of business or transfers described in § 368(a)(2)(C) or described in § 1.368-2(k).

(bb) The liabilities of Newco Unit assumed by Acquiror Unit were incurred by Newco Unit in the ordinary course of its business and are associated with the assets transferred.

(cc) Following the transaction, Acquiror Unit will continue the historic business of Newco Unit or use a significant portion of Newco Unit's historic business assets in a business.

(dd) Acquiror Unit, Newco Unit and the shareholders of Newco will pay their respective expenses, if any, incurred in connection with the transaction, except that expenses incurred in connection with the filing, printing and mailing of the proxy statement/prospectus will be shared equally by Oldco and Acquiror.

(ee) There is no intercorporate indebtedness existing between Newco Unit and Acquiror Unit.

(ff) No parties to the transaction are investment companies as defined in § 368(a)(2)(F)(iii) and (iv).

(gg) Neither Newco nor any disregarded entity (within the meaning of §1.368-2(b)(1)(i)(A)) the assets of which are treated as owned by Newco for federal income tax purposes is under the jurisdiction of a court in a Title 11 or similar case within the meaning of § 368(a)(3)(A).

(hh) The fair market value of the assets of Newco Unit to be transferred to Acquiror Unit will equal or exceed the sum of the liabilities assumed by Acquiror Unit.



The total adjusted basis of the assets of Newco Unit transferred to Acquiror Unit will equal or exceed the sum of the liabilities assumed by Acquiror Unit.

(ii) None of the compensation received by any Newco shareholder who is also an employee of Newco Unit (“shareholder-employee”) will be separate consideration for, or allocable to, any of their shares of Newco Common Stock; none of the shares of Acquiror Common Stock received by any shareholder-employee will be separate consideration for, or allocable to, any employment agreement; and the compensation paid to any shareholder-employee will be for services actually rendered and will be commensurate with amounts paid to third parties bargaining at arm’s length for similar services.

(jj) The Acquiror/Oldco Merger will be effected pursuant to a statute as a result of the operation of which the following events will occur simultaneously at the effective time of the merger: (i) all of the assets (other than those distributed in the transaction) and liabilities (except to the extent satisfied or discharged in the transaction) of each member of Newco Unit will become the assets and liabilities of one or more members of Acquiror Unit; and (ii) Newco will cease its separate legal existence for all purposes.

### **Rulings**

Based solely on the information submitted and the representations set forth above, we rule as follows:

#### Sub 1 Merger

1. No gain or loss will be recognized by Oldco on the Sub 1 Merger (§ 332(b)).
2. No gain or loss will be recognized by Sub 1 on the Sub 1 Merger (§ 337(a)).
3. Oldco’s basis in each asset received from Sub 1 will be the same as the basis of that asset in the hands of Sub 1 immediately before the Sub 1 Merger (§ 334(b)(1)).
4. Oldco’s holding period in each asset received from Sub 1 as a result of the Sub 1 Merger will include the period during which that asset was held by Sub 1 (§ 1223(2)).
5. Oldco will succeed to and take into account the items of Sub 1 described in § 381(c), subject to the conditions and limitations specified in §§ 381, 382, 383 and 384 and the regulations thereunder (§ 381(a) and § 1.381(a)-1)).

The Demutualization Merger

6. The Demutualization Merger will constitute a reorganization within the meaning of § 368(a)(1)(F). Oldco and Newco will each be “a party to the reorganization” within the meaning of § 368(b).

7. No gain or loss will be recognized by Oldco on the transfer of assets to Newco in the exchange for Newco stock and Newco’s assumption of Oldco’s liabilities pursuant to the Demutualization Merger (§ 361(a) and § 357(c)).

8. Newco will not recognize any gain or loss upon the receipt of the assets of Oldco and the assumption of the liabilities of Oldco pursuant to the Demutualization Merger (§ 1032(a)).

9. The basis of Oldco’s assets in the hands of Newco will be the same as the basis of such assets in the hands of Oldco immediately before the Demutualization Merger (§ 362(b)).

10. The holding period of Oldco’s assets in the hands of Newco will include the period during which Oldco held such assets (§ 1223(2)).

11. No gain or loss will be recognized by Oldco upon the distribution to the Oldco members of the Newco stock (§ 361(c)(1)).

12. No gain or loss will be recognized by (and no amount will be included in the income of) Oldco members upon their exchange of Oldco Memberships for shares of Newco Common Stock (§ 354(a)(1)).

13. The basis of the Newco Common Stock received by each Oldco member in the Demutualization Merger will be the same as the basis of the Oldco Membership for which they are exchanged (§ 358(a)(1)).

14. The holding period of the Newco Common Stock received in the Demutualization Merger will include the holding period of the Oldco Membership surrendered in exchange therefor, provided the Oldco Membership was held as a capital asset on the date of the exchange (§ 1223(1)).

The Acquiror/Oldco Merger

15. Provided that the Acquiror/Oldco Merger qualifies as a statutory merger, the proposed merger of Newco into LLC 3 will qualify as a reorganization within the meaning of § 368(a)(1)(A). Newco and Acquiror will each be “a party to the reorganization” within the meaning of § 368(b).

16. Newco will not recognize gain or loss upon the transfer of the assets of the Newco Unit to Acquiror Unit solely in exchange for Acquiror Common Stock and the assumption of liabilities by Acquiror Unit (§ 361(a) and 357(a)).

17. Acquiror will not recognize gain or loss upon Acquiror Unit's receipt of Newco Unit's assets in exchange for shares of Acquiror Common Stock (§ 1032(a)).

18. The basis of Newco Unit's assets in the hands of Acquiror Unit will be the same as the basis of such assets in the hands of Newco Unit immediately before the Acquiror/Oldco Merger (§ 362(b)).

19. The holding period of Newco Unit's assets in the hands of Acquiror Unit will include the period during which Newco Unit held such assets (§ 1223(2)).

20. The possible contribution by Acquiror of its membership interests in LLC 3 to Sub 2 after the Acquiror/Oldco Merger will not prevent the Acquiror/Oldco Merger from qualifying as a reorganization under § 368(a) (§ 368(a)(2)(C)).

21. Except to the extent any portion of Acquiror Common Stock is treated as unstated interest under § 483, no gain or loss will be recognized by Newco shareholders who receive solely Acquiror Common Stock in exchange for their Newco Common Stock (§ 354(a)(1)).

22. The basis of Acquiror Common Stock received by Newco shareholders will be the same as the basis of the Newco Common Stock surrendered in exchange therefore (§ 358(a)(1)). Before the issuance of the Contingent Consideration (or the determination that no Contingent Consideration will be payable), the interim basis of the Acquiror Common Stock received in the exchange by the Newco shareholders (not including that portion of each share, if any, representing interest) will be determined, pursuant to § 358(a), as though the maximum number of shares to be issued (not including that portion of each share, if any, representing interest) has been received by the Newco shareholders (Rev. Proc. 84-42 § 2.01, 1984-1 C.B. 521).

23. The holding period of Acquiror Common Stock (including any shares of Acquiror Common Stock to be received as Contingent Consideration, but excluding that portion of each share, if any, representing interest) received by shareholders of Newco will include the period during which the Newco Common Stock surrendered in exchange therefor was held, provided the Newco Common Stock was held as a capital asset on the date of the exchange (§ 1223(1)).

24. Newco shareholders who receive cash in lieu of fractional shares of Acquiror Common Stock will recognize gain or loss measured by the difference between the basis of the fractional share received, as determined above, and the amount of cash received (§ 1001). If the fractional share qualifies as a capital asset in the hands of the

shareholder, the gain or loss will be a capital gain or loss subject to the provisions of Subchapter P of Chapter 1 of the Code.

25. Because no payment, other than the Contingent Consideration, is due (or possibly due) after the date of the Acquiror/Oldco Merger, no portion of the Contingent Consideration will be treated as unstated interest under § 483 if payment of the Contingent Consideration pursuant to the Merger Agreement is made not more than one year after the date of the Acquiror/Oldco Merger.

26. In the event a portion of the Contingent Consideration is treated as unstated interest under § 483, the amount treated as interest is equal to the excess of (i) the fair market value of the Contingent Consideration paid to a Newco shareholder, determined as of the date of the payment, (the "FMV amount") over (ii) the present value of the FMV amount. The present value of the FMV amount is determined by discounting the FMV amount from the date paid to the Newco shareholder to the date of the Acquiror/Oldco Merger. The discount rate used to determine the present value of the FMV amount is the appropriate applicable Federal rate (AFR) under § 1.1274-4 for a debt instrument if the debt instrument were issued on the date of the Acquiror/Oldco Merger and matured on the date of the payment to the Newco shareholder (§§1.483-4 and 1.1275-4(c)).

### **Caveats**

No opinion is expressed about the federal tax treatment of the Proposed Transaction under other provisions of the Code and regulations or on the tax treatment of any conditions existing at the time of, or effects resulting from, the Proposed Transaction that are not specifically covered by the above rulings.

### **Procedural Statements**

This ruling letter is directed only to the taxpayer 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, a 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 letter ruling.

Pursuant to a power of attorney on file in this office, a copy of this letter ruling will be sent to your authorized representatives.

Sincerely,

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Richard K. Passales  
Senior Counsel, Branch 4  
Office of Associate Chief Counsel (Corporate)

cc: