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April 4, 2008

The Honorable Eric Solomon  
Assistant Secretary (Tax Policy)  
Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

The Honorable Douglas H. Shulman  
Commissioner  
Internal Revenue Service  
Room 3000 IR  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Re: Report On Final Regulations Regarding The Effect Of  
Subsequent Transfers Of Assets Or Stock On The Continuing  
Qualification Of Reorganizations Under Section 368

Dear Secretary Solomon and Commissioner Shulman:

I am pleased to enclose New York State Bar Association Tax Section Report No. 1152 (the "Report"), which comments on Treasury Regulations Section 1.368-1(d) (the "continuity of business enterprise" or "COBE" regulations) and Treasury Regulations Section 1.368-2(k) (the "-2(k) regulations").

By way of background, the "continuity of business enterprise" ("COBE") requirement of tax-free reorganizations is satisfied if the acquiring corporation in a reorganization either continues the target corporation's historic business or uses a significant portion of the

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target's business assets in a business. For this purpose, the acquiring corporation is treated as holding all of the business and assets of all of the members of its "qualified group."

The COBE regulations expand the definition of a COBE qualified group to include a corporation owned by qualified group members (so long as the acquirer in the reorganization itself owns stock constituting "Section 368(c) control" in at least one other member of the group). (Section 368(c) generally requires ownership of at least 80% of the total combined voting power of all classes of stock entitled to vote and the total number of shares of all other classes of stock.) The COBE regulations also treat qualified group members as owning stock held by a partnership if the group members own interests in the partnership that meet "requirements equivalent to Section 368(c)."

The -2(k) regulations establish safe harbors that permit acquiring corporations to distribute the stock or assets acquired in an acquisition to shareholders without disqualifying the acquisition as a tax-free reorganization. More specifically, Treasury Regulations Section 1.368-2(k)(1)(i) generally permits distributions of assets so long as the distribution does not result in the "liquidation" of the relevant entity (disregarding previously held assets of that corporation).

In addition, Treasury Regulations Section 1.368-2(k)(1) provides that a permissible transfer of assets or stock will not cause the putative reorganization to be disqualified "or recharacterized".

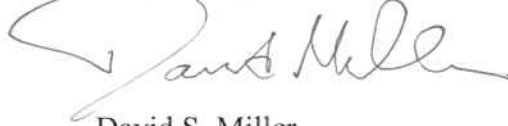
As described in the Report, we recommend certain clarifications to the COBE and -2(k) regulations that we believe will help serve the goals of administrability and certainty. In short, we recommend that the IRS and Treasury Department:

1. Clarify how interests in a partnership meet "requirements equivalent to Section 368(c)" in light of the complex nature of partnership arrangements;
2. Clarify, through specific examples, whether the liquidation standard of Treasury Regulations Section 1.368-2(k)(1)(i) contemplates the application of the authorities governing "de facto liquidations" under federal income tax law, which generally deems a corporation to have de facto liquidated only if the corporation remains merely a corporate shell, without any assets or business activities (in this case, disregarding assets held prior to the reorganization);
3. Clarify whether the addition of the words, "or recharacterized," in Treasury Regulations Section 1.368-2(k)(1) is meant to "turn off" the step transaction doctrine as soon as the requirements of a tax-free reorganization are satisfied, notwithstanding subsequent steps that, if considered together with the initial step(s), would yield a different type of reorganization (*i.e.*, whether this language represents the adoption of a "first to the finish line" approach to the step transaction doctrine in Section 368); and

4. Clarify, through specific examples, the effect of the -2(k) regulations on distributions of assets outside the COBE qualified group, and specifically to issuing corporation shareholders.

We appreciate your consideration of our comments. Please let us know if you would like to discuss these matters further or if we can assist you in any other way.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David S. Miller". The signature is fluid and cursive, with a large initial "D" and "M".

David S. Miller,  
Chair

Enclosure

cc: The Honorable Donald F. Korb  
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