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September 22, 2008

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Washington, DC 20510

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

## Re: Report on Selected Issues in Triangular Reorganizations

Dear Sirs:

We write to recommend changes to the regulations under section 368 of the Internal Revenue Code. We also suggest some changes to the statute. All of the changes we request relate to tax-free "triangular reorganizations".

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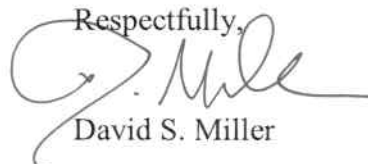
By way of background, in October 2007, the Internal Revenue Service issued regulation section 1.368-2(k), which generally permits acquiring corporations to contribute assets or stock acquired in a tax-free reorganization to a subsidiary without disqualifying the tax-free reorganization. We've previously written in support of the -2(k) regulations and continue to believe that they were a significant step in eliminating many of the arbitrary distinctions between various types of reorganizations. However, they leave open some questions with respect to triangular reorganizations. We seek clarification by ruling or regulation of a number of these questions.

In addition, as currently drafted, section 368(a) permits an acquiring corporation to use stock of its immediate parent corporation as consideration in a tax-free triangular reorganization. However, sections 368(a) and (c) do not permit the stock of a grandparent or higher-tier entity to be used. The -2(k) regulations allow taxpayers to achieve the same end result as if stock of a grandparent (or a higher entity) were used, but only if the transaction is accomplished in multiple steps: First, the stock or assets must be acquired in exchange for the acquiror's or its immediate parent's stock and, second, the acquired assets or stock must be contributed down to the desired second- or lower-tier subsidiary. These additional steps are costly and may not be possible due to non-tax legal or commercial considerations.

Therefore, we recommend that Congress amend the statute to expressly allow the stock of a grandparent or higher-tier corporation to be used as consideration in a tax-free triangular reorganization. In the meantime (before Congress acts), we request that the IRS allow the "cause to be directed" doctrine to be used for triangular "B" reorganizations. This doctrine allows a corporation to direct that acquired assets or stock be transferred to a second- or lower-tier subsidiary in a tax-free reorganization so long as the acquisition agreement contains appropriate language. However, it is not currently available for "B" reorganizations.

Finally, we recommend that Congress grant authority to the IRS and the Treasury Department to issue regulations that would require the signing date of a transaction to be used to value a parent's stock for purposes of satisfying the control requirement for triangular reorganizations under section 368(a)(2)(E). The statute currently appears to mandate that the closing price be used, which creates uncertainty if the stock price fluctuates between the signing and closing dates.

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

Respectfully,  
  
David S. Miller

cc: William D. Alexander  
Associate Chief Counsel (Corporate)  
Internal Revenue Service

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