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December 31, 2008

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

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20024

Re: Report on Proposed Regulations Implementing Section 336(e)

Dear Sirs:

We write to comment on the proposed regulations under Section 336(e) that were published in the Federal Register on August 25, 2008.

By way of background, Section 336(e) provides that if a corporation owns stock in another corporation representing at least 80% of the vote and value and the owning corporation sells, exchanges or distributes all such stock of the second "target" corporation, then an election may be made to treat the sale, exchange or distribution as a disposition of all of the assets of the target corporation, and no gain or loss is recognized by the owner corporation on the sale, exchange or distribution of the stock of the target corporation. One of the principal purposes of Section 336(e) is to avoid the triple tax that would arise in a situation where the stock of a target corporation is sold, exchanged or distributed and both the target corporation's assets and

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its shares have increased in value. In the absence of Section 336(e), if the owner corporation were to sell its stock in the target corporation and distribute the after-tax profits, the owner corporation would be subject to tax on the gain from the sale (the first level of tax), its shareholders would be subject to tax on the dividends they receive (the second level of tax), and the target corporation would be subject to tax if it sells its appreciated assets (the third level of tax). A Section 336(e) election would, instead, subject the target corporation to immediate tax on the gain in its assets, the owner corporation's shareholders would continue to be subject to a second level of tax on a distribution of the profits, but the Section 336(e) election would protect against a third level of tax because the owner corporation's stock sale would not be taxed and the target corporation would have a stepped-up basis in its assets.

In short, we believe that the proposed regulations represent an excellent first step in implementing Section 336(e), but we suggest some improvements and recommend that the scope of the regulations be significantly expanded. More specifically, we recommend that:

- The proposed regulations' model for the deemed transactions involved in a Section 355(d) or (e) transaction should be eliminated. Instead, the model that applies to sales and exchanges and distributions not qualifying under Section 355 should also apply to Section 355(d) and (e) transactions.
- The loss disallowance rule should either be eliminated or revised to permit the recognition of built-in asset loss to the extent of built-in asset gain.
- A Section 336(e) election should generally be available in the case of a disposition of target corporation stock that is part of a Section 351 transaction or in the case of a disposition of target corporation stock governed by Section 354 or 356.
- The "related party" test of Section 338 (based on Section 318) should be modified by eliminating attribution from a partner to a partnership and from a partnership to a partner if the partner's interest in the partnership is less than a specified level. Further, partnership attribution should not apply if the partnership itself does not bear an economic relationship to the sale transaction.
- In the case of an intragroup disposition of stock followed by a sale of a target corporation in which a Section 336(e) election is made, it should be confirmed that Treasury Regulation Section 1.1502-13(f)(5) elective relief is available. If the first disposition is a distribution of the stock of the target corporation subject to Section 355(f), consideration should be given to permitting a Section 336(e) election on the internal distribution.
- As is the case under Section 338(h)(10), Section 336(e) elections should be available for acquisitions of target S corporations.
- Section 336(e) elections should be broadly available in respect of foreign sellers and foreign target corporations.

- At least where the seller and the target corporation do not file a consolidated return, the Section 336(e) election should be made by the seller and the target corporation jointly in a time and manner generally consistent with what Section 338 provides.
- The rules related to aggregate deemed asset disposition price and adjusted grossed up basis, as well as the corresponding rules in Section 338, should be revised where less than 100% of the target corporation's stock is part of the qualified stock disposition.

Please let us know if you would like to discuss these matters further or if we can assist you in any other way.

Respectfully,

A handwritten signature in black ink, appearing to read "D. Miller", written over a horizontal line.

David S. Miller

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

Honorable Donald L. Korb
Chief Counsel
Internal Revenue Service

Clarissa C. Potter
Deputy Chief Counsel-Technical
Internal Revenue Service

Lon B. Smith
National Counsel to the Chief Counsel for Special Projects
Internal Revenue Service

Karen Gilbreath Sowell
Deputy Assistant Secretary for Tax Policy
Department of the Treasury