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CC:CORP:BR1

PLR-137428-06

Date:

August 20, 2007

LEGEND:

Company =

Business X =

IA1 =

IA2 =

Entity 1 =

Entity 2 =

P =

Q =

R =

S =

T =

U =

Individual S =

Internet Searches =

Date 1 =

Date 2 =

Date 3 =

Schedule 13G filers

Filer 1 =

Filer 2 =

Filer 3 =

Filer 4 =

Filer 5 =

Filer 6 =

Filer 7 =

Filer 8 =

Filer 9 =

Filer 10 =

Filer 11 =

Filer 12 =

Filing Dates

Filed date 1 =

Filed date 2 =

Filed date 3 =

Filed date 4 =

Filed date 5 =

Filed date 6 =

Filed date 7 =

Filed date 8 =

Filed date 9 =

Filed date 10 =

Filed date 11 =

Filed date 12 =

Filed date 13 =

Filed date 14 =

Filed date 15 =

Filed date 16 =

Filed date 17 =

Filed date 18 =

Filed on 19 =

Dear :

This letter responds to your August 2, 2006, letter requesting rulings as to Company's ability to rely on information contained in a series of Securities and Exchange Commission ("SEC") filings for purposes of determining shifts in ownership under section 382 of the Code. The information submitted in that request and in subsequent correspondence is summarized below.

### FACTS

Company is engaged in Business X and is a loss corporation within the meaning of section 382(k)(1) of the Code and §1.382-2(a)(1) of the Income Tax Regulations, with estimated net operating losses of \$R carried forward to its fiscal year ending Date 1. Company has only one class of (common) stock outstanding, which is publicly traded and widely held. Company relies on the existence and absence of filings of Schedules 13D and 13G ("Filings") with the SEC to identify Company's shareholders who have a direct ownership interest of five percent or more (both individuals and first tier entities) on its testing dates. See §1.382-2T(k)(1)(i). Company has no other actual knowledge or relevant tracking system of owners of its stock apart from—(i) officers and directors of Company who are separately required to disclose their ownership of Company common stock, and (ii) inquiry made of some of the persons filing Schedule 13Gs regarding the Company's stock. In connection with its ruling requests, Company has represented—"With the exception of the filings of Schedules 13D and 13G (or the absence thereof), Company has no actual knowledge regarding ownership of Company's common stock by any first-tier entity or 5-percent shareholder during the Analysis Period."

For the period beginning Date 2 and ending Date 3, a period longer than 3 years (the "Analysis Period"), Company has identified 12 entities (or groups of entities) that have filed Schedules 13G. Most have filed multiple Schedules 13G, reflecting changes in holdings that occurred during that period. Most filers have categorized themselves as being "Investment Advisors" ("IAs") under section 203 of the Investment Advisors Act of 1940 (or under the laws of one or more states) and report themselves as being the beneficial owners (as defined by the SEC) of more than 5-percent of Company's stock. Taxpayer seeks rulings that it may disregard some of these Filings for section 382 purposes based on information contained in the Filings themselves or otherwise obtained through inquiry of those who made the Filings. Facts related to the filers and Filings are set forth below. For this purpose, a "Beneficial Owner" of stock has voting power and/or investment power (disposition power) with respect to the stock and an "Economic Owner" has rights to dividends and/or to proceeds from sale of the stock (or

to distributions in liquidation). All Schedules 13G were filed pursuant to SEC Rule 13d-1(b), unless otherwise stated.

Filer 1. Filer 1 filed Schedules 13G on Filedates 7, 8, 14 and 17. In response to Item 6 on each its Schedules 13G, Filer 1, an IA, included language similar to the following, “The securities . . . are owned of record by clients of the IA. Those clients have the right to receive, or the power to direct the receipt of, dividends from, or the proceeds from the sale of, such securities. No such client is known to have such right or power with respect to more than five percent of this class of securities, except as follows: Not Applicable.”

Filer 2. Filer 2 filed Schedules 13G on Filedates 4, 8 and 15. In response to Item 6 on Filedates 4 and 8, Filer 2, an IA, stated that it had “Beneficial Ownership of the shares which are the subject of this filing through the investment discretion the reporting person exercises over its clients’ accounts.” On Filedate 15, unlike Filedates 4 and 8, Filer 2 reported Beneficial Ownership of not more than 5-percent, thus completing Item 5 rather than Item 6.

Filer 3. Filer 3 filed Schedules 13G on Filedates 8 and 15. The Filing of Filedate 8 was a Joint Filing with multiple members of the Filer 3 group joining in, though only two members reported any ownership of Company stock, each with less than 5-percent. One reporting member was an IA, which reported Beneficial Ownership of S percent and the other was a bank, reporting Beneficial Ownership of T percent (S percent + T percent was greater than 5 percent). In response to Item 6, Filers stated, “The shares reported are held by the company in trust accounts for the economic benefit of the beneficiaries of those accounts.” The Filing of Filedate 15 reported ownership of not more than 5 percent of Company’s stock.

Filer 4. Filer 4 filed Schedules 13G on Filedates 2, 5, 9 and 16. In response to Item 6 on Filedates 2, 5 and 9, Filer 4, an IA, restated the Item 6 caption “Ownership of More than Five Percent on Behalf of Another Person” and responded “N/A”. On Filedate 16, unlike Filedates 2, 5 and 9, Filer 4 reported Beneficial Ownership of not more than 5-percent, thus completing Item 5 rather than Item 6.

Filer 5. Filer 5 filed Schedules 13G on Filedates 8 and 15. In response to Item 6 on Filedate 8, Filer 5, an IA, restated the Item 6 caption “Ownership of More than Five Percent on Behalf of Another Person” and responded “Not Applicable”. On Filedate 15, Filer 5 reported Beneficial Ownership of not more than 5-percent, thus completing Item 5 rather than Item 6.

Filer 6. Filer 6 filed Schedules 13G on Filedates 13 and 14. In response to Item 6, Filer 6, an IA, restated the Item 6 caption “Ownership of More than Five Percent on Behalf of Another Person” and responded “N/A”. The taxpayer made further inquiry of Filer 6 to which Filer 6 responded, both telephonically and by emailing, to the effect that it was not

an Economic Owner of Company stock and held Company stock on behalf of Economic Owners, none of whom owned as much as 5-percent of Company's stock.

Filer 7. Filer 7 filed Schedules 13G on Filedates 11, 13 and 15. Filer 7 indicated that it was an IA in its filings of Filedates 13 and 15, but did not respond to Item 6. Filer 7's Schedule 13G for Filedate 11 was filed under SEC Rule 13d-1(c), rather than Rule 13d-1(b). In response to Item 6, Filer 7 restated the Item 6 caption "Ownership of More than Five Percent on Behalf of Another Person" and responded "Not Applicable". The taxpayer made further inquiry of Filer 7 to which Filer 7 responded, both telephonically and through emailing, to the effect that it was not an Economic Owner of Company stock and held Company stock on behalf of Economic Owners, none of whom owned as much as 5-percent of Company's stock.

Filer 8. Filer 8 filed Schedules 13G on Filedates 18 and 19. In response to Item 6 on both Schedules 13G, Filer 8, an IA, merely repeated the heading of Item 6, "Ownership of More than Five Percent on Behalf of Another Person" and included a checkbox with an "X" in it. The taxpayer made further inquiry of Filer 8 to which Filer 8 responded by email that—(i) the largest single holding by any client Economic Owner on either Filedate was U percent (less than 2 percent) held by an identified investment company and (ii) any Economic Ownership by Filer 8 and its principals, in the aggregate, on either Filedate was less than five percent of Company stock outstanding.

Filer 9. Filer 9 filed Schedules 13G on Filedates 3, 6, 10 and 12. In response to Item 6, Filer 9 indicated on Filedates 3, 6 and 10 that no one person's economic ownership interest in Company common stock was more than 5 percent. Further information contained in attached exhibits indicated that most of the reported holdings were held by IA1 beneficially (not as an Economic Owner) (i.e., "as a result of acting as IA to various investment companies"). The remaining holdings reported as beneficially held aggregated to less than 5 percent of Company's common stock. The Filing of Filedate 12 reports ownership of less than 5 percent of Company's stock.

Filer 10. Filer 10 filed Schedules 13G on Filedates 4 and 8. The Filing for Filedate 4 is a Joint Filing by two filers, Entity 1, an IA, and Entity 2, an investment company. The Filing stated that Entity 1 was deemed to be the beneficial owner of P percent of Company common stock as a result of acting as IA to various investment companies and that Entity 2, an investment company advised by Entity 1, was the beneficial owner of Q percent (greater than 5 percent) of Company common stock. P percent minus Q percent was less than 5 percent. Filer 10's Schedule 13G for Filedate 8 shows Filer 10 as no longer holding any beneficial interest in Company stock.

Filer 11. Filer 11 filed Schedules 13G on Filedates 1 and 4. Filer 11's Schedule 13G of Filedate 1 is unclear—The Filing appears intended to be a joint filing by IA2 and Individual S, but it is not apparent from the Filing what relationship, if any, Individual S bears to the IA. The Filing reports that the two Joint Filers share voting and dispositive

power regarding the entire amount of the reported stock interest. The Filing indicates it is filed under both Rules 13d-1(b) & (c) [this is confusing, considering that the two categories are mutually exclusive as regards any particular filer]. In response to Item 6, however, the Filing states that the IA2 is an IA whose clients have the right to receive dividends from, or the proceeds from the sale of, the Company stock and that no individual client's holdings of the stock are more than five percent of the outstanding stock. Internet Searches for information regarding IA2 reliably show that Individual S leads Filer IA2's portfolio management team. Filer 11's Schedule 13G for Filedate 4 shows Filer 11 as no longer holding any beneficial interest in Company stock.

Filer 12. Filer 12 filed a Schedule 13G on Filedate 1. In response to Item 6 and in additional statements included in the Filing, Filer 12, an IA, indicated that it had voting and/or dispositive power regarding the reported Company stock but that ownership was in its clients, none of whom owned more than 5 percent of the reported interest. Furthermore, the Filing reported a less than 5 percent interest in Company's common stock.

## SEC FILINGS

Generally, SEC Rule 13d-1(a) requires that a Schedule 13D be filed by a person within 10 days after acquiring Beneficial Ownership of more than 5-percent of a class of an equity security. See SEC Rule 13d-3 for definition of "beneficial ownership."

SEC Rule 13d-1(b)(1) generally provides that a Schedule 13G "short form" may be filed in lieu of Schedule 13D if the reporting person is a member of an enumerated class (including Investment Advisors, Investment Companies, Banks, etc.) who acquires the securities in the ordinary course of his business and not with the purpose or effect of changing or influencing control of the issuer, etc. Under such circumstances, the Schedule 13G is required to be filed within 45 days "after the end of the calendar year in which the person became obligated to report the person's Beneficial Ownership as of the last day of the calendar year" (except that if the person's Beneficial Ownership exceeds 10 percent before the end of the calendar year, the initial Schedule 13G must be filed within 10 days after the end of the first month in which this occurs, computed as of the last day of the month).

SEC Rule 13d-1(c) generally provides that a person who would otherwise be obligated to file a Schedule 13D and is not a member of the Rule 13d-1(b)(1) enumerated class may nonetheless, in lieu Schedule 13D, file a short form statement on Schedule 13G within 10 days of the acquisition, provided the person has not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer, and is not the beneficial owner of 20 percent or more of the class.

Schedule 13D provides that it is to be signed by the filer under the following statement: "After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct."

A Schedule 13G filed under Rule 13d-1(b) is to be signed by the filer under the following statement: "By signing below I certify that, to the best of my knowledge and belief, the securities referred to above were acquired and are held in the ordinary course of business and were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect."

A Schedule 13G filed under Rule 13d-1(c) is to be signed by the filer under the following statement: "By signing below I certify that, to the best of my knowledge and belief, the securities referred to above were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect."

Rule 13d-1(k) provides that whenever two or more persons are required to file a statement containing the information required by Schedule 13D or Schedule 13G with respect to the same securities, only one statement need be filed (a "Joint Filing"), provided certain conditions are met.

Both Schedules 13D and 13G require the filer to provide information, including, in part—(i) the name of reporting person, (ii) the type of reporting person, (iii) the amount of shares beneficially owned, (iv) the percentage of class owned, and (v) whether any other person is known to have the right to receive dividends from, or the proceeds from the sale of, such securities.

Schedule 13G, item 6, includes the following instruction:

If any other person is known to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, such securities, a statement to that effect should be included in response to this item and, if such interest relates to more than five percent of the class, such person should be identified.

#### USE OF SEC FILINGS UNDER SECTION 382

Section 1.382-2T(k)(3) generally provides that the loss corporation is required to determine the stock ownership on each testing date (and the changes in the stock ownership during the testing period) of--(i) any individual shareholder who has a direct ownership interest of five percent or more in the loss corporation, (ii) any first tier entity,



(iii) any higher tier entity that has an indirect ownership interest of five percent or more in the loss corporation, and (iv) any 5-percent owner who indirectly owns five percent or more of the stock of the loss corporation in his capacity as a 5-percent owner in any one first tier entity or higher tier entity. Section 1.382-2T(k)(1)(i) generally provides that a loss corporation may rely on the existence and absence of SEC filings of Schedules 13D and 13G (or any similar schedules) as of any date to identify all of the corporation's shareholders who have a direct ownership interest of five percent or more (both individuals and first tier entities) on such date. The loss corporation has no duty to inquire further (see §1.382-2T(k)(3)).

Both the Internal Revenue Service ("Service") under section 382 and the SEC under section 13(d) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a et seq., generally have an interest in the tracking/reporting of changes in stock ownership, with a 5-percent holder or 5-percent of holdings representing the tracking or reporting threshold. However, there are significant differences in these two reporting regimes.

Stock ownership that is relevant for purposes of determining shifts in ownership under section 382 (sometimes referred to herein as Economic Ownership) is that which gives the holder rights to dividends and/or to proceeds from sale of the stock (or to distributions in liquidation). By contrast, Beneficial Ownership relevant for SEC Filings is, as stated above, based on voting power or investment power (disposition power). The same person may be, and often is, both the Economic Owner and the Beneficial Owner of a share of stock but such is not necessarily the case, as where an investor has Economic Ownership but an Investment Advisor has Beneficial Ownership through sole right to vote the stock and dispose of the stock.

The Service, in determining ownership change under section 382, concerns itself with changes in the Economic Ownership of loss corporation stock ownership by one or more 5-percent shareholders on a testing date, generally defining stock broadly under §1.382-2(a)(3) to include both voting and non-voting stock (except for certain non-voting stock that is limited and preferred as to dividends). A "5-percent shareholder" generally is any person holding *five percent or more* of the stock of the loss corporation at any time during the testing period. See section 382(k)(7) and §1.382-2T(g). The SEC Filing requirements generally extend to any person who, after acquiring the Beneficial Ownership of any equity security of a class which is registered pursuant to section 12 of the Exchange Act, is the Beneficial Owner of *more than five percent* of the class. All non-voting stock is excluded from the reporting requirement. See 17 CFR Part 240, Rule 13d-1(a) and (i).

Because the Service and the Treasury Department promulgated §1.382-2T(k)(1)(i) to reduce taxpayers' burden of compliance in identifying 5-percent shareholders by permitting loss corporations to rely on SEC Filings as a proxy for identifying 5-percent shareholders for section 382 purposes, a statement in an SEC

Filing indicating that no Economic Owner owns “more than five percent” should be read to include that no Economic Owner owns “five percent or more” of the loss corporation stock for section 382 purposes. See TD 8149, Preamble, Supplementary Information, Explanation of Provisions, Part K. Accordingly, such a statement in an SEC Filing generally would be sufficient to establish that the reported holdings were not held by a 5-percent shareholder (other than a public group) for section 382 purposes (assuming, of course, that it is clear from the context that the filer itself is not an Economic Owner). See 1.382-2T(f)(13), (g), and (j) regarding treatment of public groups.

Section 1.382-2T(k)(2) generally provides that, to the extent that the loss corporation has actual knowledge of stock ownership on any testing date by an individual who would be a 5-percent shareholder (or a 5-percent shareholder that would be taken into account) but for the application of certain presumptions set forth in §1.382-2T, the loss corporation must take such stock ownership into account for purposes of determining whether an ownership change has occurred on that testing date. If, despite the existence of a Filing, a loss corporation has actual knowledge of sufficient weight and probity showing that all or a portion of the reported holdings were not in fact held by a section 382 5-percent shareholder on any testing date, the loss corporation may not take such holdings into account on that testing date. Such actual knowledge may come from the contents of the Filing itself or from outside the Filing. In determining whether information is of sufficient weight and probity to counter the holdings reported in the Filing, the loss corporation must give due consideration to the source of the information. Generally, information from an SEC Filing that was filed pursuant to federal law with a federal law enforcement agency and signed under penalty of perjury would be accorded greater weight than, for example, information obtained more informally such as by telephone or e-mail where the provider does not attest to the truthfulness of the information under penalty of perjury. See §1.382-2T(k)(2) (and the lead-in reference at §1.382-2T(k)(1)).

If a Filing reports Beneficial Ownership on behalf of two or more Economic Owners aggregating to more than five percent of the loss corporation’s common stock but does not affirm the existence of a “group” (within the meaning of section 13(d)(3) of the Exchange Act), and the Economic Owners do not file a Filing that affirms the existence of a “group” (within the meaning of section 13(d)(3) of the Exchange Act), the loss corporation can rely on this existence and absence of Filings to determine that the Economic Owners are not members of a group that constitutes an “entity” (within the meaning of §1.382-3(a)(1)(i)) unless the loss corporation has actual knowledge that the Economic Owners constitute such an “entity”. See §1.382-3(a)(1)(i) and §1.382-2T(k)(1)(i).

If a loss corporation chooses to rely on the existence and absence of SEC Filings as described above, it must rely on all such existences and absences of SEC Filings, except to the extent this reliance is contradicted by actual knowledge.

## RULINGS

Each of the following rulings is based on facts and the representation set forth above and is based on the presumption the taxpayer has no actual knowledge of ownership of Company stock that is to the contrary:

Filer 1. Company has actual knowledge of sufficient weight and probity (contained in the Filings on Filedates 7, 8, 14 and 17) showing that there were no Economic Owners of Company stock owning 5-percent or more of the stock. Thus, the economic ownership interests reported in these Filings are to be considered owned by members of (one of) Company's public group(s).

Filer 2. Because Filer 2 failed to indicate that no other person had an Economic Ownership interest of more than 5-percent in Company stock on Filedates 4 and 8, Filer 2's Schedules 13G (Filedates 4, 8 and 15) must be taken into account.

Filer 3. Because it appears from Filer 3's filing of Filedate 8 that none of the Economic Ownership was in the joint filers and that no Economic Owner owned as much as 5-percent of Company stock, the ownership interests reported in Filer 3's two filings are to be considered owned by members of (one of) Company's public group(s).

Filer 4. Because Filer 4 failed to indicate that it had no economic ownership interest itself in Company stock, Filer 4's Schedules 13G (Filedates 2, 5, 9 and 16) must be taken into account.

Filer 5. Because Filer 5 failed to indicate that it had no economic ownership interest itself in Company stock, Filer 5's Schedules 13G (Filedates 8 and 15) must be taken into account.

Filer 6. Filer 6's Schedules 13G (Item 6) responses failed to indicate that it had no Economic Ownership interest itself in Company stock. Taxpayer, however, made further inquiry of Filer 6. Considering that an answer of "N/A" in response to Item 6 may be considered ambiguous or not particularly responsive to the question raised in Item 6 and weighing the manner and form of Filer 6's stated response to the inquiries made, we find Filer 6's responses to be of sufficient weight and probity to establish that Filer 6 was not an Economic Owner of the Company stock and held the reported Company stock on behalf of Economic Owners, none of whom owned as much as 5-percent of Company's stock. Thus, for section 382 purposes, the stock holdings reported in each of Filer 6's two Filings are considered owned by members of (one of) Company's public group(s).

Filer 7. Filer 7 failed to respond to Item 6 on Filedates 13 and 15, and on Filedate 11 responded "Not Applicable," thus failing to indicate that it had no Economic Ownership interest itself in Company stock on each occasion. Taxpayer sought clarification

through further inquiry. Weighing the manner and form of Filer 7's stated response to the inquiries made, we find Filer 7's responses to be of sufficient weight and probity to establish that Filer 7 was not an Economic Owner of the Company stock and held the reported Company stock on behalf of Economic Owners, none of whom owned as much as 5-percent of Company's stock. Thus, for section 382 purposes, the stock holdings reported in each of the three Filings are considered owned by members of (one of) Company's public group(s).

Filer 8. Filer 8's response to Item 6 on the Schedules 13G (Filed dates 18 and 19) was ambiguous, suggesting that Filer 8 may have been holding stock on behalf of a more-than-5-percent Economic Owner. Further, Filer 8's response failed to indicate that it had no economic ownership interest itself in Company stock. Weighing the manner and form of Filer 8's stated responses to further inquiries made, we find Filer 8's responses to be of sufficient weight and probity to establish, as of each of the two Filed dates, that— (i) none of its clients was the Economic Owner of as much as five percent of Company stock, and (ii) Filer 8 and its principals, taken together, owned less than five percent of Company stock. Thus, for section 382 purposes, the stock holdings reported in each of Filer 8's two Filings are considered owned by members of (one of) Company's public group(s).

Filer 9. In response to Item 6 on the Schedules 13G (Filed dates 3, 6, and 10), Filer 9 stated that no one person's Economic Ownership interest in Company common stock was more than 5 percent. While it is not absolutely clear from the context of this statement that Filer 9 itself had no Economic Ownership interest in Company, other information contained in the Filing indicated that Filer 9's Economic Ownership, if any, in Company stock was less than five percent. Thus, the stock holdings reported in each of Filer 9's four Filings are considered owned by members of (one of) Company's public group(s).

Filer 10. On Filed date 4, Entity 2, which as an investment company was the Economic Owner of its holdings, was a First Tier Entity whose interest in Company must be taken into account for purposes of measuring shifts in ownership under section 382. The other holdings reported by Filer 10 in the filing (i.e., the P - Q percent held by Entity 1 on behalf of an investment companies other than Entity 2) would be considered owned by members of (one of) Company's public group's and not counted for purposes of measuring shifts in ownership under section 382. Filer 10's Schedule 13G of Filed date 8, which shows Filer 10 as no longer holding any beneficial interest in Company stock, must also be taken into account.

Filer 11. Based on Filer 11's response to Item 6 on Filed date 1, as well as other information contained in the Filings and learned through Internet Searches, the stock holdings reported by Filer 11 in each of its two Filings are considered owned by members of (one of) Company's public group(s)

Filer 12. Filer 12's reported holdings in its sole Filing were less than five percent of Company stock. Thus, the reported holdings are considered owned by members of (one of) Company's public group(s).

#### CAVEATS

We express no opinion about the tax treatment of the transactions under other provisions of the Code and regulations or the tax treatment of any conditions existing at the time of, or effects resulting from, the transactions that are not specifically covered by the above rulings. 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 an appropriate party. This office has not verified any of the materials submitted in the support of the request for rulings. Verification of the information, representations, and other data may be required as part of the audit process.

#### PROCEDURAL STATEMENTS

This ruling letter is directed only to the taxpayers 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, any 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.

In accordance with the power of attorney on file in this office, a copy of this ruling letter will be sent to your authorized representative.

Sincerely,

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Mark Jennings  
Branch Chief, Branch 1  
Office of Associate Chief Counsel (Corporate)