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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:CORP:01

PLR-110302-10

Date:

November 10, 2010

Company A =

Company B =

Business Y =

Product =

Use =

Regulatory Application =

Administration =

\$a =\$b =\$c =\$d =\$e =\$f =

Date 1 =

Year =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =
Date 10 =
Date 11 =
Date 12 =
Date 13 =
Country A =
Country B =

Dear :

We respond to your representative's letter dated March 5, 2010, requesting rulings regarding certain federal income tax consequences resulting from an ownership change as defined in section 382(g) of the Internal Revenue Code. Additional information was submitted on April 22 and September 13, 2010. The material information submitted for consideration 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 an 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. In particular, this office has not

considered and does not express any opinion on the specific fair market value, if any, of the Product rights on the change date or to be included in Company A's calculation of its net unrealized built-in loss or built-in gain on the change date. Our rulings in this letter are based on a technical analysis of the operation of section 382(h) of the Code and Notice 2003-65, 2003-2 C.B. 747, in the situation described below.

Summary of Facts

Company A is a publicly traded corporation incorporated on Date 1 that engages in Business Y. On Date 2, Company A entered into a sublicense agreement with Company B that provided Company A with, among other things like patents and know-how, the rights to develop and distribute Product worldwide (the Sublicense Agreement). In partial consideration for the rights and uses included in the Sublicense Agreement, Company A agreed to pay Company B an initial license fee of \$a and was obligated to make future milestone payments to Company B of less than \$b in the aggregate, as well as royalty payments. Company A paid \$a to Company B on Date 3 pursuant to the Sublicense Agreement, and Company A capitalized this payment for tax purposes under § 1.263(a)-4(b) of the Income Tax Regulations.

On Date 4, Company A submitted a Regulatory Application for Product to Administration, and Administration accepted the Regulatory Application on Date 5. On Date 6, however, Administration sent Company A a non-approval letter for the Regulatory Application. On Date 7, Company A met with Administration to discuss the non-approval, and, on Date 8, Company A submitted to Administration a complete written response. No additional clinical or research work was performed during the period from the date on which Administration sent the non-approval letter (Date 6) and Date 8 when Company A submitted a response to the non-approval letter (a period of about three and a half months). On Date 10, Administration granted marketing approval for Product for Use.

Since inception in Year, Company A has incurred approximately \$c of net operating losses (NOLs) and approximately \$d in research and development credits. Company A believes it has undergone four ownership changes under § 382(g), with the latest ownership change on Date 9. On Date 10, a few months after Company A's ownership change on Date 9, Company A received approval for Product from Administration, and, as a result, Company A met an additional milestone under the Sublicense Agreement and made payments to Company B on Date 11 and Date 12. Company A capitalized these payments for tax purposes under § 1.263(a)-4(b).

On Date 13, Company A entered into an Amended Sublicense Agreement with Company B whereby Company A transferred a portion of the Product rights to Company B, including, among other things, domain names, existing applications and approvals, the rights to certain trademarks, know-how, and the Country A and Country B distribution rights. Under the Amended Sublicense Agreement, Company B made an

upfront payment of \$e to Company A for this portion of the Product rights and will make future payments totaling \$f upon the achievement of milestones, as well as royalty payments. Company A retains the non-Country A and non-Country B distribution rights to Product.

Representations

Company A makes the following representations:

- (a) Company A is a loss corporation as defined in section 382(k)(1).
- (b) Company A underwent an ownership change as defined in section 382(g) on Date 9.
- (c) The payments made by Company A to Company B pursuant to the Sublicense Agreement were capitalized pursuant to § 1.263(a)-4(b).

Rulings

Based on the information submitted and summarized above, we hold as follows:

- (1) The rights to develop and distribute Product worldwide, acquired by Company A under the Sublicense Agreement on Date 2, are intangible assets on the Date 9 change date and are subject to amortization under section 167.
- (2) Company A's transfer of a portion of the Product rights to Company B on Date 13 pursuant to the Amended Sublicense Agreement resulted in a license rather than a disposition by Company A.
- (3) If (1) Company A had a net unrealized built-in gain (NUBIG) on the Date 9 change date, (2) the fair market value of the rights to distribute and develop Product held by Company A exceeded their adjusted bases (a built-in gain) on the Date 9 change date, (3) Company A elects to apply the 338 Approach of Notice 2003-65, and (4) provided that Company A does not dispose of the Product rights during the 5-year recognition period, the Product rights will generate recognized built-in gain (RBIG) in an amount equal to the excess of the cost recovery deduction that would have been allowable with respect to such intangible assets had an election under section 338 been made for the hypothetical purchase of Company A's assets over Company A's actual allowable cost recovery deduction. Any RBIG for any taxable year within the 5-year recognition period following the ownership change increases the section 382 limitation for that year.

- (4) If (1) Company A had a net unrealized built-in loss (NUBIL) on the Date 9 change date, (2) the adjusted bases of the rights to distribute and develop Product held by Company A exceeded their fair market value (a built-in loss) on the Date 9 change date, (3) Company A elects to apply the 338 Approach of Notice 2003-65, and (4) provided that Company A does not dispose of the Product rights during the 5-year recognition period, the Product rights will generate recognized built-in loss (RBIL) in an amount equal to the excess of Company A's actual allowable cost recovery deduction over the cost recovery deduction that would have been allowable with respect to such intangible assets had an election under section 338 been made for the hypothetical purchase of Company A's assets. Any RBIL for any taxable year within the 5-year recognition period following the ownership change is treated as a pre-change loss subject to the section 382 limitation.

Except as expressly provided herein, we express no opinion concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter under any other provision of the Code or regulations, or concerning any conditions existing at the time of, or effects resulting from, the facts of this letter that are not specifically covered by the above rulings. In particular, we do not express any opinion regarding (i) whether Company A has undergone ownership changes under section 382(g); (ii) the federal tax treatment of Company A's capitalization of the various payments made to Company B under the Sublicense Agreement under § 1.263(a)-4(b) or any Code section or regulation; (iii) the specific fair market value, if any, of the Product rights to be included in Company A's NUBIG or NUBIL calculation on any ownership change dates, including Date 9; (iv) whether the rights to distribute and develop Product held by Company A had a built-in gain or a built-in loss on any ownership change dates, including Date 9, (v) whether Company A had a NUBIG or a NUBIL on any ownership change dates, including Date 9, and (vi) what method Company A elects to utilize under the Notice 2003-65.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code 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, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

In accordance with a power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Filiz A. Serbes
Chief, Branch 3
Office of Associate Chief Counsel (Corporate)

cc: