

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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to: Lawrence Davidow  
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from: Nancy Lee  
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subject: "Go Shop" Provisions

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

SUMMARY

This memorandum responds to your request for help in determining whether a "go shop" provision in a merger agreement affects the bright-line date described in Treas. Reg. § 1.263(a)-5(e)(1). For the reasons discussed below, we conclude that a "go shop" provision in a fully-executed merger agreement does not change the bright-line date for purposes of Treas. Reg. § 1.263(a)-5(e). Please contact Jason Kristall at (202) 622-5020 if you would like further assistance or have any questions about this memorandum or our conclusion.

FACTS

Acquiring Corporation ("Acquirer") acquires Target Corporation ("Target") in a transaction described in Treas. Reg. § 1.263(a)-5(e)(3). The terms of the agreement are set forth in a merger agreement that was executed by representatives of both corporations and approved by both corporations' boards of directors on March 31, 2012. Pursuant to this merger agreement, Target retained the right, until April 30, 2012, to continue to look for another acquirer (the "go shop" provision). Had Target received a better offer, Acquirer would have had an opportunity to match that offer.

Had Acquirer declined to match the offer, Target would have been free to abandon its agreement with Acquirer and enter into a deal with the alternate acquirer instead. Some time after April 30, 2012, the transaction between Acquirer and Target closed successfully.

## LAW

Treas. Reg. § 1.263(a)-1T(c)(3) provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under Treas. Reg. § 1.263(a)-4(c)(1)(i) and (d)(2)(i)(A) includes an ownership interest in a corporation or other entity. See also Treas. Reg. § 1.263(a)-4(a).

Under Treas. Reg. § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate the business acquisition or reorganization transactions described in Treas. Reg. § 1.263(a)-5(a). An amount is paid to facilitate a transaction described in Treas. Reg. § 1.263(a)-5(a) if the amount is paid in the process of investigating or otherwise pursuing the transaction. Whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined based on all of the facts and circumstances. Treas. Reg. § 1.263(a)-5(b).

Treas. Reg. § 1.263(a)-5(e)(1) provides that an amount (other than an inherently facilitative amount) paid in the process of investigating or otherwise pursuing a covered transaction (as described in Treas. Reg. § 1.263(a)-5(e)(3)) facilitates the transaction only if the amount relates to activities performed on or after the earlier of (1) the date on which a letter of intent, exclusivity agreement, or similar written communication (other than a confidentiality agreement) is executed by representatives of the acquirer and the target; or (2) the date on which the material terms of the transaction (as tentatively agreed to by representatives of the acquirer and the target) are authorized or approved by the taxpayer's board of directors (or committee of the board of directors) ("bright-line date").

## ANALYSIS

Amounts that are not inherently facilitative but that are paid in the process of investigating or otherwise pursuing a covered transaction facilitate the transaction only if they relate to activities performed on or after the bright-line date. Under the regulation, this bright-line date is the earlier of the date a letter of intent, exclusivity agreement, or similar written communication is executed by representatives of both parties, or the date that the material terms of the transaction are approved by the parties' boards of directors.

In this case, the execution of the merger agreement and the approval of the terms therein by the parties' boards of directors occur on the same date. The "go shop" provision is only one of the terms of this merger agreement and does not serve to negate the document's execution, nor does it trump the approval of those terms by the

corporations' boards of directors. Therefore, the bright-line date in this case is March 31, 2012, the date of the merger agreement's execution and its approval by the corporations' boards of directors.

### CONCLUSION

The execution of a merger agreement that sets forth the terms of a covered transaction and is approved by both parties' boards of directors on the date of execution establishes the bright-line date for purposes of Treas. Reg. § 1.263(a)-5(e). The inclusion of a "go shop" provision does not change this bright-line date.

### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.