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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Significant Index No.: 4941.04-00

Date: **JUL 30 1999**

Contact Person:

ID Number:

OP. E. CO. T. 3

Telephone Number:

Employer Identification Number:

Legend:

B =
C =
T =
X =
Y =
M =

Dear Sir:

This is in reference to a request for a private letter ruling dated July 14, 1999, submitted by your authorized representatives, concerning the federal tax consequences under section 4941 of the Internal Revenue Code of the proposed transactions described below.

The information provided indicates that you (the "Foundation") are a nonprofit, nonstock corporation, organized and operated exclusively for charitable, scientific, and educational purposes. The Foundation is exempt from federal income tax as an organization described in section 501(c)(3) of the Code and has been classified as a private foundation described in section 509(a).

The Foundation is a private grant making foundation, created by B (the "Founder") who is deceased. The Foundation has been carrying out its charitable purposes through a discretionary program of gifts and grants that support various programs, including medical research, promotion of the arts, protection of the environment, and protection of endangered species. Until his death, the Founder was the sole contributor to the Foundation, and, thus, was a substantial contributor to the Foundation as defined in section 507(d)(2) of the Code, and was the sole "member" of the Foundation. As the sole member, he had the power to appoint and remove the Foundation's directors at will.

Under the Founder's will (the "Will"), all the residue of his estate was bequeathed to the Foundation. Included in the estate ("Estate") was all of the stock of X, an investment company. X and its subsidiaries owned various businesses and assets, including all of the stock of Y, a business enterprise, and related assets (Y and related assets, collectively, the "Businesses"). In the Will, Founder expressed his intention that the co-executors ("Executors") of his estate eventually convert

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the Businesses into cash and distribute the cash to the Foundation.

The Will appointed eight (8) individuals (all of whom were directors on the date of the Founder's death) to succeed him as "members" of the Foundation. Of those eight individuals, one has died and another was not re-elected as a director, but continues to serve as a member. At the present time, the board of directors consists of eleven (11) individuals, six (6) of whom are also members. Several of the members and directors have a relationship with the Businesses as either officers or key employees. The Executors are both members of the Foundation and key employees of the Businesses. Pursuant to the Foundation's certificate of incorporation and bylaws, and the laws of the state of incorporation, the members have the power to appoint or remove directors.

Approximately one year after Founder's death, X's businesses and assets were restructured. The restructuring was designed to rearrange certain of the businesses in a manner that would maximize the proceeds received by the Foundation upon their ultimate disposition, thereby maximizing the funds available the Foundation for its charitable programs. Another objective of the restructuring was to place the businesses in a logical and manageable structure from an operational and managerial perspective. As a result of the restructuring, the assets of the Businesses are owned by wholly-owned corporate subsidiaries of T, a limited liability company (Holding Company) which is 100% owned by the Foundation. The managers of T are the Executors of the Will.

Until his retirement from Y in 1996, C was an employee of Y's corporate predecessor for approximately 25 years, and was the chief operating officer for many of those years. Following his retirement, C was retained as a consultant to advise the corporate predecessor of Holding Company on business matters.

C was appointed to the board of directors of the Foundation by Founder, but C has never been a member of the Foundation. C attended no Foundation meetings until after Founder's death. C was selected by Founder to serve on the board of directors to help assure that his knowledge, expertise, and advice concerning the various business operations then owned by the Founder would continue to be available to the Foundation following Founders' death. C attended a total of six special board meetings before his resignation.

Neither C nor any member of his family or any entity in which C or his family has a 20-percent or greater interest has made any contributions to the Foundation. Similarly, no member of C's family is a foundation manager with respect to the Foundation.

Following Founder's death, the individual who succeeded C as chief operating officer of Y contracted a serious illness. C was persuaded to return to Y as chief executive officer on an emergency basis and generally to oversee the operations of the Businesses during the administration of the Estate and the expected disposition of certain of the Businesses by T.

Prior to the formation of Holding Company, a bank ("Bank") was retained to assist and advise the Executors of the Will in the selling of all or a portion of the Businesses. During the period prior to C's resignation from the Foundation's board of directors (sometimes hereafter described as the first round of the bidding process, and the period thereafter is sometimes referred to as the "second round"), C participated in the auction process acting in his capacity as the chief executive officer of Y by: (i) compiling information on the Businesses as requested by Bank, (ii) assisting Bank in the preparation of a memorandum describing the assets and operations of the Businesses; (iii) participating in discussions concerning which potential bidders to contact; (iv) reviewing the bids submitted in the first round of the auction process; and (v) meeting with and otherwise assisting

bidders as they conducted their "due diligence."

In the late stages of the first round of the bidding process, the Foundation retained a prominent investment firm ("Investment Bank") to work with the Bank and provide advice to the Foundation in connection with the sale of all or a portion of the Businesses. Investment Bank reviewed the sales process to date and conducted its own independent review of the Businesses. Subsequent to the retention of Investment Bank, Bank and Investment Bank (the "Financial Advisors") reviewed the bidding process to date and resolved to commence an additional round of bidding.

Five days after the Investment Bank was retained by the Foundation, C resigned as a director of the Foundation. The next day C submitted a bid on his own behalf for Y and other assets of the Foundation. Simultaneously with submitting his own bid, C recused himself from representing any of the Businesses during the bidding process and discontinued any contact with other bidders or potential bidders. All bidders involved in the original and the new bidding round have been advised of C's bidder status and his recusal from the sales process.

Since C's recusal from the sales process, the Financial Advisors have recontacted all previous bidders and solicited several new bidders. Both the old and the new bidders are in the process of revisiting the relevant company facilities, conducting additional due diligence, and meeting with company officials, other than C, under the supervision of the Financial Advisors. The Financial Advisors have distributed additional written material to all bidders. C was not involved in the preparation of this material, but did receive a copy of the material like other bidders. C and each of the other bidders have discussed the terms of their respective bids with the Financial Advisors. C will participate in the bidding process on the same terms as the other bidders.

Each set of bids will be evaluated by Holding Company and Foundation with the assistance of the Financial Advisors. The sales of all or a portion of the Businesses will be subject to the approval of the court in the state of M having jurisdiction over the Estate. In addition, any sale of the assets will require the approval of M's office of Attorney General.

Section 4941 of the Code imposes an excise tax on an act or acts of self-dealing between a "disqualified person" and private foundation.

Section 4941(d)(1) of the Code defines an act of self-dealing to include -

- (A) sale or exchange, or leasing, of property between a private foundation and a disqualified person,
- (B) lending of money or other extension of credit between a private foundation and a disqualified person.

Section 4946(a)(1)(B) of the Code defines the term disqualified person to include a foundation manager.

Section 4946(b)(1) of the Code defines the term foundation manager to include an officer, director, or trustee of a foundation (or an individual having powers or responsibilities similar to those of officers, directors, or trustees of the foundation).

In Rev. Rul. 76-448, 1976-2 C.B. 368, an exchange of securities between a private foundation and a corporation that was previously a disqualified person by reason of the ownership of more than 35 percent of its total combined voting power by the former foundation manager, did not result in an act of

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self dealing. The status of the corporation as a disqualified person with respect to the foundation rested solely upon the ownership of more than 35 percent of its total combined voting power by the former foundation manager. The status of the former foundation manager as a disqualified person with respect to the foundation rested solely upon his capacity as a foundation manager. The former foundation manager resigned 5 years prior to the exchange, and did not participate in planning the exchange offer while he was a disqualified person.

C resigned his position as a director of the Foundation prior to submitting his bid for the assets. At that time he was no longer a disqualified person since his status as a disqualified person rested solely upon his capacity as a foundation manager. However, important facts that distinguish this case from the situation presented in Rev. Rul. 76-448 are that C was an active participant in the planning of the sale of the Businesses and, as the chief operating officer of Y, is in a position of authority with respect to the employee/directors and employee/members.

Nevertheless, in addition to the fact that C is no longer part of the decision-making process, a number of factors will have the effect of preventing C from exercising any undue influence over the sale of assets by the Foundation. These factors include: 1) An open bidding process designed to obtain fair market value for the assets; 2) The solicitation of additional bidders during the second round of bids; 3) C's recusal from the bidding process other than as a bidder after his resignation as a director of the Foundation; and 4) The retention of independent Financial Advisors to evaluate the bids; Moreover, the sale of assets by the Foundation will occur under the scrutiny and supervision of the state court of jurisdiction, and must be approved by M's office of Attorney General.

It is also important to note that the sale of the Businesses by the Foundation is a direct result of Founder's intentions as expressed in the Will. This fact insulates C from any suggestion or inference that while he was a disqualified person he may have instigated or otherwise set in motion the chain of events that will eventually lead to the sale of the assets.

The Foundation has made the following representations with respect to this ruling request:

1. C has not participated in fixing the compensation or bonuses of employee-directors at any time.
2. The Foundation has received representations from the Executors that the compensation and bonuses of employee-directors have been paid for no reason other than sound business reasons.
3. The Foundation believes that all reasonable efforts will be made to maximize the sales price of the business and that the Foundation's directors will act in accordance with their fiduciary duty of loyalty to the Foundation.
4. The Foundation represents that there was no understanding or arrangement between the Foundation and C to either (1) reopen the bidding to accommodate a bid from C or (2) to allow any preference to C in the second (or subsequent) round of bids over other bidders.

Accordingly, based on the facts and representations received to date, we rule as follows:

Because C is not a foundation manager or otherwise described in section 4946(a)(1) of the Code, he is not a disqualified person, and any sale transaction in which all or a

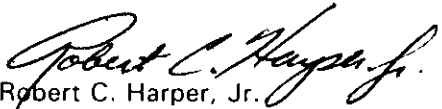
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portion of the stock and/or assets of the Businesses owned directly or indirectly by the Foundation is sold to C, or to any entity in which C has an interest, including any such sale transaction which includes the lending of money or extension of credit to C, or any entity in which C has an interest, will not result in an act of self-dealing under section 4941.

This ruling is directed only to the Foundation. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,



Robert C. Harper, Jr.
Chief, Exempt Organizations
Technical Branch 3

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