

**Gillis, Diana L.**

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**Subject:** FW: 801.10 - Question re: Tax Payment

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**From:** Whitehead, Nora  
**Sent:** Wednesday, June 24, 2015 9:23 AM  
**To:** [REDACTED]  
**Cc:** Gillis, Diana L.  
**Subject:** RE: 801.10 - Question re: Tax Payment

We agree with you. That older interpretation is out of date and incorrect [on the 338(h)(10) issue].

Nora Whitehead  
(202) 326-3262  
Check out the [PNO Blog!](#)

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**From:** [REDACTED]  
**Sent:** Wednesday, June 24, 2015 6:10 AM  
**To:** Walsh, Kathryn E.; Gillis, Diana L.; Whitehead, Nora  
**Subject:** 801.10 - Question re: Tax Payment

Kate, Diana, and Nora,

Good morning – I want to confirm that an additional payment to target’s shareholders to compensate them for an incremental tax cost related to the transaction would not be included in the size-of-transaction consistent with this [0307002]prior interpretation.

In addition to cash consideration to be paid for an acquisition of voting securities, Buyer will pay to target’s shareholders an additional payment to compensate them for taxes that the shareholders likely will pay as a result of an election pursuant to 338(h)(10) of the Internal Revenue Code, whereby the acquisition of target’s equity will be treated as an asset acquisition for Federal tax purposes. This payment will not add to the cash that the shareholders will receive in consideration for their shares; rather, it would be designed to ensure that the net after-tax consideration that the selling shareholders receive in the transaction is no less than what it would be without the special tax election. In that sense, it seems like it would be treated no differently than a transaction expense, and not included in the size-of-transaction.

Please confirm this is correct.

Many thanks,  
[REDACTED]

[REDACTED]