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Person to Contact:

Telephone Number:

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Acquiring =

Acquiring Sub =

Target =

Date W =

Date X =

b =

c =

d =

Corp A =

Corp B =

Corp C =

e =

f =

g =

h =

i =

j =

k =

l =

m =

n =

This is in response to your letter of September 13, 1999, requesting rulings under sections 280G and 4999 of the Internal Revenue Code. Specifically you requested a ruling whether, under the facts outlined below, there will be a change in the ownership or effective control of Target, or in the change in the ownership of a substantial portion of the assets of Target within the meaning of section 280G(b)(2) of the Code. The facts as submitted are set forth below.

Acquiring and Target are both widely-held, publicly traded corporations. On Date W, Acquiring and Target entered into a Merger Agreement, which was approved by the shareholders of both Acquiring and Target. Immediately prior to the Merger, Acquiring had outstanding b shares of common stock held by approximately c shareholders, and options to acquire d shares of Acquiring stock. Immediately prior to the Merger, Corp A, Corp B, Corp C held more than five percent of the stock of Target. Their holdings were e, f, and g percent respectively. Only Corp A had a greater than five percent interest in Acquiring following the Merger.

Target had outstanding h shares of common stock held by approximately i shareholders and options to acquire j shares of Target stock.

Pursuant to the Merger Agreement, Acquiring Sub, a newly formed subsidiary of Acquiring, merged with and into Target. The separate corporate existence of Acquiring Sub ceased and Target became a wholly-owned subsidiary of Acquiring. Pursuant to the Merger Agreement, each share of Target's common stock was converted into the right to receive k shares of Acquiring common stock. The Merger was consummated on Date X.

Following the Merger, the pre-Merger Acquiring shareholders owned approximately l percent of Acquiring. The pre-Merger Target shareholders owned approximately m percent of Acquiring. All outstanding options have been treated as stock for purposes of section 280G of the Code.

The Board of Directors of Acquiring following the Merger consists of n individuals. Half are former Acquiring directors and half are former Target directors. The pre-Merger Target Board of Directors agreed to and fully endorsed the post-Merger Acquiring Board of Directors.

As a result of the Merger, certain payments were made to executives of Target. All of Target's outstanding stock options that had not yet become exercisable became fully exercisable on the effective date of the Merger. Certain executives of Target held restricted stock which vested upon the Merger.

Section 280G of the Code provides that no deduction will be allowed for any excess parachute payment. Section 280G(b)(1) defines the term "excess parachute payment" as an amount equal to the excess of any parachute payment over the portion of the base amount allocated to such payment.

Section 280G(b)(2)(A) of the Code defines the term "parachute payment" as any payment in the nature of compensation to (or for the benefit of) a disqualified individual if (i) such payment is contingent on a change (I) in the ownership or effective control of the corporation, or (II) in the ownership of a substantial portion of the assets of the corporation; and (ii) the aggregate present value of the payments in the nature of compensation to (or for the benefit of) such individual which are contingent on such change equals or exceeds an amount equal to three times the base amount.

Section 280G(d)(5) of the Code generally provides that all members of the same affiliated group (as defined in section 1504, determined without regard to section 1504(b)) shall be treated as one corporation for purposes of section 280G.

Section 4999(a) of the Code imposes on any person who receives an excess parachute payment a tax equal to 20 percent of the amount of the payment.

Section 1.280G-1 of the Proposed Income Tax Regulations, Q&As 27, 28 and 29, published in the Federal Register on May 5, 1989, (54 Fed. Reg. 19,390), provides guidance concerning when a corporation will be considered to have undergone a change in ownership or effective control, or a change in the ownership of a substantial portion of its assets.

Q&A 27(a) provides that a change in the ownership or control of a corporation occurs on the date that any one person, or more than one person acting as a group, acquires ownership of stock of the corporation that, together with stock held by such person or group, possesses more than 50 percent of the total fair market value or total voting power of the stock of such corporation. Q&A 27(b) provides that persons will not be considered to be "acting as a group" merely because they happen to purchase or own stock of the same corporation at the same time, or as a result of the same public offering. However, persons will be considered to be "acting as a group" if they are owners of an entity that enters into a merger, consolidation, purchase or acquisition of stock, or similar business transaction with the corporation. Q&A 27(c) provides that section 318(a) shall apply in determining stock ownership.

Example (3) of Q&A 27 deals with a corporate merger. There, Corporation P merged into Corporation O and the shareholders of P received O stock in exchange for their P stock. The example concludes that because the P shareholders received a greater than 50 percent interest in O, O experienced a change in ownership. By implication, the example concludes that P did not experience such a change.

Q&A 28(a) provides, in part, that a change of effective control of a corporation is presumed to occur on the date that either (1) any one person, or more than one person acting as a group, acquires (or has acquired during the 12-month period ending on the date of the most recent acquisition by such person or persons) ownership of stock of the corporation possessing 20 percent or more of the total voting power of the stock of such corporation; or (2) a majority of the members of the corporation's board of directors is replaced during any 12-month period by directors whose appointment or election is not endorsed by a majority of the members of the corporation's board of directors prior to the date of the appointment or election.

The presumption of Q&A 28(a)(1) and (2) may be rebutted by establishing that the acquisition or acquisitions of the corporation's stock, or the replacement of the majority of the members of the corporation's board of directors, does not transfer the power to control (directly or indirectly) the management and policies of the corporation from any one person (or more than one person acting as a group) to another person (or group). Q&A 28(c) contains the same language as Q&A 27(b) concerning when persons will be considered to be "acting as a group." Q&A 28(d) contains the same language as Q&A 27(c) concerning the application of section 318(a).

It has been represented that, immediately following the Merger, the pre-Merger Target shareholders will own more than 50 percent of the total fair market value and total voting power of the outstanding Acquiring stock. Acquiring will own 100 percent of the total voting power of the outstanding stock of Target.

Viewing the Merger from Acquiring's perspective, Acquiring surrendered potential ownership or control when it issued its stock to Target's shareholders in consideration for Target stock. Since Target's shareholders acquired sufficient stock value and voting power due to this transaction, Acquiring experienced a change of ownership under Q&A 27.

Viewing the Merger from Target's perspective, all of Target's stock was transferred to Acquiring in consideration for the issuance of Acquiring stock to Target shareholders, which resulted in Acquiring receiving a greater than 20 percent voting interest in Target. Accordingly, under Q&A 28, it is presumed that Target experienced a change in effective control.

The facts submitted here indicate that the pre-Merger Acquiring shareholders will not act in a concerted way to control the management and policies of the post-Merger corporations (Acquiring and Target). The facts also indicate that the post-Merger Acquiring Board of Directors was endorsed by a majority of the pre-Merger Target Board of Directors.

Accordingly, based strictly on the information submitted and Acquiring's representations set forth above, we rule as follows:

1) Provided that after the Merger the pre-Merger Acquiring shareholders do not act in a concerted way to control the management and policies of the post-Merger corporations, the Merger will not cause a change in the ownership or effective control of Target, nor will it cause a change in the ownership of a substantial portion of Target's assets within the meaning of section 280G(b)(2)(A)(i) of the Code.

2) The provisions of section 280G of the Code do not apply to any payments that are received by employees or former employees of Target and its subsidiaries that are contingent upon the Merger.

3) The provisions of section 4999 of the Code do not apply to any payments that are received by employees or former employees of Target and its subsidiaries that are contingent upon the Merger.

Except as specifically ruled on above, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion was requested and none is expressed regarding the federal income tax consequences of the Merger described above.

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. The Taxpayer should attach a copy of this ruling to any income tax return to which it is relevant.

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not been adopted. Therefore, this ruling will be modified or revoked by the adoption of temporary or final regulations to the extent that the regulations are inconsistent with any conclusion in the ruling. However, when the criteria in section 12.05 of Rev. Proc. 2000-1, 2000-1 I.R.B. 4, 47 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to Acquiring.

Sincerely yours,
ROBERT B. MISNER
Assistant Chief, Branch 4
Office of the Associate Chief Counsel
(Employee Benefits and Exempt Organizations)

Enclosure:
Copy for 6110 purposes