

**Internal Revenue Service**

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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Person To Contact:

Telephone Number:

Refer Reply To:

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PLR-138402-05

Date:

November 17, 2005

Legend

Taxpayer =  
Director =  
Company =  
Bank =  
Date 1 =  
Date 2 =  
a =  
Trust =  
State A =  
b =

Dear

This letter is a response to a request for a private letter ruling, dated June 17, 2005, submitted on behalf of Taxpayer by its authorized representative. In its request for a ruling, Taxpayer asks for rulings concerning Director's status as a disqualified individual for purposes of sections 280G and 4999 of the Internal Revenue Code.

Director is the former chairman of the Board of Directors of Company, the bank holding company of Bank. On Date 1, Company merged with Taxpayer, in a transaction that constituted a change in ownership or control of Company within the meaning of section 280G(b)(2) of the Code. Prior to the merger, Company was publicly traded.

Director was a member of the Board of Directors of Taxpayer from Date 2 until Date 1, at which point he resigned his seat on the Board of Directors and his position as Chairman of the Board. During the 12-month period preceding the merger, Director served as the chairman of the Board of Directors of Company, and was neither a shareholder owning, directly or indirectly, more than one percent of the stock of

Company nor was he one of the top one percent highest paid employees or consultants of Company or Bank.

As chairman of Company's Board of Directors, Director received an annual fee of \$a. This fee was larger than the fee paid to other members of Company's Board of directors; the difference was in consideration for Director's additional responsibilities as Chairman of the Board. Director was not on the payroll as an employee of Company or Bank, and all compensation was reported on Form 1099-MISC. Director also received pre-determined grants of non-qualified stock options in amounts consistent with those received by other directors of Company. These awards were granted pursuant to the non-employee provisions of Company's stock option plan. Director received these awards annually except for in the calendar year prior to the change in control, when director declined the award.

In addition to serving as chairman of Company's Board of Directors, Director also served on the Board of Trustees of Trust, a Real Estate Investment Trust, organized under the laws of State A. Under the law of State A, Trust operates as a corporation and the board of Trustees serves as the Board of Directors of Trust. Trust was formed by Director and two other individuals associated with the Company and the Bank, and the Bank contributed real estate assets to the Trust. Taxpayer represents that, for purposes of the private letter ruling request, the Company and the Trust would be considered part of an affiliated group for purposes of sections 280G and 4999 of the Code. Director received no additional compensation for any services rendered in his capacity as a member of the Trust's Board of Trustees.

By virtue of the change in control of the Company, Director was entitled to certain benefits, which had an aggregate value of \$b. The amount by which this amount exceeded Director's base amount (for purposes of sections 280G and 4999) was placed in escrow (the "Escrowed Amount") pending a ruling by this office on the application of sections 280G and 4999 to the Escrowed Amount.

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 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 280G(c) defines a "disqualified individual" as an individual who is (1) an employee, independent contractor, or other person specified in the regulations who performs personal service for any corporation, and (2) is an officer, shareholder, or other highly compensated individual.

Section 1.280G-1 of the regulations, Q/A 15, provides that an individual is a disqualified individual with respect to a corporation if, at any time during the "disqualified individual determination period," the individual is an employee or independent contractor of the corporation and is, with respect to the corporation, a shareholder, an officer, or a highly-compensated individual. According to Q/A 48, taxpayers may rely on these regulations after August 4, 2003 for the treatment of any parachute payment.

Section 1.280G-1, Q/A 20 provides that the "disqualified individual determination period" is the portion of the year of the corporation ending on the date of the change in ownership or control of the corporation (the "change in ownership period") and the twelve month period immediately preceding such change in ownership period. For purposes of Q/A 20, a corporation may elect to use its taxable year or the calendar year.

Q/A 17 provides that a shareholder is a disqualified individual if that shareholder owns stock of a corporation, during the "disqualified individual determination period," having a fair market value that exceeds 1 percent of the total fair market value of the outstanding shares of all classes of the corporation's stock. For purposes of determining the amount of stock owned by an individual, the constructive ownership rules of section 318(a) shall apply. Section 318(a)(4) states that if a person has an option to acquire stock, such stock shall be considered as owned by such person.

Q/A 19 provides that a highly compensated individual with respect to a corporation is any individual who is, or would be if the individual were an employee, a member of the group consisting of the lesser or the highest paid 1 percent of the employees of the corporation (rounded up to the nearest integer), or the highest paid 250 employees of the corporation, when ranked on the basis of the compensation (as determined under Q/A 21) earned during the disqualified individual determination period. For purposes of the preceding sentence, the number of employees of the corporation is the greatest number of employees the corporation has during the disqualified individual determination period. However, no individual whose annualized compensation during the disqualified individual determination period is less than the amount described in section 414(q)(1)(B)(i) of the Code for the year in which the change in ownership or control occurs will be treated as a highly compensated employee.

Because Director, during the disqualified individual determination period, was neither a "shareholder," under Q/A 17, nor a "highly compensated individual" under Q/A

19, the sole basis for finding Director to be a disqualified individual for purposes of sections 280G and 4999 of the Code is whether he would be considered an “officer.”

Q/A 18 provides that whether an individual is an officer with respect to a corporation is determined on the basis of all the facts and circumstances in the particular case (such as the source of the individual’s authority, the term for which the individual is elected or appointed, and the nature and extent of the individual’s duties). Any individual who has the title of officer is presumed to be an officer unless the facts and circumstances demonstrate that the individual does not have the authority of an officer. However, an individual who does not have the title of officer may nevertheless be considered an officer if the facts and circumstances demonstrate that the individual has the authority of an officer. Generally, the term officer means an administrative executive who is in regular and continued service. The term officer implies continuity of service and excludes those employed for special and single transactions.

In the request for a ruling, it is represented that Director did not have administrative executive authority over Company, Bank or Trust. Therefore, based solely on the information and representations submitted and set forth above, we rule as follows:

1. Based on his role as chairman of the Board of Directors of Company, Director is not a “disqualified individual” for purposes of sections 280G and 4999 of the Code.
2. Based on his role as a member of the Board of Trustees of Trust, Director is not a “disqualified individual” for purposes of sections 280G and 4999 of the Code.
3. The payment of the Escrowed Amount to Director will not result in the disallowance of the deduction for the payment to Director under section 280G of the Code.
4. The payment of the Escrowed Amount to Director will not result in the imposition of an excise tax on the payment of such amount under section 4999 of the Code.

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.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the code provides that it may not be sued or cited as precedent. The taxpayer should attach a copy of this ruling to any income tax return to which it is relevant.

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

Sincerely,

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Robert Misner  
Senior Technician Reviewer  
Executive Compensation Branch  
Office of Division Counsel/Associate Chief  
Counsel (Tax Exempt and Government Entities)