

**Internal Revenue Service**

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LEGEND:

- Company =
- Target =
- Date B =
- Date C =
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- Exchange =
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This letter is in response to the letter dated December 13, 1999, submitted by your authorized representative requesting rulings under section 280G of the Internal Revenue Code. Specifically, the letter requested rulings, under the facts outlined

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below, that there would not be a change in the ownership and control of Target, nor a change in the ownership of a substantial portion of its assets within the meaning of section 280G of the Code, and that section 280G does not apply to any compensation payments received by employees or former employees of Target. The facts, as submitted, are set forth below.

Prior the merger described below, Company and Target were widely-held, publicly traded corporations. On Date B, Company, Target, and a newly-formed, wholly-owned subsidiary of Company, Merger Sub, entered into an Agreement and Plan of Merger (Agreement). Agreement provided for the acquisition of Target by Company in a transaction in which Merger Sub merged into Target, with Target continuing in existence following the merger. The merger was intended to be a tax-free reorganization under the Code. The Board of Directors of Company and Target unanimously approved the merger.

As a result of the merger, Target is a wholly-owned subsidiary of Company. On consummation of the merger on Date C, each outstanding share of Target common stock was converted into d shares (Exchange Ratio) of Company common stock. Accordingly, Target's common stock was de-listed from trading on the Exchange and under the Securities Exchange Act of 1934.

Also, on consummation of the merger, each outstanding and unexercised option to acquire shares of Target common stock was automatically converted into an option to purchase shares of Company common stock. In each case, the number of shares of Company common stock subject to the new Company option were equal to the product of the Exchange Ratio and the number of shares of Target common stock subject to such Target option.

Immediately prior to the merger, Company had approximately e outstanding shares of common stock and f options to purchase shares of Company common stock which were vested as of Date C. Immediately prior to the merger, Target had approximately g outstanding shares of common stock and h options to purchase shares of Target common stock which were vested as of Date C.

Immediately following the merger and taking into account the Exchange Ratio, the pre-merger shareholders, including options holders, of Company own approximately k% of Company and the pre-merger shareholders, including options holders, of Target own approximately m% of Company.

In connection with the merger, Company makes the following representations:

1. The pre-merger Company shareholders owned 20% or more of the total voting power of Company's stock immediately following the merger, and therefore, indirectly acquired ownership of 20% or more of the total voting power of

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Target's stock;

2. The pre-merger Company shareholders owned 50% or less of the total fair market value and total voting power of Company stock immediately following the merger, and therefore, indirectly acquired ownership of 50% or less of Target;
3. Immediately following the merger, the Board of Directors (BOD) of Company was increased from p to r members and is now comprised of the existing p directors of Company and s additional directors designated by Target. Target's Chairman and Chief Executive Officer is serving as Chairman of the BOD of Company after the merger;
4. The composition of Company's BOD following the merger was endorsed by a majority of both Company's and Target's pre-merger BOD;
5. The individual who served as Chairman, President, and Chief Executive Officer of Company continued as President and Chief Executive Officer of Company following the merger;
6. The charter and bylaws of Target in effect immediately prior to the merger remained the charter and bylaws of Target immediately after the merger;
7. To the best of Company's knowledge, no pre-merger shareholder of Company owned shares representing more than five percent of the voting power in Company (and indirectly of Target) immediately following the merger;
8. To the best of Company's knowledge, no pre-merger shareholder of Company had any agreement, written or unwritten, express or implied, to act in concert to control the management and policies of Company (and indirectly of Target) immediately following the merger;
9. To the best of Company's knowledge, there is no agreement binding any pre-merger Company shareholder to vote for a particular nominee to the Board of Directors of Target at any time following the merger; and
10. Pursuant to the terms of the various employment and/or severance agreements certain employees of Company and Target may receive payments as a result of the merger.

Section 280G of the Code provides that no deduction will be allowed for any excess parachute payment. Section 280G(b)(1) defines "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.

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Section 280G(b)(2)(A) of the Code defines “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 in the ownership or effective control of the corporation or 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 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 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, does not transfer power to control (directly or indirectly) the management and

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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).

Q&A 29 provides that a change in the ownership of a substantial portion of a corporation’s assets occurs on the date that 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) assets from the corporation that have a total fair market value equal to or more than one third of the total fair market value of all of the assets of the corporation immediately prior to such acquisition or acquisitions. For this purpose, a transfer of assets by a corporation is only treated as a change in the ownership of the assets if the corporation transfers the assets to an entity in which, immediately after the transfer, the shareholders of the corporation own a greater than 50 percent interest (by value or voting power). See Q&A 29(b) and Example (3) of Q&A 29(d). Q&A 29(c) contains the same language as Q&A 27(c) concerning the application of section 318(a).

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

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

The facts submitted, however, indicate that the Company shareholders will not act in a concerted way to control the management and policies of Target. The facts also indicate that post-merger board of directors of Target was endorsed by a majority of Target’s board of directors prior to the date of appointment.

Accordingly, based strictly on the information submitted and Company’s representations, we rule as follows:

1. Provided that after the merger the pre-merger shareholders of Company do not act in a concerted way to control the management and policies of Target, the merger of Merger Sub into Target did not cause a change in the ownership or effective control of Target, nor did it cause a change in the ownership of a substantial portion of Target’s assets within the meaning of section 280G of the

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Code;

2. The provisions of section 280G of the Code do not apply to any compensation payments that are received by employees or former employees of Target and its subsidiaries and that are contingent on the merger; and
3. The provisions of section 4999 of the Code do not apply to any compensation payments that are received by employees or former employees of Target and its subsidiaries and that are considered to be contingent on 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 above-described merger.

This ruling is directed only to the taxpayer(s) 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. 00-4, 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, copies of this letter are being sent to your authorized representatives.

Sincerely,  
Robert B. Misner  
Assistant Chief, Branch 4