

**Internal Revenue Service**

Department of the Treasury

Number: **200212013**  
Release Date: 3/22/2002  
Index Number: 280G.01-01

Washington, DC 20224

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Refer Reply To:  
CC:TEGE:EB:EC-PLR-135641-01  
Date:  
December 17, 2001

**LEGEND:**

- Company 1 =
- Company 2 =
- Plan =
- Year 1 =
- Year 2 =
- Year 3 =
- Year 4 =
- Date 1 =
- Date 2 =
- Date 3 =
- Date 4 =
- Date 5 =
- Date 6 =
- Date 7 =
- Date 8 =
- Date 9 =
- Date 10 =
- Date 11 =
- Date 12 =
- Date 13 =
- Date 14 =
- Amount 1 =

This is in reply to a request for a ruling on behalf of Company 1 and Company 2 concerning whether payments under the Plan are subject to the deduction limitations of section 280G and the excise tax under section 4999, both of the Internal Revenue Code.

Until recently, Company 1 was a publicly-held corporation. Company 2 is a holding company and the common parent of various subsidiary and affiliate companies.

Company 1 has financial hardship dating to sometime prior to Year 1.

, Company 1 began considering additional restructuring options sometime prior to Year 4.

Of the restructuring options considered, integrating Company 1's operations with those of Company 2 was seen as an attractive solution to Company 1's financial situation. To this end, Company 1 and Company 2 engaged in extensive negotiations. The negotiations were in good-faith and at arm's length, and they culminated with

The agreement between Company 1 and Company 2 contemplated that

. Company 1 managers were to receive employment offers on a case by case basis.

On Date 1, Company 1 petitioned a bankruptcy court for relief under Chapter 11 of the United States Bankruptcy Code. Company 1 sought and received court permission to operate as a debtor-in-possession.

On Date 2, Company 1 discovered that

On Date 3, Company 1 informed officials at the stock exchange where its stock was listed and traded about . However, Company 1 did assent to the issuance of a stop trading order on Company 1 stock.

On Date 5, the stock exchange informed Company 1 that it was proceeding to strike Company 1's stock from its listing and registration because Company 1 no longer satisfied the listing guidelines maintained by the exchange.

The Securities and Exchange Commission approved the de-listing application, and Company 1's stock was de-listed from the stock exchange on Date 7.

, Company 1's stock has not traded on any established securities exchange since the stock exchange issued its stop trading order on Date 4, and its stock has not been listed on any established securities exchange since it was de-listed on Date 7.

On Date 8, a creditors' committee was formed on behalf of Company 1's unsecured creditors. The creditors' committee retained legal counsel and financial advisors.

On Date 1, Company 1 filed a motion with the bankruptcy court seeking an order authorizing it to implement the Plan. You represent that implementation of the Plan was necessary because, among other things, a condition of the agreement between Company 1 and Company 2 required Company 1 to conduct its operations in substantially the same manner after petitioning the bankruptcy court as it did before, and that, given the complex and varying aspects of Company 1's business, such a condition could be satisfied only by stabilizing Company 1's key management force. The Plan was the means Company 1 used to accomplish this stabilization.

Company 1 developed the Plan with the assistance of its financial advisor. The Plan addressed Company 1's anticipated personnel needs during the bankruptcy proceedings and covered approximately key employees. You represent that the objectives of the plan were to (1) retain management employees essential to continuing operations, (2) establish a severance program to create a stronger sense of security through the bankruptcy proceedings, and (3) provide a success fee for key employees who remain with Company 1 through the completion of the sale.

The Plan consisted of a

On Date 9, the bankruptcy court conducted a hearing on Company 1's Date 1 motion requesting an order authorizing the implementation of the Plan. The hearing continued on Date 10. Counsel for the creditors' committee and the committee's financial advisors were present at the hearing. Counsel for other parties in interest also participated at the hearing.

The Plan's purpose, as well as its terms and mechanics, was detailed to the court at the hearing. Except for certain sealed documents, all documents considered by the bankruptcy court were available for public inspection. In response to comments made at and after the hearing, Company 1 modified various provisions of the Plan to reflect the concerns of participating parties in interest.

On Date 10, counsel for the creditors' committee told the bankruptcy court that the creditors' committee approved the Plan,

On Date 11, the bankruptcy court granted Company 1's Date 1 motion, authorizing it to implement the Plan.

On Date 12, Company 1's board of directors approved a recommendation to the bankruptcy court that Company 2

On Date 13, the bankruptcy court approved

On Date 14, Company 2, , purchased

Section 280G(a) 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 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 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(b)(5)(A) of the Code provides, in relevant part, that a parachute payment does not include any payment to a disqualified individual with respect to a corporation (other than a small business corporation as defined in section 1361(b) but without regard to paragraph (1)(C) thereof) if immediately before the change described in section 280G(b)(2)(A) no stock in such corporation was readily tradeable on an established securities market or otherwise, and the shareholder approval requirements of section 280G(b)(5)(B) are met with respect to such payment.

Section 280G(d)(5) of the Code provides that all members of the same affiliated group (as defined in section 1504, determined without regard to section 1504(b)) should be treated as one corporation for purposes of section 280G. Section 1.280G-1 of the Proposed Income Tax Regulations, Q&A 6, published in the Federal Register on May 5, 1989 (54 Fed. Reg. 19,390), provides that the affiliated group rule contained in section 280G(d)(5) applies for purposes of determining whether a corporation's stock was readily tradeable on an established securities market or otherwise immediately before the change described in section 280G(b)(2)(A).

Section 280G(b)(5)(B) of the Code provides that the shareholder approval requirements of Section 280G(b)(5) are met with respect to any payment if (i) such payment was approved by a vote of the persons who owned, immediately before the change described in section 280G(b)(2)(A)(i), more than 75 percent of the voting power of all outstanding stock of the corporation, and (ii) there was adequate disclosure to shareholders of all material facts concerning all payments which (but for this paragraph) would be parachute payments with respect to a disqualified individual.

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.

You acknowledge that the \_\_\_\_\_ transaction between Company 1 and Company 2 constitutes a change of ownership or control of Company 1 within the meaning of section 280G(b)(2)(A) of the Code. You also represent that no stock of any Company 1 affiliate was readily tradeable on an established securities market or otherwise immediately before that change in ownership or control.

Based on the above-described facts and representations, we rule as follows:

1. The change in ownership or control contemplated by section 280G(b)(2)(A) of the Code occurred on Date 14, the date Company 2

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2. Because the failing financial condition and pending bankruptcy of Company 1 caused its stock to be de-listed by the stock exchange, neither Company 1 nor any of its affiliate companies, immediately before the change in ownership or control, had any stock that was readily tradable on an established securities market or otherwise;

3. The shareholder approval requirements of section 280G(b)(5)(B) of the Code were satisfied upon the bankruptcy court's order approving the Plan because the creditors' committee and the bankruptcy judge represented the shareholders' interests and the shareholders were not otherwise eligible to approve the payments under the Plan;

4. Payments under the Plan are not parachute payments within the meaning of section 280G(b)(2)(A) of the Code; and

5. The provisions of section 4999 of the Code do not apply to any payments under the Plan.

Except as specifically ruled above, no opinion is expressed or implied concerning the tax consequences of any transaction or item discussed or referenced herein. 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.

Sincerely,  
Robert B. Misner  
Assistant Chief  
Executive Compensation Branch  
Office of the Division Counsel/Associate Chief Counsel  
(Tax Exempt and Government Entities)

Enclosure:

Copy for 6110 purposes