

Internal Revenue Service

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Date:

February 3, 2004

Corporation =

Date 1 =

Date 2 =

Date 3 =

Year 2 =

Year 3 =

Group A =

Group B =

Group C =

Dear :

This is in response to a letter dated September 12, 2003, submitted on behalf of Corporation by its authorized representative requesting rulings under section 280G of the Internal Revenue Code. Specifically, rulings are requested that, under the facts outlined below, there was no change in effective control and that certain payments were therefore not subject to section 280G of the Code.

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The facts, as submitted, are as follows. On Date 1, Group A threatened a proxy contest to unseat the incumbent members of Corporation's board of directors. In exchange for Group A's agreement not to nominate or proposed to nominate directors at the annual shareholder meeting for that year, Corporation agreed to reduce the size of the board from fifteen to 9 members by the shareholders annual meeting occurring two years later in Year 3. The reduction was to be accomplished by reducing to three the number of board members elected at each meeting until Year 3.

Prior to the Year 2 shareholders meeting, the board, due to the death of one of its members, consisted of 14 members. Group B opposed the directors nominees selected by the incumbent board and commenced a proxy contest with respect to the Year 2 meeting. Group B nominated three directors who were elected to the board at the Year 2 meeting. The Inspectors Report certifying the election of these directors was issued on Date 2. The proxy statement for Group B indicated that, except for the members of the group, Group B did not enter into any contracts, arrangements, or understandings within the past year with any person with respect to Corporation's shares including joint ventures, loan or option arrangements, puts or calls, guarantees against or division of loss or profit, or giving or withholding proxies.

In connection with the Year 3 annual shareholder meeting, a proxy context was commenced by Group C. Group C proposed the election of three directors. These directors were elected at the meeting and the results were certified by the Inspectors Report on Date 3. The Year 3 annual meeting occurred within 12 months of the anniversary of the Year 2 meeting.

Group C did not own any stock of Corporation at the time of the Year 3 meeting. Group C did not enter into any agreements with members of Group B. Group C did not enter into any contracts, arrangements, or understandings within the prior year with any person with respect to Corporation's shares including joint ventures, loan or option arrangements, puts or calls, guarantees against or division of loss or profit, or giving or withholding proxies (other than with Group C).

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.

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

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(or for the benefit of) such individual which are contingent on such change equals of 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 nondeductible excise tax equal to 20 percent of the amount of the payment.

For the years in issue, 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 control.

Q/A-28(a)(2) provides that a change of effective control of a corporation is presumed to occur on the date that 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 policies of the corporation from any one person (or more than one person acting as a group) to another person (or group).

According to Q/A-28(b), the presumption of Q/A-28(a) may be rebutted by establishing that the replacement of the majority of the corporation's board of directors does not transfer the power to control (directly or indirectly) the management or policies of the corporation from any one person (or more than one person acting as a group) to another person (or group).

By Year 3, the board of directors consisted of nine individuals. During the preceding 12 months, a majority of those nine directors were replaced. Thus, there is a presumption of a change in effective control of Corporation. However, the proxy contests that elected these directors were brought by two distinct and unrelated groups in Years 2 and 3 and the replacement of the majority of the members of the board of directors did not transfer power to control (directly or indirectly) the management and policies from any one person (or more than one person acting as a group) to another person (or group). Based on these facts, the presumption is rebutted, and there is no change in effective control of Corporation.

Based solely on the information and representations made by Corporation, we rule as follows:

1. The election of the directors at the Year 2 meeting and the election of the directors at the Year 3 meeting did not constitute a change in the ownership or effective control of Corporation within the meaning of section 280G(b)(2)(A)(i)(I)

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of the Code, and consequently, Corporation has not made a parachute payment to any disqualified individual.

2. The provisions of section 280G do not apply to any payments received by the executives of Corporation following the election of the Year 2 directors and Year 3 directors.

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.

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling were not adopted for the year in issue. Therefore, this ruling may be modified or revoked by the adoption of the final regulations, to the extent the regulations are inconsistent with any conclusion in the letter ruling. See section 12.04 of Rev. Proc. 03-1, 2003-1 I.R.B. 747 (or its successor). However, when the criteria in section 12.05 of Rev. Proc. 03-1 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

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,

Robert B. Misner
Senior Technician Reviewer
Office of Executive Compensation Branch
(Tax Exempt and Government Entities),
CC:TEGE:EB:EC

cc: Copy for 6110 purposes