

Internal Revenue Service

Department of the Treasury

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November 28, 2000.

LEGEND:

Corporation =

Exchange =

a =

b =

Date 1 =

c =

d =

Corporation E =

Holding Corporation =

Acquisition Corporation 1 =

Acquisition Corporation 2 =

f =

g =

h =

i =

k =

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m% =n% =\$P =\$Q =r =s =t =

This letter is in response to the letter dated August 14, 2000, submitted by your authorized representative requesting rulings under section 280G of the Internal Revenue Code. Specifically, the letter requests rulings that, under the facts outlined below, the merger will not cause a change in ownership or effective control of Corporation; the merger will not cause a change in a substantial portion of Corporation's assets; and the provisions of sections 280G and 4999 of the Code will not apply to payments that are contingent on the merger.

Corporation's stock is publicly held and actively traded on Exchange.

The authorized capital of Corporation consists of a shares of common stock, of which b shares were issued and outstanding as of Date 1, with outstanding options to acquire c shares of common stock, and d shares of preferred stock, none of which were issued and outstanding.

Corporation E's stock is also publicly held and actively traded on Exchange. As of Date 1, the authorized capital of Corporation E consists of f shares of common stock, of which g were issued and outstanding, with additional options to acquire h shares of Corporation E common stock outstanding.

Half of the outstanding capital stock of Holding Corporation is owned by Corporation and half of the outstanding capital stock of Holding Corporation is owned by Corporation E.

Acquisition Corporation 1 and Acquisition Corporation 2 are wholly owned subsidiaries of Holding Corporation.

Corporation, Corporation E, Holding Corporation, Acquisition Corporation 1, and

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Acquisition Corporation 2 have entered into an Agreement and Plan of Merger (Agreement) dated as of Date 1. Agreement contemplates that Acquisition Corporation 1 will merge with and into Corporation and that Acquisition Corporation 2 will merge with and into Corporation E. Pursuant to the merger, each share of common stock of Corporation will be converted into the right to receive i shares of common stock of Holding Corporation, and each share of common stock of Corporation E will be converted into the right to receive k shares of Holding Corporation.

As a result of the merger and related stock transaction, former shareholders of Corporation will hold approximately m% of Holding Corporation, a greater than 50% interest, and the former shareholders of Corporation E will hold approximately n% of Holding Corporation (based on the number of common shares currently outstanding).

Corporation and Corporation E have agreed to use commercially reasonable efforts to repurchase common stock for consideration of \$P and \$Q, respectively, prior to the consummation of the merger. It is not expected that this repurchase will affect the percentages discussed in the above paragraph.

Following the merger, the Board of Directors of Holding Corporation will consist of r members, s of which will be former Corporation directors and t of which will be former Corporation E directors. The Chairman of the Board of Corporation will serve as the chairman of the Board of Directors of Holding Corporation.

Corporation is unaware of any agreements among the Corporation E shareholders to act in a concerted way to control the management and policies of Holding Corporation.

Corporation previously entered into employment agreements with certain employees. These employment agreements provide certain compensation and benefits following a termination of employment coincident with or related to the occurrence of a change in control, as defined in the various employment agreements.

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 (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.

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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 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.

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

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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).

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 not 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).

As a result of the merger, Corporation will surrender potential ownership and control when it issues its stock to Holding Corporation for issuance of Holding Corporation stock to Corporation shareholders. However, Corporation shareholders will receive greater than 50% of the total fair market value and voting power of outstanding Holding Corporation stock. Because Corporation shareholders will acquire sufficient stock value and voting power due to the merger, no change in ownership of Corporation will occur under Q&A 27.

Also, as a result of the merger, Corporation E’s stock will be transferred to Holding Corporation in consideration for the issuance of Holding Corporation stock to Corporation E shareholders. This will result in Corporation E shareholders receiving a greater than 20% voting interest in Holding Corporation (and, indirectly in Corporation). Thus, under Q&A 28 it is presumed that Corporation will experience an effective change in control.

The presumption of an effective change in control is rebutted by the facts of the merger as the merger will not transfer the power to control (directly or indirectly) the management and policies of Corporation to another person or group. The facts submitted indicate that Corporation E shareholders will not act in a concerted way to control the management and policies of Holding Corporation or Corporation after the merger. The facts also indicate that the composition of the post-merger board was agreed upon by both Corporation and Corporation E pursuant to Agreement.

No change in the ownership of a substantial portion of the assets of Corporation is contemplated as a result of the merger.

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

1. Provided that after the merger the shareholders of Corporation E do not act in a concerted way to control the management and policies of Holding Corporation, the merger will not cause a change in the effective control of Corporation within the meaning of section 280G(b)(2)(A)(i)(I) of the Code. Also, the merger will not cause a change in ownership or a change in the ownership of a substantial portion of Corporation's assets within the meaning of section 280G(b)(2)(A)(i)(I) and (II);
2. The provisions of section 280G of the Code do not apply to any payments received by employees or former employees of Corporation and its subsidiaries that are contingent upon the merger; and
3. The provisions of section 4999 of the Code do not apply to any payments that are received by employees or former employees of Corporation 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 above.

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.

Sincerely,

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

Enclosure: Copy for 6110 purposes