

Internal Revenue Service

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Washington, DC 20224

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Date:

April 07, 2004

Corporation =

Date 1 =

Date 2 =

Year 3 =

Date 4 =

Year 5 =

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This is in response to a request dated November 7, 2003, submitted on behalf of Corporation by its authorized representative requesting a ruling under section 280G of the Internal Revenue Code. Specifically, a ruling is requested that certain amounts were included in the base amount for purposes of determining whether Corporation is subject to any deduction limit under section 280G of the Code and whether the participants are subject to an excise tax under section 4999.

Corporation will be acquired in a reverse merger. The merger will close no sooner than Date 1 of Year 5. As a result of the merger, pursuant to the terms of the employment agreements between certain executives and Corporation, certain employees will receive severance pay. Additionally, in the event all conditions to closing the merger have been satisfied during Year 3, then Corporation will pay the severance on Date 2 of Year 3. In addition, pursuant to the terms of the executive salary continuation agreements (SCA), executives are entitled to amounts payable on the participant's retirement or separation from service. Several of the SCA's were

amended effective Date 4, to provide that Corporation may make a payment at any time up to Date 2 in full and complete satisfaction of Corporation's obligations under the SCA's. Payments made under the employment agreements or SCA's are collectively referred to as "accelerated payments." In the event the accelerated payments are made in Year 3, the executives will not be required to return the accelerated payments under any circumstance, including termination of the merger.

The accelerated payments will be reported on each executive's Year 3 Form W-2 and applicable income and FICA tax will be withheld from such payments. Assuming the merger is completed, Corporation agrees that the payments are payments in the nature of compensation to (or for the benefit of) a disqualified individual, and such payments are contingent on a change in the ownership or effective control of Corporation within the meaning of section 280G(b)(2)(A)(i)(I).

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)(3) of the Code defines "base amount" as the individual's annualized includible compensation for the base period. Under section 280G(d)(2), the "base period" is the period consisting of the most recent 5 taxable years ending before the date on which the change in ownership or control occurs.

For the year in issue, section 1.280G-1 of the Proposed Income Tax Regulations, Q/A-34, published in the Federal Register on August 4, 2003 (68 Fed. Reg. 45,745), provides guidance concerning the definition of "base amount."

Q/A-34(a) defines the "base amount" as the average annual compensation (as defined in Q/A-21) which was includible in the gross income of such individual for taxable years in the "base period." Q/A-34(c) provides that because the base amount includes only compensation that is includible in gross income, the base amount does not include certain items that constitute parachute payments. For example, payments in the form of untaxed fringe benefits are not included in the base amount, but may be treated as parachute payments.

Based solely on the information and representations made by Corporation, we rule that the accelerated payments are included in the base amount under section 280G of the Code for the purpose of determining whether Corporation is subject to any deduction limit under section 280G, and whether the participants are subject to an excise tax under section 4999.

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.

Except as expressly provided herein, 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(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached 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,

Robert B. Misner
Senior Technician Reviewer
Office of Executive Compensation Branch

Office of the Division Counsel/Associate
Chief Counsel (Tax Exempt & Government
Entities)

cc: Copy for 6110 purposes