# When Parachutes Cross the Border – International Aspects of Section 280G

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Today more than ever, advisors are faced with the consequences of applying the Code to international transactions.[1] Quite frequently, the application of the Code to international transactions is ripe with unanswered questions and tentative conclusions. In this respect, one area that is commonly over-looked with respect to its international significance is Section 280G ("Section 280G" or the "golden parachute rules").

Section 280G is a common subject for United States employee benefit and executive compensation attorneys. Yet, in the context of international mergers and acquisitions it is not uncommon for international counsel (and domestic counsel) to be unaware of the implications of the golden parachute rules to foreign corporations and foreign taxpayers. For example, deal advisors often ask whether the residency of an executive will affect the private shareholder vote, or; why does a French company acquiring a South African corporation need to consider Section 280G? This and a number of other considerations and questions, are relevant even for foreign corporations.

Without exploring the nuances of the Code and regulations with respect to Section 280G, it would seem logical to conclude that it would not apply in the international context.[2] Nevertheless, this is not how Section 280G works. Instead, Section 280G applies in the context of a foreign corporation acquiring or merging with another foreign corporation, without the need for a domestic intermediary, other than an individual subject to income taxation in the U.S.

This column discusses the implications of Section 280G in the context of international mergers and acquisitions, with special attention paid to the practical considerations for employers, advisors, and disqualified individuals.

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1 Transaction for purposes of this article, refers to any event that triggers a parachute payment according to Section 280G(b)(2)(A)(i)(I-II).

2 This article assumes that the reader has a general knowledge of Section 280G.

## Background

Section 280G was added to the Code in 1984, in response to the perceived abuse of executive change-in-control payments in the context of corporate acquisitions. At the time of enactment, the focus of Section 280G was to provide an impediment to excessive executive payouts in the context of a transaction, in order to protect minority shareholders from corporate abuse (perceived or real). To accomplish this intent, Congress used Section 280G and Section 4999. Section 280G applies the basic framework underlying the golden parachute rules, including the loss of a corporate deduction for excess parachute payments.[3] However, Section 280G works in tandem with Section 4999 — which provides for a special 20% excise tax on excess parachute payments. It is within this framework that the golden parachute rules operate to disincent companies/executives from paying "excessive" payments to their disqualified individual population. The effectiveness of this rule, is debatable—given that it was originally intended to protect shareholders.[4] However, given the current political climate, it appears that the golden parachute rules will be here for the foreseeable future.

In 2003, the IRS issued final regulations under Section 280G and Section 4999. These regulations offered much needed guidance on the specifics of the golden parachute rules. However, the regulations offered little comfort for international corporations. Below is a general discussion of the key aspects of dealing with Section 280G in the international context, traps for the unwary, and key considerations to mitigate or avoid common mistakes.

## Section 280G and Foreign Corporations

The first question that advisors often receive from clients in the international context of Section 280G, is whether the golden parachute rules apply to foreign corporations. Unfortunately, the answer is that foreign corporations are not specifically excluded from the application of Section 280G, for a variety of policy and practical reasons. Expressly, Section 280G(b)(2) indicates that Section 280G applies to "corporations." The Section 280G regulations clarify the meaning of the term "corporation" to include ". . . a foreign corporation as defined under Code Section 7701(a)(5)."[5] Neither the Code nor the regulations provide for any relief for foreign corporations in this context. Thus, regardless of the location of the transaction, Section 280G could be a concern (subject to the existence of a U.S. taxpayer as discussed below).

The motivation behind the broad inclusion of any corporation, regardless of jurisdiction or residence, is to avoid companies structuring transactions outside the reach of Section 280G, by using offshore vehicles to conduct

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3 "Excess parachute payments" refers to the definition in Section 280G(b). Generally, the term "excess parachute payments" is defined to mean any amount over a disqualified individual's one-times base amount.

4 Because of the loss of a corporate deduction on excess parachute payments, Section 280G has the additional effect of penalizing shareholders. Further, because of the excise tax under Section 4999, numerous companies pay excise tax-gross ups, resulting in large additional payments to disqualified individuals with the intent of making the disqualified individual whole. However, recent policies implemented in the last several years by shareholder rights groups, have penalized companies for the inclusion of tax-gross ups within change-in-control agreements, by withholding votes for management. Nevertheless, within the private company sphere, and historical change-in-control agreements, the phenomenon still exists.

5 Reg. 1.280G-1, Q&A 45.

acquisitions. However, regardless of the rationale, the expansive definition of corporation can catch advisors and corporate officers off-guard.

## Section 280G and Foreign Taxpayers

The second ingredient in order for Section 280G to apply within a foreign transaction, is found within the meaning of disqualified individual, as discussed below. The term "disqualified individual" as defined in Section 280G(c), does not exclude non-resident aliens, or U.S. resident aliens. Rather, it is silent with respect to the citizenship or residency of the individual. Nevertheless, in order to be subject to U.S. taxation, an individual would need to be a citizen or resident alien of the United States. With respect to being a resident alien, this can be in the context of being a "green-card" holder (i.e., permanent resident) or tax-resident based on Section 7701(b) and the so-called "substantial presence test." Consequently, where an individual is a U.S. resident alien, the golden parachute rules may apply, depending on the circumstances of the transaction.

For U.S. resident aliens, the application of the golden parachute rules is just as common as the applicability to U.S. citizens.

To illustrate, imagine a United Kingdom based corporation that is in talks to acquire a Belgium based corporation. The CFO of the Belgian corporation is a U.S. tax-resident by virtue of being a green-card holder, because of a previous job as a CFO of a U.S. corporation. If the CFO has a change-in-control agreement (or will have substantial equity accelerated in the transaction) that is triggered upon the acquisition by the United Kingdom based corporation, he will be subject to potential Section 280G liability in the U.S., to the extent the CFO has excess parachute payments.[6]

What this example is intended to illustrate is that, regardless of the residence of the corporation, the mere employment of a U.S. tax resident (who happens to be a disqualified individual) could potentially trigger the application of the golden parachute rules.

Conversely, non-resident aliens will not be subject to Section 280G unless parachute payments received by the non-resident alien are classified as U.S. source income. [7]

The issue of whether a non-resident alien should be subject to Section 280G was presented to the IRS during the comment period for the final Section 280G regulations. Specifically, the preamble to the 2003 final regulations provides the following:

> Commentators recommended that the final regulations provide that a disqualified individual who, during the disqualified individual determination period, was a non-resident alien and was not subject to income tax in the U.S. on wages earned from the affiliated group, not be subject to the excise tax. Treasury and the IRS do not believe that they have the authority to preclude application of the excise tax to a non-resident alien under these circumstances. Accordingly, the

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6 This analysis does not consider the effects of the CFO claiming a foreign tax credit with respect to foreign taxes paid in Belgian. However, it is worth noting, that the CFO will likely be able to offset a portion of the U.S. tax liability by claiming foreign tax credits.

7 U.S. source income will generally arise from payments that are for services performed within the U.S. This article does not consider the application of income tax treaties (i.e., bi-lateral negotiated treaties) on payments to residents of another country.

> final regulations do not include any special rules for excess parachute payments received by non-resident aliens.[8]

As the above quote illustrates, non-resident aliens are not specifically excluded from Section 280G. Thus, rather than determining immediately that any non-resident alien is not subject to Section 280G, it is worth first considering the source of the payments. Non- resident aliens can be subject to Section 280G in a variety of circumstances, the most obvious being where the payment of the compensation derives from services performed in the U.S. For executives that have multinational ties, but are not citizens of the U.S., this could be more common than currently recognized. Thus, before dismissing the application of Section 280G to a non-resident alien, first consider the source of the payments.

As indicated the Code does not make any special mention of disqualified individual status applying only to U.S. citizens or resident aliens. Rather, the term disqualified individuals is silent on the applicability by residence. Thus, it would appear that the term disqualified individuals is drafted in a manner to take into account all individuals meeting the above criteria, without reference to nationality.

This definition can have broad implications in the international context. For example, as discussed in more detail below, disqualified individuals are generally excluded from the private shareholder vote (necessary to obtain an exemption from the excise taxes owed on parachute payments). This means that foreign shareholders who will not be subject to Section 280G because they are not U.S. taxpayers, will still be required to abstain from voting for purposes of the private shareholder vote. Thus, the reach of Section 280G, can extend beyond just U.S. taxpayers or individuals receiving U.S. source income.

## Private Company Shareholder Vote

A commonly used (and welcomed) exemption from Section 280G allows shareholders of a privately held corporation to vote to exempt excess parachute payments from the reach of Section 280G.[9] To gain the benefits of this exemption, a series of requirements must be satisfied. The key requirement in this discussion is that the excess parachute payments must be voted on by ". . .more than 75 percent of the voting power of all outstanding stock of the corporation entitled to vote. . .immediately before the change in ownership or control…"[10]

This raises the question of which shareholders are entitled to vote in order to comprise the 75% of all outstanding stock. At first glance, it would appear all shareholders, by reference to the "all outstanding stock." But, according to the regulations, stock is not outstanding where it is owned by a disqualified individual who will receive a payment that is characterized as a parachute payment, but for the shareholder vote (unless all shareholders are disqualified individuals).[11]

In the international context, this rule has a strange application. For example, the rule acts to prevent a non-resident alien employee- shareholder of a

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8 TD 9083, 8/2/03, section 3.

9 Section 280G(b)(5)(A)(ii).

10 Reg. 1.280G-1, Q&A-7(a)(1).

11 Reg. 1.280G-1, Q&A-7(b)(4).

foreign privately held corporation from voting on the exemption of payments for other disqualified employees, even where that employee might not be concerned with application of Section 280G on an individual basis (i.e., the foreign individual's payments will never be at risk, as he or she is not subject to Section 280G as a non-resident alien). This results from the fact that non-resident aliens are not exempted from the definition of disqualified individuals.

From a policy perspective, this rule was created (not allowing disqualified individuals to vote) to eliminate anyone that might have a bias for approving the payments. In the example above, the individual is excluded from voting, but clearly does not possess any unusual bias, as Section 280G is outside the shareholder's purview. Of course, the argument could be made that the individual has a bias, if that individual originally approved the payments as an executive of the corporation. However, if the individual represents the true voting power of the corporation by virtue of his or her ownership, this argument is a slippery slope—as a minority shareholder by design is generally not able to control the affairs of a corporation.

This strange application was presented to the IRS during the comment period before the adoption of the Section 280G final regulations. Nonetheless, the IRS did not take action to prevent the inconsistency. While not directly addressing this point, the final regulations do provide (as the quote above illustrates) unequivocally that a non-resident alien disqualified individual is not afforded any relief, regardless if Section 280G is outside of reach.

If this situation arises in the context of a privately held corporation, there is the probability that this rule could exclude a shareholder with significant voting power from participating in the vote, resulting in a skewed representation of the voting power of the company (i.e., a minority shareholder becomes a majority shareholder for purposes of the private shareholder vote). Unfortunately, there does not appear to be a clear mechanism to reduce the chances of this from occurring. Nor does the IRS seem eager to provide relief.

## Common Solutions for Excise Tax Situations

As is the common theme of this column, Section 280G considerations are often an after-thought in the international deal context. Therefore, the common Section 280G mitigation techniques are not often utilized to alleviate or reduce an excise tax situation. For example, a common mitigation technique is having an executive of a takeover target increase his or her base amount, by exercising options or selling restricted stock units in the years before a transaction. Further, the inclusion of payments under a non-compete agreement, instead of a change-in-control agreement, pre-transaction are difficult in retrospect to mitigate Section 280G consequences.

By not performing any pre-transaction mitigation, international corporations may be at a disadvantage compared with domestic corporations.[12] Further,

[12] The disadvantage refers to the international corporation's employment of U.S. citizens or resident aliens who are subject to U.S. income taxation. Thus, in the race for talent, the cost of employing a U.S. citizen or resident alien is higher for companies in the international context, by virtue of not being aware of the reach of Section 280G or even its application. This real cost of employment, might present itself in the form of a tax-gross up or loss of a deduction for a U.S. subsidiary. This is not surprising, given that it is virtually impossible for a company to be aware of every foreign jurisdiction's tax rules that may affect the corporation.

international corporations are often left with the least desirable Section 280G save; paying a tax-gross-up to disqualified individuals. Tax-gross-ups result in the payment of the taxes due on excess parachute payments. This operates to penalize ordinary shareholders by potentially removing deal consideration from the calculation of the deal price. Further, tax-gross ups (depending on the size) can provide cash uncertainty in the midst of the deal context.[13] Of course, depending on the size of the gross- up, the effects may be minimal. In order to minimize the effects of a large payment, a cut-back in payments could be implemented. Of course this brings with it other concerns with respect to employee consent, relations, and Section 409A.

For privately held corporations, the common solution is the private company shareholder vote, as discussed above. However, for publicly traded corporations, this exemption will not be available, resulting in the likely use of a tax-gross up, or making the decision that the executives will bear the brunt of the excise tax liability (or using a modified cut-back strategy).

Regardless of the technique, in the international transaction context, Section 280G if often additionally burdensome, based on the lack of awareness and nature of a foreign tax code being an after-thought.

## Information Reporting and Withholding in Context of Section 280G

Where a U.S. taxpayer is subject to excise tax (i.e., owes the 20% excise tax, in addition to federal income taxes on the parachute payments) what is required of a foreign corporation with respect to information reporting or income tax withholding? Is income tax withholding required; does the foreign corporation need to prepare a Form W-2?

What if the disqualified individual has not received a Form W-2 for the last five-years, how does a company compute the base amount for determining excise tax liability? These are the types of questions that are often overlooked in the deal context, but are questions commonly faced by corporations undergoing a change-in-control.

## Foreign Employer Tax Withholding

Generally, foreign employers must withhold income tax on compensation paid to U.S. tax residents to the extent the compensation paid is considered "wages" under the Code.[14] Generally, parachute payments in the nature of compensation are taxable as income to employees under Section 61 and subject to income tax withholding and reporting by a disqualified individual's employer. Further, excise taxes imposed on excess parachute payments may also be subject to withholding by the employer. Thus, a foreign employer may be obligated to withhold income tax on parachute payments and withhold for the 20% excise tax imposed under Section 4999 if the parachute payments are considered wages under Section 3401.[15] The term

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[13] In some transactions, a tax-gross up can result in a substantial cash expense for a company. It is not unheard of within a transaction for the costs of a tax-gross up, in addition to the payment of change-in-control payments to approach 1%-10% of a company's deal price.

[14] Section 3402(a)(1).

[15] Section 4999(c)(1) (requiring employers to withhold for the excise tax if the excess parachute payment is considered wages under Section 3401).

"wages" is defined in Section 3401(a) as, ". . .all remuneration. . .for services performed by an employee for his employer."

It is a settled point of tax law that the location of the services is not relevant to the income tax withholding obligation by the employer, nor is the employer's nationality.[16] Thus, where the "excess parachute payments" are considered wages under Section 3401(a), a foreign employer may be subject to an income tax withholding obligation. This can be a difficult position for a foreign employer, given that they are not likely to have the infrastructure in place to facilitate U.S. income tax withholding. Nor are they likely to have the institutional knowledge to provide payroll reporting and remittance of income taxes. Exceptions to the general rule of income tax withholding on wages, may be available depending on the facts and circumstances. However, whether these exceptions apply in the context of parachute payments is uncertain.[17]

The Code provides an exception from income tax withholding where an employee's compensation is subject to foreign income tax withholding.[18] Further, an exception is afforded where an employee does not anticipate a U.S. income tax liability for the current year (and had no U.S. income tax liability in the preceding year).[19] In addition, there are a mixture of other exceptions that may be applicable to relieve a foreign employer's income tax withholding obligation with respect to compensation paid to a U.S. tax resident.[20] However, depending on the nature of the taxpayer's connection to the U.S. some of the exceptions may not be available.[21] Further, depending on the characterization of the parachute payment as wages, withholding for excise taxes may or may not be required.[22]

For Section 280G purposes, if the excess parachute payments are considered wages, it will be imperative for a foreign employer to determine if it has an income tax withholding or excise tax withholding obligation. If an obligation exists, the foreign employer will need to explore whether any of the particular exceptions to the general rule fit the circumstances at hand and whether those exceptions apply in the context of excess parachute payments. Therefore, it is important to have a full-picture of the facts surrounding the payment, before drawing any conclusions (especially considering the penalties and interest that may be applied by the IRS).

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16 Reg. 31.3401(a)-1(b)(7).

17 Guidance is not entirely clear whether excise taxes must be withheld on excess parachute payments that are not considered wages under Section 3401. The argument that the 20% excise tax must still be withheld by an employer, even where the parachute payments are not wages, is based on language in Section 4999(c)(1), which seems to indicate that a determination of the excess parachute payments as wages is not central to the determination of withholding for the excise taxes.

18 Section 3401(a)(8)(ii).

19 Section 3402(n).

20 Moreover, if the payments are in excess of $1 million and are considered supplemental wages, certain exceptions to income tax withholding for the foreign employer may not be applicable.

21 For example, the foreign income tax withholding exception under Section 3401(a)(8)(ii) is not applicable to individual's subject to taxation in the U.S. based on permanent residence status (i.e., green-card holders). However, it is worth noting that a bi-lateral income tax treaty may trump the effects of the Code where they contrast. For example, Article 24 of the Model U.S. Income Tax Treaty arguably allows for nondiscrimination with respect to green card holders and U.S. citizens, and the associated tax withholding obligations.

22 See *supra* note 17.

Even where a foreign employer does not have an income tax withholding obligation, it is possible that the foreign employer could have an information reporting obligation for U.S. tax purposes.

## Information Reporting (Form W-2)

As mentioned, it is possible for a foreign employer to have a U.S. information reporting obligation with respect to parachute payments even where the foreign employer is not required to withhold income taxes. This can happen if the foreign employer has a FICA obligation with respect to a U.S. taxpayer's wages or where an exemption from income tax withholding is claimed, but the income exclusion under Section 61 is not substantially certain (e.g., where relief from income tax withholding is based on anticipated personal exemptions on Form W-4).[23]

For information reporting triggered by an obligation to withhold FICA taxes, peculiar results can occur, because excess parachute payments will generally be above the FICA wage base.[24] Thus, even though the excess parachute payments may not be subject to the largest part of FICA taxation (i.e., the current 4.2% Social Security charge for both the employee and the employer), the fact that the wages of the individual are subject to the Medicare portion of FICA (i.e., 1.45% employer and employee charges), the Medicare obligation can create an information reporting obligation for a foreign employer.

As indicated, generally, an annual Form W-2 must be furnished to all employees whose remuneration is subject to FICA or income tax withholding (or would have been subject to withholding but for Section 3402(n), or otherwise).[25] Thus, if a foreign employer is required to withhold and pay FICA taxes on behalf of a U.S. taxpayer, based on change-in-control payments or otherwise, the employer may be required to comply with the Form W-2 reporting requirements (generally and specifically for Section 280G).

Likewise, if a foreign employer claims an exemption from income tax withholding for the employee's wages, but the employee may still be subject to income inclusion under Section 61, information reporting may be a conservative (but appropriate) position.[26]

With respect to golden parachute payments and Form W-2, an employer will need to report not just the payments that trigger the Section 280G liability as income, but also the corresponding excise tax on any excess parachute payments (i.e., the 20% excise tax). The instructions to Form W-2 require reporting of the excise tax on Form W-2, Box 12, using Code K.[27]

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23 See Section 3402(n) and Section 6501(a). Please note, that an employer may also claim an exemption from income tax withholding under Section 911; however, information reporting may still be applicable because of the possibility that the employee may not satisfy the Section 911 exclusion requirements.

24 Meaning that the mere payment of parachute payments will not trigger the FICA obligation unless the individual does not have any other compensation for the year, or has compensation below the FICA wage base.

25 *Id*.

26 See *supra* note 18. The mere fact that the employee may have to include the wages in income, subject to meeting a variety of statutory requirements (i.e., the **Section 911** exclusion) may warrant information return reporting for the employer.

27 Reporting on Form W-2, Box 12, using Code K, is generally applicable even if the parachute payments are not considered wages. However, this is not entirely settled. The

Nevertheless, the foreign employer may be able to delegate the Form W-2 responsibility to a U.S. entity (or payroll provider) to the extent a U.S. entity exists. However, the instructions to Form W-2 indicate that, "[u]se of a reporting agent or other third-party payroll service provider does not relieve an employer of the responsibility to ensure that [Form] W-2 [is] furnished to employees and that [Form] W-2 [is] filed with the [Social Security Administration], correctly and on time."[28] Thus, a foreign employer should take care to monitor that the obligation is being discharged appropriately and timely to avoid the assessment of penalties.

## Determining the Employee's Base Amount

A key component in determining if Section 280G liability exists is by quantifying a disqualified individual's "base amount" to determine if the excess parachute payments equal or exceed three-times the base amount.[29]

Generally, in quantifying the base amount, an employee's Box 1, W-2 wages for the previous five-years are used to determine the base amount.[30] However, in the international context, if a foreign employer is not subject to information reporting (because of a totalization agreement or otherwise) historical Form W-2s may not be available. In this situation, it is important to note that Section 280G does not require the computation of the base amount based on Box 1, Form W-2. Rather, Section 280G defines the base amount, as ". . .the individual's annualized includible compensation for the base period."[31] The regulations do not make mention of Form W-2 in computing the base amount. Thus, in order to determine the base amount, a foreign employer, will be required to back into the "base amount" without the assistance or crutch of the Box 1 wages on Form W-2.

Further, in order to complicate matters, the regulations provide that the base amount should include ". . .amounts that were excluded under [Code] [S]ection 911. . .or which would have been includible in such gross income if such person had been a [U.S.] citizen or resident. . ."[32] This can result in an administrative nightmare for foreign employers undergoing a change in control, as it requires substantial employee cooperation to gather the necessary documents to determine whether an excise tax liability exists. In the international context, however, employers may not be as worried to have employees produce the documents, as the loss of a corporate tax deduction (as briefly discussed below) is not a concern of the foreign employer.

## Loss of the Deduction

One area in which international companies may not experience the deterrent effect of Section 280G, is with respect to the loss of a corporate tax deduction.[33] The general rule of Section 280G is that the disqualified

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excise tax, if wages, must also be reported in the applicable income and withholding portions of the form.

28 See Page 3 of 25, of the 2012 General Instructions to IRS Forms W-2 and W-3.

29 Section 280G(b)(3) and Reg. 1.280G-1, Q&A 34(a) and 35(a).

30 *Id*.

31 Section 280G(b)(3).

32 Reg. 1.280G-1, Q&A 34(a).

33 Recall that Section 280G(a) disallows a corporate tax deduction for any excess parachute payments.

individual is subject to a 20% excise tax on excess parachute payments, and that the corporation loses a deduction with respect to the excess parachute payments. However, in the international context, the foreign corporation would not lose the compensatory deduction (to the extent one previously existed under local law), assuming the foreign corporation is not subject to U.S. taxation. Therefore, the consideration of a tax deduction is not a concern for foreign employers who do not have a taxable presence in the U.S.

The result of this is that employees subject to Section 280G may find that their employers are indifferent to the potential Section 280G exposure. Many U.S. corporations often handle Section 280G by hiring advisors and legal experts to provide pertinent advise, prepare the calculations to substantiate the compensatory deduction (and determine if the executive owes excise tax), along with the preparation of legal documents to effectuate planning or the private shareholder vote. In the international arena, a foreign employer will generally be reluctant to spend substantial resources on compliance with Section 280G, unless they have a broad executive population potentially subject to excise tax liability (or they have a high ranking executive being pulled into the fray).

On the other hand, the buyer in a transaction, may wish to engage in a careful analysis of the potential executive payments, including the potential excise tax liability in determining the acquisition price (or in determining the cost-benefit of retaining executives versus providing a tax-gross up). Regardless, it is apparent that employees face an additional hurdle based on the operation of the golden parachute rules to foreign employers.

## Summary

As discussed throughout the column, there is a broad range of considerations for foreign employers, U.S. tax residents employed by foreign employers, and deal advisors in the context of international corporate acquisitions. Some of these considerations have the ability to reduce transaction costs, and increase the deal price, however, incrementally.

At this point it is now apparent that foreign corporations can be subject to Section 280G, depending on the circumstances involved, and that there are a few important issues to monitor in advising corporations in this area. Going-forward, a prudent approach for foreign employers with U.S. taxpayers is to take a current look at change-in-control arrangements to minimize the application of the golden parachute rules. Additionally, a foreign employer should consider the effects of Section 280G when implementing any benefit with a change-in-control trigger.

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