

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:

Telephone Number:

Refer Reply To:
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Date:

In Re:

February 22, 2006

Legend

Taxpayer =
Plan 1 =
Plan 2 =
Date 1 =
Date 2 =
Year 1 =
Year 2 =
Date 3 =

Dear :

This is a response to a letter, submitted on behalf of Taxpayer requesting a private letter ruling relating to Taxpayer's performance based compensation plans, as described under section 162(m) of the Internal Revenue Code and the accompanying regulations.

Taxpayer has maintained two performance-based incentive plans for senior management personnel, Plan 1 and Plan 2 (collectively, "the Plans"). Amounts paid under the plans are intended to be qualified performance-based compensation, as the term is defined under section 1.162-27(e) of the Income Tax Regulations. Each plan has been and is administered by a compensation committee comprised entirely of "outside directors" (within the meaning of section 1.162-27(e)(3)), which has the authority to establish the targets under the performance goals of each of the Plans on an annual basis.

The material terms of Plan 1 were approved by the shareholders of Taxpayer on Date 1, and the material terms of Plan 2 were approved by the shareholders of

Taxpayer on Date 2, in accordance with section 162(m)(4)(C) of the Code and section 1.162-27(e)(4) of the regulations.

On Date 3, Taxpayer and two of its affiliates commenced bankruptcy proceedings under Chapter 11 of the Bankruptcy Code. Taxpayer has continued to operate its business and manage its properties as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The United States Trustee appointed an official committee of unsecured creditors, as well as a committee and a legal representative for certain personal injury claimants (collectively, "the Creditor Committees").

The material terms of Plan 1 and Plan 2 would have been subject to shareholder approval no later than the first shareholder meeting of Year 1 and Year 2, respectively. With the support of its creditors, Taxpayer made full disclosure of the material terms of the Plans, compliant with section 162(m), to the Bankruptcy Court, which approved the material terms of both Plans on Date 3.

Taxpayer requests a ruling that if the material terms of the Plans or other compensation to be paid solely on account of the attainment of one or more pre-established objective goals, including the performance goals, are disclosed to and approved by the Bankruptcy Court before payment of such compensation, then the requirements of section 162(m)(4)(C)(ii) are satisfied.

Section 162(a)(1) of the Code allows a deduction for all of the ordinary and necessary business expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered.

Section 162(m)(1) provides that a publicly held corporation shall not be allowed a deduction for remuneration with respect to any covered employee to the extent that the amount of such remuneration for the taxable year exceeds \$1,000,000.

Section 162(m)(4)(C) excepts from this limitation certain "performance-based compensation" paid solely on account of the attainment of one or more performance goals, but only if (i) the performance goals are determined by a compensation committee of the board of directors of the taxpayer which is comprised solely of two or more outside directors; (ii) the material terms under which the remuneration is to be paid, including the performance goals, are disclosed to shareholders and approved by a majority of the vote in a separate shareholder vote before the payment of such remuneration; and (iii) before any payment of such remuneration is to be paid, the compensation committee certifies that the performance goals and any other material terms were in fact satisfied.

Section 162-27(e)(4)(vi) of the regulations provides that once the material terms of a performance goal are disclosed to and approved by shareholders, no additional disclosure or approval is required unless the compensation committee changes the material terms of the performance goal. If, however, the compensation committee has the authority to change the targets under a performance goal after shareholder approval of the goal, material terms of the performance goal must be disclosed and reapproved by shareholders no later than the first shareholder meeting that occurs in the fifth year following the year in which shareholders previously approved the performance goal.

In Rev. Rul. 2004-87, C.B. 2004 32 I.R.B. 2004, it is noted that, in the context of the approval vote permitted by section 280G(b)(5)(A)(ii)(II) concerning parachute payments, for a corporation in bankruptcy, the continuing interests of equity owners can be difficult to determine or predict; the pre-bankruptcy shareholders may end up with a continuing equity interest in the company or the equity may end up partially or fully transferred to creditors; and, correspondingly, the pre-bankruptcy shareholders may lack a material continuing equity interest in the affairs of the corporation and therefore also lack the corresponding motivation to appropriately evaluate the payments at issue. For these reasons, it is concluded in Rev. Rul. 2004-87 that the bankruptcy court approval is deemed to be meet the shareholder approval and disclosure requirements of section 280G(b)(5)(A)(ii)(II).

For the reasons cited for the conclusion in Rev. Rul. 2004-87, and based on the facts and representations described above, we rule that the shareholder approval requirements of section 162(m)(4)(C)(ii) of the Code are satisfied upon the Bankruptcy Court's order approving the Plans.

The ruling contained in this letter is 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 a ruling, 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 requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant.

Sincerely,

Robert B. Misner
Senior Technician Reviewer Executive
Compensation Branch
Office of the Division Counsel/Associate
Chief Counsel (Tax Exempt &
Government Entities)

Enclosure:
Copy for 6110 purposes