

INTERNAL REVENUE SERVICE

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LEGEND:

Target =
Acquiring =
Sub =
date a =
date b =
date c =
date d =
date e =
date f =

Dear

This is in reply to a request for a ruling concerning the deduction limitation of section 162(m) of the Internal Revenue Code. The facts, as presented by Acquiring, are as follows.

Acquiring and Sub report income on a fiscal year basis. Target reports income on a calendar year basis.

On date a, Acquiring formed Sub. Sub was formed for the sole purpose of acquiring the stock of Target. On date b, Acquiring approved the merger and the merger agreement. On date c, the proposed merger was approved by the board of directors of Target. The merger was approved by the shareholders of Target on date d. The closing of the merger occurred on date f.

According to Acquiring, Target will not be required to file any proxy statements with the SEC that disclose executive compensation for Target's fiscal year ending date e or the short year that ended with the merger on date f. As a general rule, the summary compensation table would be shown on the annual report on Form 10-K filed with the SEC or would be disclosed in a proxy statement filed within 120 days of the end of the issuer's fiscal year.

There are Target executives who are expected to continue to serve as executives of the post-merger combined company. However, the compensation paid by Target will not be counted or reported by Acquiring because acquiring is not a public corporation. Therefore, the compensation paid and deducted by Acquiring in the merger year will never be reported on a summary compensation table sent to shareholders either by Target or Acquiring.

Section 162(a)(1) of the Code allows as a deduction all the ordinary and necessary 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) of the Code provides that in the case of any publicly held corporation, no deduction is allowed for applicable employee remuneration with respect to any covered employee to the extent that the amount of the remuneration for the taxable year exceeds \$1,000,000.

Section 162(m)(3) of the Code defines "covered employee" to mean any employee of the taxpayer if as of the close of the taxable year, such employee is the chief executive officer of the taxpayer or is an individual acting in such capacity, or the total compensation of such employee for the taxable year is required to be reported to shareholders under the Securities Exchange Act of 1934 by reason of such employee being among the 4 highest compensated officers for the taxable year (other than the chief executive officer).

Section 1.162-27(c)(2) of the Income Tax Regulations provides the general rule for who is a covered employee. Under the regulations, a covered employee means any individual who, on the last day of the taxable year, is (A) the chief executive officer of the corporation or is acting in such capacity; or (B) among the four highest compensated officers (other than the chief executive officer). Whether an individual is the chief executive officer or one of the four highest compensated officers is determined pursuant to the executive compensation disclosure rules under the Exchange Act.

In the notice of proposed rulemaking containing the proposed regulations under section 162(m), the preamble contains the following language concerning the identification of "covered employee":

The regulations clarify which employees are "covered employees" for purposes of section 162(m). The legislative history to section 162(m) provides that "covered employees" are defined by reference to the SEC rules governing executive compensation disclosure under the Exchange Act. Under the regulations, an individual generally is a "covered employee" if the individual's compensation is reported on the "summary compensation table" under the SEC's executive compensation disclosure rules, as set forth in Item 402 of Regulation S-K, 17 CFR 229.402, under the Exchange Act. However, the regulations specifically provide that, in

order to be a "covered employee" for section 162(m) purposes, an individual must be employed as an executive officer on the last day of the taxable year. Thus, only those employees who appear on the "summary compensation table" and who are also employed on the last day of the taxable year are "covered employees."

Therefore, based on the facts as outlined above, we rule that, assuming that no summary compensation table listing Target's officers is included in any Target proxy statement that is sent to shareholders and filed by Target with the SEC for fiscal year ending on date e or for the short taxable year ending on date f, for purposes of section 162(m) of the Code, Target's officers will not be "covered employees" with respect to the fiscal year ending on date e or for the short taxable year ending on date f.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent. Except as specifically ruled above, no opinion is expressed as to the federal tax consequences of the transaction described above under any other provisions of the Code.

Sincerely yours,
ROBERT MISNER
Senior Technical Reviewer
Executive Compensation Branch
Office of the Division Counsel/Associate Chief
Counsel
(Tax Exempt and Government Entities)

Enclosure:
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