

**Internal Revenue Service**

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Department of the Treasury  
Washington, DC 20224

Person To Contact:  
  , Badge No.  
Telephone Number:

Refer Reply To:  
CC:TEGE:EB:EC – PLR-139439-03  
Date:  
November 03, 2003

Company =

Stock Incentive Plan =

Date 1 =

Date 2 =

Date 3 =

Dear :

This is in reply to your letter dated June 26, 2003, submitted on behalf of Company, requesting a ruling under section 162(m) of the Internal Revenue Code. Specifically, a ruling was requested on the application of section 1.162-27(f)(1) of the Income Tax Regulations to certain restricted stock units issued by Company. The facts as represented are as follows.

Prior to its initial public offering (IPO) on Date 1, Company adopted the Stock Incentive Plan ("Plan"). The Plan authorized the grant of various stock based awards including stock options, stock appreciation rights, restricted stock, and restricted stock units. The first meeting of the shareholders of Company at which directors were to be elected that occurred after the close of the third calendar year following the year in which the IPO occurs was Date 2.

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Prior to Date 2, Company issued restricted stock units under the Plan to Company employees. Each restricted stock unit generally entitles its holder to receive from Company one share of Company common stock on the delivery date specified in the holder's award agreement, provided the terms of the award agreement and the Plan have been satisfied. Company retains the right to deliver a cash payment equal to the fair market value of such share in lieu of delivering a share of common stock. In addition, the holder of the restricted stock unit will receive periodic payments equal to the regular cash dividends paid in respect of one share of Company common stock while the restricted stock unit is outstanding ("dividend equivalent payment").

With respect to restricted stock units that were granted prior to Date 2, some of the shares of stock underlying such restricted stock units were delivered prior to Date 2. The remaining shares of common stock will be delivered after Date 2 ("undelivered restricted stock unit stock"). The last delivery date is expected to be Date 3.

It has been represented that the prospectus that accompanied the IPO disclosed information concerning the Plan that satisfied all applicable securities laws then in effect.

It has been represented that prior to Date 2, there were no material modifications (within the meaning of section 1.162-27(h)(1)(iii)) of the Plan or the undelivered restricted stock units, the Plan has not expired, and not all of the shares of common stock authorized for issuance under the Plan were issued.

A grant of a restricted stock unit is the economic equivalent of a grant of a restricted share of common stock that is subject to the same forfeiture conditions and transfer restrictions.

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 1.162-27(f)(1) of the regulations provides that, in the case of a corporation that was not a publicly held corporation and then becomes a publicly held corporation, the deduction limit does not apply to any remuneration paid pursuant to a compensation plan or agreement that existed during the period in which the corporation

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was not publicly held. However, in the case of such corporation that becomes publicly held in connection with an initial public offering, this relief applies only to the extent that the prospectus accompanying the initial public offering disclosed information concerning those plans or agreements that satisfied all applicable securities laws then in effect. In accordance with section 1.162-27(c)(1)(ii) of the regulations, a corporation that is a member of an affiliated group that includes a publicly held corporation is considered publicly held and, therefore, cannot rely on paragraph (f)(1).

Section 1.162-27(f)(2) of the regulations provides that paragraph (f)(1) may be relied upon until the earliest of one of the four following events: (i) the expiration of the plan or agreement; (ii) the material modification of the plan or agreement, within the meaning of section 1.162-27(h)(1)(iii) of the regulations; (iii) the issuance of all employer stock and other compensation that has been allocated under the plan; or (iv) the first meeting of the shareholders at which directors are to be elected that occurs after the close of the third calendar year in which the initial public offering occurs.

Section 1.162-27(f)(3) of the regulations provides that paragraph (f)(1) will apply to any compensation received pursuant to the exercise of a stock option or stock appreciation right, or the substantial vesting of restricted property, granted under a plan or agreement described in paragraph (f)(1) if the grant occurs on or before the earliest of the events specified in paragraph (f)(2).

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

Company's delivery of shares of common stock (or cash payment equal to the fair market value of such shares) after Date 2 with respect to the undelivered restricted stock unit stock is remuneration that is not subject to the disallowance rule of section 162(m)(1) of the Code, pursuant to the transitional relief provisions of section 1.162-27(f)(1) of the regulations.

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. Specifically, no opinion is expressed regarding the application of section 162(m) to the Company's payment of compensation in the form of dividend equivalent payments after Date 2.

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. The taxpayer should attach a copy of this ruling to any income tax return to which it is relevant.

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

Sincerely yours,

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ROBERT B. MISNER  
Senior Technician Reviewer  
Executive Compensation Branch  
Office of the Division Counsel/Associate  
Chief Counsel (Tax Exempt and  
Government Entities)

Enclosure:  
Copy for 6110 purposes