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Department of the Treasury  
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Person To Contact:

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In Re:

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PLR-147287-05

Date:  
January 18, 2006

**LEGEND:**

Taxpayer =  
Bonus Plan =  
Date 1 =  
Date 2 =

Dear :

This letter responds to a request for a letter ruling submitted on behalf of Taxpayer on September 13, 2005, requesting a ruling under section 162(m) of the Internal Revenue Code.

On Date 1, Taxpayer's Compensation Committee unanimously approved adoption of the Bonus Plan, and directed that it be submitted for shareholder approval at Taxpayer's annual shareholder meeting. The Bonus Plan is intended to be a qualified performance-based compensation plan under section 162(m)(4)(C) of the Code and section 1.162-27(e) of the income tax regulations.

As stated in Taxpayer's proxy statement of Date 2, if the Bonus Plan is not approved by stockholders, no payments relating to "those targets" will be made by taxpayer. Taxpayer's proxy statement also states that Taxpayer reserves the right to pay discretionary bonuses, or other types of compensation, outside of the Bonus Plan. The proxy statement further states that no employee has a guaranteed right to any discretionary bonus as a substitute for a performance bonus in the event that performance targets are not met or that shareholders fail to approve the material terms of the Bonus Plan.

Taxpayer requests a ruling that Taxpayer's reserving the right, in its proxy statement, to pay discretionary bonuses outside of the Bonus Plan, as well as the subsequent payment of any discretionary bonuses, does not prevent the Bonus Plan

from qualifying as a qualified performance-based compensation plan under section 162(m)(4)(C) of the Code and section 1.162-27(e) of the regulations.

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 for any publicly held corporation, no deduction shall be allowed for applicable employee 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 that limit "performance-based compensation" that, in relevant part, is payable solely on account of attaining one or more performance goals determined by a compensation committee of the board of directors, which is comprised solely of two or more "outside directors" if the material terms under which the remuneration is to be paid are approved by a majority of the shareholders.

Section 1.162-27(e)(2)(i) of the regulations provides that qualified performance-based compensation must be paid solely on account of the attainment of one or more preestablished, objective goals. A performance goal is considered preestablished if it is established in writing by the compensation committee not later than 90 days after the commencement of the period of service to which the performance goal relates, provided that the outcome is substantially uncertain at the time the compensation committee establishes the goal. However, in no event will a performance goal be considered to be preestablished if it is established after 25 percent of the period of service (as scheduled in good faith at the time the goal is established) has elapsed.

Under section 1.162-27(e)(2)(iii)(A) of the regulations, the terms of an objective formula or standard must preclude discretion to increase the amount of compensation payable that would otherwise be due on attainment of a goal.

Under section 1.162-27(e)(2)(iv) of the regulations, the determination of whether compensation is considered performance-based generally shall be made on a grant-by-grant basis.

Under section 1.162-27(e)(2)(v) of the regulations, compensation is not considered performance-based if the facts and circumstances indicate that the employee would receive all or part of the compensation regardless of whether the performance goal is attained. Thus, if the payment of compensation under an award is only nominally or partially contingent on attaining a performance goal, none of the compensation payable under the award will be considered performance-based.

Section 1.162-27(e)(4)(vi) 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 authority to change 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.

Based on the forgoing, we rule that Taxpayer's reservation of the right to pay discretionary bonuses outside of the Bonus Plan will not prevent the Bonus Plan from qualifying as a qualified performance-based compensation plan under section 162(m)(4)(C) of the Code and section 1.162-27(e) of the Income tax Regulations.

The question of whether, in operation, the payment of discretionary bonuses causes the performance based compensation to be paid other than solely on account of the attainment of one or more pre-established, objective performance goals is a question of fact. Questions of fact are best resolved in this area upon examination of several or more field income tax returns. Thus, no opinion is expressed concerning whether the payments of discretionary bonuses will prevent the Bonus Plan from qualifying as qualified performance-based compensation.

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,  
WILLIAM C. SCHMIDT  
Senior Counsel  
Executive Compensation Branch  
Office of the Division Counsel/Associate  
Chief Counsel (Tax Exempt &  
Government Entities)