

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:TEGE:EB:EC
PLR-107874-17

Date:
May 19, 2017

Legend

Taxpayer =
Director =
Year 1 =
Date A =
Date B =
Date C =

Dear :

This letter is in response to a letter dated March 2, 2017, submitted by your authorized representative, requesting a ruling under section 162(m) of the Internal Revenue Code (Code). Specifically, Taxpayer requested a ruling that Director qualifies as an “outside director” for purposes of section 162(m)(4)(C) of the Code. The facts, as represented, are as follows.

Taxpayer is a publicly held corporation. Director is a member of Taxpayer’s board of directors and chairs the audit committee. In connection with an unexpected resignation of Taxpayer’s Chief Financial Officer (CFO), Taxpayer appointed Director to serve as interim CFO starting on Date A while Taxpayer conducted a search for a permanent replacement CFO. Pursuant to the appointment agreement, the appointment automatically expired on Date C. Taxpayer did not pay Director a base salary for the appointment, limited Director’s authority to primarily completing financial disclosure statements, and constrained any policy making function by not appointing Director to serve as Executive Vice President (Taxpayer’s prior and successor CFO’s served as Executive Vice Presidents with policy making functions). Prior to the expiration of the appointment agreement, Taxpayer selected a permanent replacement CFO and, on Date B, Director ceased to serve as interim CFO.

Section 162(a)(1) of the Code allows a deduction for all of 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 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 million.

Section 162(m)(4)(A) defines “applicable employee remuneration,” with respect to any covered employee for any taxable year, generally as the aggregate amount allowable as a deduction for the taxable year (determined without regard to section 162(m)) for remuneration for services performed by the employee (whether or not during the taxable year).

Section 162(m)(4)(C) provides that applicable employee remuneration does not include any remuneration payable 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 2 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 payment of such remuneration, and (iii) before any payment of such remuneration, the compensation committee referred to in clause (i) certifies that the performance goals and other material terms were in fact satisfied.

Section 1.162-27(e)(3)(i) of the Income Tax Regulations (Regulations) provides that a director is an “outside director” if the director (A) is not a current employee of the publicly held corporation; (B) is not a former employee of the publicly held corporation who receives compensation for prior services (other than benefits under a tax-qualified retirement plan) during the taxable year; (C) has not been an officer of the publicly held corporation; and (D) does not receive remuneration from the publicly held corporation, either directly or indirectly, in any capacity other than as a director. For this purpose, remuneration includes any payment in exchange for goods or services.

Section 1.162-27(e)(3)(vi) of the Regulations provides that whether a director is an employee or a former officer is determined on the basis of the facts at the time that the individual is serving as a director on the compensation committee. Thus, a director is not precluded from being an outside director solely because the director is a former officer of a corporation that previously was an affiliated corporation of the publicly held corporation. For example, a director of a parent corporation of an affiliated group is not precluded from being an outside director solely because that director is a former officer

of an affiliated subsidiary that was spun off or liquidated. However, an outside director would no longer be an outside director if a corporation in which the director was previously an officer became an affiliated corporation of the publicly held corporation.

Section 1.162-27(e)(3)(vii) of the Regulations provides that, solely for this purpose, “officer” means an administrative executive who is or was in regular and continued service. The regulations state that the term implies continuity of service and excludes those employed for a special and single transaction. An individual who merely has (or had) the title of officer, but not the authority of an officer, is not considered an officer. The regulations further state that determination of whether an individual is or was an officer is based on all of the facts and circumstances in the particular case, including without limitation the source of the individual’s authority, the term for which the individual is elected or appointed, and the nature and extent of the individual’s duties.

Revenue Ruling 2008-32, 2008-2 C.B. 6, considers a situation in which the board of directors of a publicly held corporation appointed a director to serve as an interim CEO while the board of directors conducted a search for a permanent replacement CEO. The service agreement between the publicly held corporation and the director did not limit the director’s authority as interim CEO and provided for termination of service upon selection of a permanent CEO. Revenue Ruling 2008-32 holds that the director is an officer because the director was not employed for a single transaction and did not merely have the title of officer but was, instead, employed for an indefinite period to serve as an interim officer with the full authority vested in that office.

Therefore, based solely on the facts presented, we rule as follows:

Director qualifies as an “outside director” of Taxpayer for purposes of section 162(m)(4)(C) of the Code.

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. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are 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 rulings, it is subject to verification on examination.

Sincerely,

Thomas D. Scholz
Senior Counsel, Executive Compensation
(Employee Benefits)
(Tax Exempt & Government Entities)

Enclosures:
Copy of letter
Copy for section 6110 purposes