

INTERNAL REVENUE SERVICE

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Company =

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 Company, are as follows.

Company is a publicly held corporation and a calendar year taxpayer. Several of Company's corporate officers have either resigned or intend to resign their positions as employees and corporate officers, and all of their duties as such. These individuals may continue to perform services as Company independent consultants and directors for the remainder of their resignation year and in subsequent years. Company contends that resignation from their positions as employees and corporate officers does not necessarily equate to separation from service with Company. These persons may be listed pursuant to the executive compensation disclosure rules under the Securities Exchange Act as members of the group of highest-compensated executive officers of Company for both the resignation year and for subsequent years, based on their deferred bonuses and annual income from consulting contracts.

Some corporate officers who have been listed among the top four officers other than the CEO may, at some point in the future, resign their positions as Company officers (although they would continue to receive compensation from option income and possibly from consulting income in subsequent years). It is not contemplated that they would reassume their positions as corporate officers of Company subsequent to such resignations.

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

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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."

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Although the clarification of covered employees for purposes of section 162(m) is defined by reference to SEC rules, the SEC disclosure rules call for 2 additional individuals for whom disclosure would have been required but for the fact that they were not serving as executive officers at the end of the last completed fiscal year. Thus, individuals may be listed as members of the highest compensated group who are not covered employees for purposes of section 162(m) of the Code.

Therefore, based on the facts as outlined above, we rule that for purposes of section 162(m) of the Code, Company officers will not be "covered employees" with respect to any year in which they have resigned their positions as Company officers (and Company employees) before the last day of that year, or with respect to any subsequent year to such resignation with no intent to resume their duties as officers at anytime in the foreseeable future. Accordingly, no compensation paid to these officers with respect to their resignation year, or with respect to any subsequent year in which they do not serve as employee-officers of the Company, will be subject to the section 162(m) deduction limitation.

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. No opinion is expressed as to the status of the consultants and/or directors as officers or employees of Company.

Sincerely yours,

ROBERT B. MISNER
Assistant Chief, Branch 4
Office of the Associate
Chief Counsel
(Employee Benefits and
Exempt Organizations)

Enclosure:

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