

December 8, 2009

### Year-End Changes Needed for Some 162(m) Performance-Based Compensation Plans

Publicly held corporations may need to adopt an amendment by December 31, 2009 for certain performance-based compensation plans and agreements, including incentive compensation and equity plans and executive employment agreements. Under Revenue Ruling 2008-13, performance-based compensation that could be payable in the event of an employee's (i) involuntary termination without "cause," (ii) retirement, or (iii) voluntary termination for "good reason" (each, a "*Non-Qualifying Event*"), without requiring the attainment of the pre-established performance goals, would *not* be "performance-based compensation" for purposes of Section 162(m) of the Internal Revenue Code, *even if the Non-Qualifying Event does not occur*.

Code Section 162(m) limits the annual deduction a publicly held corporation may take with respect to compensation for its CEO and next three highest compensated officers (other than the CEO and CFO) (each a "*Covered Employee*") to \$1 million per Covered Employee. However, compensation that qualifies as "performance-based" is exempt from such cap. Under IRS regulations, the payment of compensation upon the death or disability of the Covered Employee, or a change of ownership or control of the corporation, without regard to whether the performance goals have been met, will not disqualify the plan or agreement from being "performance-based compensation," even though the amount paid upon such events will not qualify as "performance-based compensation." The IRS previously opined in private letter rulings that this provision also applied to the Covered Employee's voluntary termination due to retirement or for "good reason." Rev. Rul. 2008-13 has reversed this position for performance periods that begin after January 1, 2009.

Publicly held corporations with performance-based plans or agreements with a calendar year performance year may need to amend such plans or agreements by December 31, 2009 to ensure that otherwise compliant compensation for 2010 and later continues to be exempt from the deduction limit under Code Section 162(m).

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