Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

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Date:
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Company =

Plan =

date A =

tax year X =

Y% =

Amendment 1 =

Amendment 2 =

Amendment 3 =

Amendment 4 =

Amendment 5 =

Dear

This is in reply to a request for a ruling concerning whether for purposes of section 162(m) of the Internal Revenue Code, certain amendments to Company's Plan made after February 17, 1993, will constitute material modifications.

Company's board of directors adopted the Plan on date A. The purpose of the Plan is to provide retirement benefits

As of February 17, 1993, benefits under the Plan were calculated using a formula. Part of the formula

Another part of the formula is

A third part of the formula gives a benefit to

All of the individuals who may potentially be covered employees for the tax year X were employed by Company before February 17, 1993.

The Plan provides generally that all Plan benefits are payable from Company's general assets, and participants in the Plan are general creditors of Company with no priority over other creditors. The Plan requires that if the present value of the amount payable under the Plan exceeds the present value will be paid at the participant's choice either to the participant in cash or a grantor trust established by the participant. As a consequence of the trust arrangement, Plan benefits are deductible and, consequently, subject to section 162(m) of the Code when Company funds the trust.

Five sets of Plan amendments were made to the Plan since February 17, 1993.

Amendment 1

Amendment 2

Amendment 3

of the Plan.

Amendment 4

Also added was a lump sum payment option to benefits under earlier amendments. A miscellaneous change allows the compensation committee to

Another change limits
Also a benefit is deleted that had applied to

Amendment 5 made ministerial changes to an award that was added to the Plan by an earlier amendment.

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(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.

Section 162(m)(4) of the Code 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). However, pursuant to section 162(m)(4), the term does not include 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 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 before the payment of the remuneration, and

(iii) before any payment of such remuneration, the compensation committee referred to in clause (i) certifies that the performance goals and any other material terms were in fact satisfied.

According to section 1.162-27(h)(1)(i) of the regulations, the deduction limit of section 162(m) does not apply to any compensation payable under a written binding contract that was in effect on February 17, 1993.

Section 1.162-27(h)(1) of the regulations sets forth rules for what constitutes a written binding contract that was in effect on February 17, 1993. It provides, in relevant part, that the corporation must be obligated to pay the compensation if the employee performs the services and that the exception for written binding contracts in effect on February 17, 1993 does not apply to a written binding contract that is materially modified. A material modification occurs when the contract is amended to increase the amount of compensation payable to the employee. If a binding, written contract is materially modified, it is treated as a new contract entered into as of the date of the material modification. A modification of the contract that accelerates the payment of the compensation will be treated as a material modification unless the amount of compensation paid is discounted to reasonably reflect the time value of money. The adoption of a supplemental contract or agreement that provides for increased compensation, or the payment of additional compensation, is a material modification of a binding, written contract where the facts and circumstances show that the additional compensation is paid on the basis of substantially the same elements or conditions as the compensation that is otherwise paid under the written binding contract. However, a material modification of a written binding contract does not include a supplemental payment that is equal to or less than a reasonable cost-of-living increase over the payment made in the preceding year under that written binding contract.

In this case, changes made to the Plan by Amendments 1, 3, 4, and 5 do not increase compensation and there is no material modification to the Plan. Whether, in Amendment 2, the supplemental benefit that has the potential to increase participants' benefits by Y% is a material modification requires a determination of whether the increase comes within a reasonable amount for a cost-of-living increase. A factual determination such as this is to be made by the Internal Revenue Service office having examination jurisdiction over Company's tax return.

Based on the facts submitted, we rule that Amendments 1, 3, 4 and 5 made to the Plan after February 17, 1993, do not materially modify the Plan as it existed on February 17, 1993. Consequently, any amounts contributed to the grantor trusts of covered employees to fund benefits under the Plan that may result from Amendments 1, 3, 4 and 5 are not applicable employee remuneration for purposes of section 162(m) of the Code.

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 provision of the Code.

Sincerely yours,

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ROBERT B. MISNER
Assistant Chief, Executive
Compensation Branch
Office of Division Counsel/
Associate Chief Counsel
(Tax Exempt and Government
Entities)

Enclosure:
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