

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

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Refer Reply To:

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Date:

February 25, 1999

Company =

Y =

Z =

a =

b =

date =

Dear

This is in response to a request for ruling under section 162(m) of the Internal Revenue Code regarding the number of covered employees when a publicly held corporation has co-chief executive officers.

On date, the Company, which is the result of a merger between X and Y, appointed a and b as co-chief executive officers of the Company, to serve in such capacities after the completion of the merger which occurred shortly thereafter.

The Company intends to adopt a new Executive Performance Compensation Plan (the Plan) with the specific purpose of complying with section 162(m) of the Code and the underlying regulations. The Plan will be drafted with the specific intent to comply with section 1.162-27(e) of the Income Tax Regulations. The Plan will provide certain performance-based criteria for determining the maximum amount of bonus compensation payable to "covered employees" as defined in section 162(m)(3) and the

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underlying regulations. The Plan will be timely established by the Company's "compensation committee" to comply with section 1.162-27(e)(2)(i) and will be included in the Company's proxy to be voted upon by its shareholders, as required by section 1.162-27(e)(4), at the next annual meeting of the Company's shareholders.

Section 162(m)(3) of the Code defines a "covered employee" as any employee of the taxpayer if (A) 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 (B) 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 four highest compensated officers for the taxable year (other than the chief executive officer).

Section 1.162-27(c)(2)(i) of the regulations defines a "covered employee" for section 162(m) purposes as "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)."

Section 1.162-27(c)(2)(ii) of the regulations provides that whether an individual is the chief executive officer described in section 1.162-27(c)(2)(i)(A) or an officer described in section 1.162-27(c)(2)(i)(B) is determined pursuant to the executive compensation disclosure rules under the Exchange Act.

Item 402(a)(2) and (3) of Regulation S-K, as promulgated by the Securities and Exchange Commission, provides, in part, as follows:

(2) All Compensation Covered. This item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(3) of this item, . . .

(3) Persons Covered. Disclosure shall be provided pursuant to this item for each of the following (the "named executive officers"):

(i) All individuals serving as the registrant's chief executive officer or acting in a similar capacity during the last completed fiscal year ("CEO"), regardless of compensation level;

(ii) The registrant's four most highly compensated executive officers other than the CEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosures would have been provided pursuant to paragraph (a)(3)(ii) of this item but for the fact that the

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individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year.

Instructions to Item(a)(3). 1. Determination of Most Highly Compensated Executive Officers. The determination as to which executive officers are most highly compensated shall be made by reference to total annual salary and bonus for the last completed fiscal year (as required to be disclosed pursuant to paragraph (b)(2)(iii)(A) and (B) of this item), but including the dollar value of salary or bonus amounts forgone pursuant to Instruction 3 to paragraph (b)(2)(iii)(A) and (B) of this item: Provided, however, That no disclosure need be provided for any executive officer, other than the CEO, whose total annual salary and bonus, as so determined does not exceed \$100,000.

Thus, under Item 402(a)(3), disclosure could be required in this case, for SEC purposes, of up to eight persons: Both a and b because they will have served as the Company's CEO; the four "most highly compensated executive officers"; and the two additional individuals described in paragraphs (a)(3)(iii) of Item 402. However, this list must be pared down to five individuals for deduction-disallowance purposes under section 162(m) of the Code: One CEO, because the term "chief executive officer" is stated in the singular in both section 162(m)(3)(A) and section 1.162-27(c)(2)(i)(A) of the regulations; and the four highest compensated officers under the provisions of sections 162(m)(3)(B) and 1.162-27(c)(2)(i)(B).

Because nowhere in the legislative history is it indicated that Congress contemplated a situation wherein a company would have co-CEOs, we must select a method for determining which of the Company's executives should be "covered employees" that most closely follows the provisions of section 162(m) of the Code. Accordingly, we rule as follows:

1. Whichever co-chief executive officer, either a or b, who is the more highly compensated using the method set out in Instructions to Item (a)(3) will be a "covered employee" under section 162(m)(3)(A) of the Code.

2. Whichever co-executive officer, either a or b, who is not more highly compensated using the method set out in Instructions to Item (a)(3) will be a "covered employee" under section 162(m)(3)(B) if that co-CEO's compensation is among the four highest compensated officers other than the CEO.

Except as specifically ruled on above, no opinion is expressed as to the consequences of the transaction described above under any other provisions of the Code.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(j)(3) of

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the Code provides that it may not be used or cited as precedent. The Company should attach a copy of this ruling to the next federal income tax return it files.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Robert Misner  
Assistant Chief, Branch 4  
Associate Chief Counsel  
(Employee Benefits and  
Exempt Organizations)