

## Internal Revenue Service

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Washington, DC 20224

Third Party Communication: None

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PLR-161420-04

Date:

March 14, 2005

Company =

Plan =

Broker =

This is in response to your ruling request dated November 22, 2004, on behalf of Company, requesting a ruling under section 83 of the Internal Revenue Code that the private placement of certain warrants by Company will not cause options issued to Company's employees under the Plan to be viewed as actively traded on an established market within the meaning of section 1.83-7(b)(1) of the Income Tax Regulations.

Company is planning to offer for sale warrants and the concurrent grant of nonqualified options to its employees under the Plan to purchase shares of its common stock through to be conducted by Broker. Company states that this offering of warrants will be a private placement governed by section 4(2) of the Securities Act of 1933 (Securities Act). Under the private placement, the company will not register the warrants or the stock issued on exercise of the warrants under the Securities Act. Company will not apply to list the warrants on any securities exchange or to include the warrants on any automated quotation system.

The warrants will be sold to the "institutional buyers," within the meaning of Rule 144A the Securities Act.

The offer of the warrants is only to persons to whom Broker delivers the offer and is not made to anyone else (including employees of Company) or to the public generally. Company and Broker may reject any offer to purchase for any reason. The buyer of the warrants must agree, as a condition to bidding on the warrants, not to offer, sell, assign, pledge, or otherwise transfer the warrants. The warrants will be represented by certificates issued in definitive form. The warrants will contain the transfer restrictions. There are also hedging restrictions in place and if the restrictions are violated, Company is allowed to cancel the warrants with no payment or other obligation.

At the same time that the warrants are issued, Company will grant to employees nonqualified options under the Plan. The nonqualified options are not transferable or exercisable immediately. The vesting of the nonqualified options depends on the employee's performance of services for Company, whereas the vesting of the warrants does not depend on the holder's performance of services. Thus, the warrants are not issued "in connection with the performance of services." The period over which the warrants vest and the number of warrants that vest in each month corresponds generally to the vesting schedule of the nonqualified options. If the nonqualified options are forfeited, cancelled, or exercised, the warrants can be terminated, or early automatic exercised.

Section 83(a) of the Code provides that if, in connection with the performance of services, property is transferred to any person other than the person for whom the services are performed, the excess of (1) the fair market value of the property (determined without regard to any restriction which by their terms will never lapse) at the first time the rights of the person having a beneficial interest in the property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over (2) the amount, if any, paid for the property, will be included in the gross income of the person performing the services in the first taxable year in which the rights of the person having the beneficial interest in the property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable.

Section 1.83-7(a) of the regulations provides that if there is granted to an employee (or beneficiary) in connection with the performance of services, an option to which section 421 does not apply, section 83(a) shall apply to the grant if the option has a readily ascertainable fair market value at the time the option is granted.

Section 1.83-7(a) provides that section 83 will not apply to the transfer of an option without a readily ascertainable fair market value.

Section 1.83-7(b) of the regulations provides that options are considered to have a readily ascertainable fair market value if they are actively traded on an established market. When an option is not actively traded on an established market, it does not have a readily ascertainable fair market value unless its fair market value can otherwise

be measured with reasonable accuracy. An option is not considered to have a readily ascertainable fair market value unless the taxpayer can show that all the conditions listed in section 1.83-7(b)(2) exist.

If section 83(a) does not apply at the time an option is granted because the option does not have a readily ascertainable fair market value, then section 83(a) will not apply until the option is exercised or otherwise disposed of, even if the fair market value of the option becomes readily ascertainable before then. If the option is exercised, sections 83(a) and 83(b) apply to the transfer of property pursuant to such exercise. If the options are sold or otherwise disposed of in an arms length transaction, sections 83(a) and 83(b) apply to the transfer of money or other property received in the same manner as sections 83(a) and 83(b) would have applied to the transfer of property pursuant to an exercise of the option. Section 1.83-7(a).

Based on the information provided, we rule as follows:

The private placement of the warrants as described above does not create an established market for the active trading of the warrants and thus does not cause the options to be viewed as being actively traded on an established market with the meaning of section 1.83-7 of the regulations.

Except as specifically ruled on above, no opinion is expressed or implied concerning the tax consequences of any item of any transaction or item discussed above.

This ruling is provided only to the taxpayers who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent. The taxpayer should attach a copy of this ruling to any income tax return to which it is relevant.

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

Sincerely,

Robert B. Misner  
Senior Technician Reviewer  
Executive Compensation Branch  
Office of the Division Counsel/Associate  
Chief Counsel (Tax Exempt and  
Government Entities)

Enclosure: Copy for 6110 purposes