

Deadline Approaching for Amending Certain Plans and Agreements to Preserve Exception under Internal Revenue Code Section 162(m)

Revenue Ruling 2008-13 (the “Ruling”), issued by the Internal Revenue Service (“IRS”) on February 21, 2008, represented a significant change in the position of the IRS with respect to the “performance-based” compensation exception to the \$1 million cap on deductible compensation under Section 162(m) of the Internal Revenue Code of 1986, as amended (the “Code”).¹ In the Ruling, the IRS stated that compensation would not be considered “performance-based” for purposes of Section 162(m) of the Code if the plan or agreement under which the compensation is paid provides that the compensation will be paid without regard to whether the performance goal is attained in either of the following situations: (i) the employee’s employment is involuntarily terminated by the employer without cause or the employee terminates his or her employment for good reason, or (ii) the employee retires. The position set forth in the Ruling differed from the position taken by the IRS in two earlier private letter rulings, and therefore the IRS granted broad transition relief as follows:

The position set forth in the Ruling will not be applied to disallow a deduction for any compensation that otherwise would satisfy the “performance-based” compensation exception under Section 162(m)(4)(C) of the Code and the related regulations and that is paid under a plan, agreement or contract with payment terms similar to those described in the Ruling if either

- (i) the performance period for the compensation begins on or before January 1, 2009 or
- (ii) the compensation is paid pursuant to the terms of an employment contract as in effect (without regard to future renewals or extensions, including renewals or extensions that occur automatically absent action of the one of the parties) on February 21, 2008.

This transition relief will expire at year end for many plans that base their performance periods on the calendar year. Thus, unless the employment contract transition relief applies, awards for the performance period commencing on January 1, 2010 will need to comply with the position set forth in the Ruling and so may require amendments to plans or agreements or other action.

For a summary of the Ruling see our Firm Memorandum referenced in the footnote below.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to contact Michael Macris at (212) 701-3409 or mmacris@cahill.com; or Glenn Waldrip at (212) 701-3110 or gwaldrip@cahill.com.

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¹ See Firm Memorandum dated February 26, 2008, *IRS Revenue Ruling under Internal Revenue Code Section 162(m) Upholds Private Letter Ruling but Grants Transition Relief* available at http://www.cahill.com/news/memoranda/0000072/res/id=sa_File1/022608-%20IRS%20Revenue%20Ruling%20Confirms%20Interpretation%20Adversely%20Affecting%20Incentive%20Award%20But%20Grants%20Broad%20Transition%20Relief.pdf