March 2009

PUBLIC COMPANY ADVISER

Helping Public Companies

From assisting you with your IPO to compliance with SEC and Sarbanes-Oxley regulations, Holtz Rubenstein Reminick has been helping middle market companies succeed. We are one of the leading CPA firms in the country serving SEC registrants.

Executive Compensation Programs

How to Know if You're in Compliance

In 2008, the IRS issued two rulings regarding the deductibility of executive compensation by public companies. In the first, it reversed a previous position related to incentive compensation plans that allow payments in the event of certain terminations. In the second, it provided guidance on compensation committee member requirements.

Additionally, the Emergency Economic Stabilization Act of 2008 ("EESA") placed strict limits on the deductibility of executive compensation by financial institutions that receive certain government relief. Some lawmakers would like to impose similar restrictions on companies in other industries as well.

The million dollar question

Under current tax rules, a public company's tax deduction for compensation paid to a covered employee is limited to $1 million per tax year. Covered employees include the CEO (or an executive acting in that capacity) and the three other highest-paid officers whose compensation must be reported to shareholders under SEC rules. It doesn't include the CFO.

Performance-based compensation is excluded from the $1 million cap, provided:

- Performance goals are established by a board of directors compensation committee comprising solely of two or more outside directors,

- Performance goals and other material terms are approved by a majority of the shareholders in a separate vote before the compensation is paid, and

- The compensation committee certifies that the performance goals and other material terms have been met before the compensation is paid.

IRS regulations provide that compensation isn't performance-based —

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A View from the Top

We are pleased to provide you with the March edition of the HRR Public Company newsletter, which highlights a very topical issue.

Executive compensation is the most discussed subject in the financial world today. This summary should be useful in preparing and refining this year's disclosures.

Please call us if you have any questions on this important topic.

Is there another topic you'd like to see? I encourage you to submit ideas for future articles. We want this publication to be as detailed as possible, to meet your needs.

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Executive Compensation

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and, therefore, not tax-deductible — if the facts and circumstances indicate that the employee would receive all or part of the compensation regardless of whether the performance goal is attained. (There's an exception for compensation paid on account of death, disability or a change in ownership or control of the company.)

It's also important to note that, under EESA's executive compensation regulations for financial institutions receiving certain government relief, performance-based pay is not excluded from what are even tighter deductibility limits.

Revisiting and redefining

In previous private letter rulings, the IRS carved out additional exceptions for compensation paid following involuntary termination without cause by an employer or voluntary termination with good reason by an employee. But in Revenue Ruling 2008-13, the IRS backed away from this position and ruled that incentive plans allowing payments under these circumstances are not performance-based and are subject to the $1 million cap.

The IRS recognized that many corporations based their compensation arrangements on previous guidelines. So its ruling doesn't apply to compensation for performance periods that began on or before Jan. 1, 2009, or pursuant to employment agreements in effect on Feb. 21, 2008.

To qualify as an outside director, an individual must not be:

1) a current employee,

2) a former employee who receives compensation during the current tax year, or

3) a current or former officer.

In addition, he or she must not receive compensation from the corporation in any capacity other than as a director. In Revenue Ruling 2008-32, the IRS held that a compensation committee member who has served as the corporation's *interim* CEO will not qualify as an outside director.

Next steps

In light of these rulings, your company needs to review its compensation plan and employment contracts. It may be necessary to revise your compensation arrangements or reconstitute your compensation committee to obtain the most favorable tax treatment.

Save the Date: HRR CFO Roundtable

Holtz Rubenstein Reminick is hosting a roundtable for Chief Financial Officers of middle-market publicly-traded companies. Its purpose is to offer CFOs an open forum to discuss recent SEC rulings, FASB pronouncements, and SOX compliance issues, among other current topics. Please join us:

Thursday, April 23
8:30 to 10:00 a.m.
125 Baylis Road, Melville, NY

RSVP to Cindy Lowry:
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Have a Question? Contact an HRR Partner

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