

LEGAL UPDATES

PUBLISHED: FEBRUARY 8, 2008

## Service

Employee Benefits &  
Executive  
Compensation

# New IRS Guidance on Section 162(m)

On January 25, the Internal Revenue Service released Private Letter Ruling (PLR) 200804004, which marks a change to what the IRS considers "performance-based compensation" under Internal Revenue Code (IRC) section 162(m). The PLR held that performance-based compensation that normally would be exempt from the \$1,000,000 deduction limit under IRC 162(m) will not satisfy the performance-based exception if an executive is entitled to payment, whether or not the performance goals are achieved, in the event of involuntary termination or resignation for good reason. According to the ruling, the possibility that an executive could be paid the bonus in these circumstances without the performance goals having been met causes the bonus not to be deductible to the company to the extent the executive's compensation for the year exceeds \$1,000,000.

IRC 162(m) limits the deduction with respect to compensation paid by a public company to its top five executive officers. Legislation broadening the application of the provision was introduced last year, along with a proposal to cap the amount of compensation that could be deferred each year.

This holding contradicts the rulings in at least two prior PLRs, including one published in March 2006. Termination vesting provisions, such as the one described in this PLR, are fairly common in annual and long-term bonus plans and in executive employment agreements. This private letter ruling may suggest tightening views on IRC 162(m) at the IRS and may have implications for tax reporting, compensation committees and shareholder proxy disclosures.

Husch Blackwell Sanders LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters, or request a printed copy.

Husch Blackwell Sanders encourages you to reprint this material. Please include the statement, "Reprinted with permission from Husch Blackwell

Sanders, copyright 2010, [www.huschblackwell.com](http://www.huschblackwell.com)." at the end of any reprints. Please also email [info@huschblackwell.com](mailto:info@huschblackwell.com) to tell us of your reprint.

This information is intended only to provide general information in summary form on legal and business topics of the day. The contents hereof do not constitute legal advice and should not be relied on as such. Specific legal advice should be sought in particular matters.