

To: Our Clients and Friends

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## Executive Employment Agreements and Bonus Plans May Need to be Amended to Comply with Revenue Ruling 2008-13

### Background

Section 162(m) of the Internal Revenue Code generally precludes a publicly held corporation from deducting compensation paid to covered employees to the extent it exceeds \$1 million, unless the payment constitutes qualified performance-based compensation. Performance-based compensation must be paid solely on account of the attainment of a predetermined, objective performance goal that is approved by a compensation committee.

Last year, the IRS issued [Revenue Ruling 2008-13](#), which clarified that amounts paid to certain covered employees could not be treated as performance-based compensation and, therefore, would not be deductible, if the terms of the agreement permit payment to an executive who terminates employment, or whose employment is terminated for any reason other than death, disability or change in control, before attaining the specified goal. This loss of deduction results if such a provision is simply included in the terms of the agreement, regardless of whether the event that would accelerate payment actually occurs.

Seemingly recognizing the potentially extensive impact of this holding, and the fact that many practitioners were viewing the holding as a change in position, the IRS provided transition relief for any agreements or contracts for which the performance period began on or before January 1, 2009, and for compensation paid pursuant to an employment contract in effect on February 1, 2008. In other words, for most public companies operating on a calendar year basis, Revenue Ruling 2008-13 will apply to performance goal periods beginning on or after January 1, 2010.

### Action Steps

Companies subject to the \$1 million compensation deduction limitation that rely on the performance-based compensation exception should review all incentive compensation plans and any employment

agreements or other arrangements that may result in the payment of at least \$1 million to ensure compliance with Revenue Ruling 2008-13 before the start of the new performance period.

Please feel free to contact any member of the Bryan Cave LLP Employee Benefits and Executive Compensation Group listed below if you require assistance or have any questions regarding the information contained in this Bulletin.

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