

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

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Telephone Number:

In Re:

Refer Reply To:

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Date:

November 25, 2003

Corporation =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear :

This is in response to your letter dated July 16, 2003, submitted on behalf of Corporation requesting two rulings under section 423 of the Internal Revenue Code. Specifically, you requested that the adoption of certain amendments to Corporation's employee stock purchase plan would not be a modification of the plan and would not require shareholder approval.

The facts, as submitted, are as follows. Corporation maintains an option plan that is intended to be an employee stock purchase plan (Plan) under section 423 of the Code. On the first business day of each payment period, Corporation grants to each eligible employee, who is a participant in the Plan, an option to purchase on the last day of the payment period a specified number of shares at a price equal to 85% of the lesser of the common stock price on the first business day of the payment period or the last business day of the payment period. The payment period is defined in the ESPP as either the (i) six-month period commencing on the first day of January and ending on the last day of June of each calendar year, or (ii) the six-month period commencing on the first day of July and ending on the last day of December of each calendar year.

Each employee who continues to be a participant in the Plan on the last business day of a payment period is deemed to exercise the options that were granted on the first day of the payment period. Options could be exercised within 27 months from the date the option was granted.

Under the Plan, the board of directors (or a committee appointed by the board of directors) may adopt amendments to the Plan provided that, without shareholder approval, no amendment may (i) increase the number of shares that may be issued under the Plan; (ii) change the class of employees eligible to receive options under the Plan, if such action would be treated as the adoption of a new plan for purposes of section 423 of the Code; or (iii) cause Rule 16b-3 under the Securities Exchange Act of 1934 to become inapplicable to the Plan.

The offer to purchase stock under the Plan and subsequent acquisition of the stock are transactions that require the stock to either be registered on an effective registration or be exempt from the registration requirements of the Securities Act of 1933 (the Act). Until recently, those transactions were covered by the Corporation's Form S-8 registration statement with respect to the Plan. The Corporation is not, however, currently eligible to use its registration statement on Form S-8 relating to the Plan as a result of missing the deadline for filing its Quarterly Report on Form 10-Q for the quarter ending Date 2. The result of Corporation's temporary ineligibility to use Form S-8 is that it cannot grant options or issue stock pursuant to the Plan in compliance with the registration requirements under the Act. To grant options or issue shares on exercise of an option under the Plan in compliance with such requirements, the options and shares must be covered by an effective registration statement.

In response to these SEC restrictions, the Corporation will amend the Plan to extend the payment period and delay the exercise date for the first payment period until Date 3. Under this amendment, the option purchase price would be the lesser of a price equal to 85% of the lesser of the common stock price on the first business day of the first payment period (Date 1) or the last business day of the revised first payment period (Date 3). Corporation will also amend the Plan to refrain from granting any options between Date 4 and Date 3. Additionally, Corporation will amend the Plan to require employees to notify the Corporation of any qualifying disposition and permit the Corporation to withhold directly from an employee's accumulated payroll deductions or through the sale of stock purchased under the Plan to cover required employment tax withholdings, should any withholdings ever be required.

Section 423(b) of the Code provides that an employee stock purchase plan must be approved by the stockholders of the granting corporation within 12 months before or after the date such plan is adopted.

Section 424(h)(1) of the Code provides that if the terms of any option to purchase stock are modified, extended, or renewed, such modification, extension, or renewal is considered the grant of a new option.

Section 424(h)(3) of the Code provides, in part, that the term “modification” means any change in the terms of the option which gives the employee additional benefits under the option, but such term does not include a change in the terms of the option in the case of an option not immediately exercisable in full to accelerate the time at which the option may be exercised.

Section 1.425-1(e)(5)(i) of the Income Tax Regulations provides that for purposes of sections 421 through 424 of the Code, a modification is any change in the terms of the option which gives the optionee additional benefits under the option. For example, a change in the terms of the option which shortens the period during which the option is exercisable is not a modification of the option.

In this case, the first amendment changes the date on which the option is exercisable to Date 3. However, this change does not extend the exercise period, instead, it results in the elimination of the second payment period such that participants will not receive additional grants of options and prevents participants from exercising the options to Date 3. Thus, this amendment does not provide any additional benefits to the optionees.

The other three amendments merely provide the Corporation with a method under which it can track the exercise of options and assist in meeting its employment tax obligations. Thus, these proposed amendments are not modifications of the options and do not result in the grant of new options.

None of the proposed amendments result in the creation of a new plan that must be approved by shareholders to meet the requirements of section 423 of the Code.

Based solely on the information submitted by the Corporation, we rule as follows:

1. The proposed amendments to the Plan do not result in the granting of a new option within the meaning of section 424(h) of the Code; and
2. The proposed amendments to the Plan do not require shareholder approval since the amendments do not create a new plan.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k) (3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination. Additionally, this ruling makes no conclusions regarding whether the options or the Plan meet the requirements of section 423 of the Code.

Sincerely,

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

CC Copy for 6110 purposes