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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

201147032

TAX EXEMPT AND GOVERNMENT ENTITIES DIVISION

AUG 1 0 2010

SE:T:EP:RA:A2

Re:

Dear

This letter is in response to a ruling request, dated August 27, 2008, which was submitted on your behalf by your authorized representative, regarding the income tax consequences of a transfer of excess assets from a terminated defined benefit plan to a safe-harbor 401(k) plan under section 4980 of the Internal Revenue Code (the "Code").

The following facts and representations have been submitted:

Employer =

Plan X =

Plan Y =

Plan Z =

The Employer established Plan X effective July 1, 1972, and was most recently restated effective March 1, 2006. A request for a favorable determination letter was submitted on January 31, 2007. On February 29, 2000, Plan X was amended to provide that future benefit accruals would cease for participants who were not at least age 45 and had completed a minimum of 5 years of service or were eligible for an early retirement window benefit as March 1, 2000, and also to provide that no new participants would be eligible to enter Plan X after February 29, 2000. The Employer intends to terminate Plan X effective at some future date.

The Employer and certain controlled group members currently maintain two 401(k) plans, Plan Y and Plan Z. The Employer represents that:

Coincident with the termination of Plan X, the Employer will maintain only one 401(k) plan which will be a safe-harbor 401(k) plan in accordance with the provisions of section 401(k)(12) of the Code. This will be accomplished by merging Plan Z into Plan Y and maintaining Plan Y as the ongoing-successor plan. Subsequent to the merger, Plan Y will generally cover employees who are currently eligible to participate in Plans Y and Z and employees of the Employer who have accrued benefits in Plan X.

Plan Y will be amended to include an employer matching contribution provision (subsequently referred to as "Amended Plan Y") to which other requirements applicable to safe-harbor 401(k) plans will also apply, including the applicable vesting requirements. In addition, Amended Plan Y shall permit the Employer to make additional discretionary matching or nonelective contributions which would be subject to nondiscrimination testing. The Employer intends for Amended Plan Y to constitute a "qualified replacement plan" under section 4980(d)(2) of the Code upon termination of and with respect to Plan X.

At least 95% of the active participants in Plan X who are current employees of the Employer after the termination of Plan X will be active participants in Amended Plan Y. Amended Plan Y will include provisions that restrict the amount of contributions and allocations that may be made by or on behalf of highly compensated employees who participated in Plan X. Any such restrictions shall be designed to prevent a violation of the nondiscrimination tests (such as the Actual Deferral Percentage test described in section 401(k)(3)(A) of the Code and the Actual Contribution Percentage test described in section 401(m)(2) of the Code, if either is ever applicable) and will only apply to highly compensated employees to the extent the tests apply to Amended Plan Y.

The Employer will terminate Plan X and request a favorable determination letter upon termination. The Employer will offer each participant of Plan X the option to elect a lump sum or annuity payment with such distributions to be available upon receipt of the favorable determination letter. Any and all remaining (excess) assets held under Plan X shall be transferred to Amended Plan Y after Plan X has been terminated and all benefits have been paid to all beneficiaries of Plan X. This transfer of excess assets shall be made after the merger of Plan Z into Plan Y, and the amendment of Plan Y as described above and following a reasonable period of time allowing the Employer to communicate the merger and amended provisions of Amended Plan Y to eligible employees.

After the excess assets have been transferred to Amended Plan Y, such assets will be placed in a suspense account and allocated not less than ratably over a period of seven years with the seven-plan-year period beginning with the year of the transfer. For example, if possible within the constraints of section 415(c) of the Code, one-seventh of the transferred assets will be allocated in the plan year in which the transfer takes place. The remaining transferred assets will be allocated no less rapidly than over the remaining six years. Earnings on transferred excess assets will be spread over the allocation period. The allocation of the suspense account shall be made in accordance with the matching formula of Amended Plan Y and such allocation shall satisfy all or a portion of the Employer's matching contribution liability of Amended Plan Y under section 401(k)(12) of the Code. The Employer may, at its discretion, direct the allocation of assets within the suspense account that is greater than the minimum allocation required by section 4980(d)(2)(C) of the Code. The Employer also intends to pay some or all of the qualified plan expenses from the suspense account and that such payments may be applied to the minimum allocation amount required by section

4980(d)(2)(C) of the Code. The Employer asks that this seven-plan-year period may be extended if allocations cannot otherwise be made due to limits imposed on individual participants under section 415(c) of the Code.

Based on the foregoing facts and correspondence, the following rulings have been requested.

1. Whether excess assets transferred from terminated Plan X to Amended Plan Y constitute a reversion resulting in any excise tax or other tax liability to the Employer under section 4980 of the Code;

2. Whether the excess assets transferred from terminated Plan X to Amended Plan Y constitute taxable income to the Employer or any qualified plan participants;

3. Whether the excess assets transferred from terminated Plan X to Amended Plan Y may be allocated in lieu of the Employer's contribution to Amended Plan Y (that the Taxpayer represents will constitute a qualified replacement plan) including a matching contribution under a section 401(k)(12)(B) of the Code;

4. Whether Amended Plan Y may limit amounts contributed or allocated by or for highly compensated employees including highly compensated employees who were participants in terminated Plan X and if such individuals shall be considered active participants in Amended Plan Y for purposes of the 95% coverage requirement of section 4980(d)(2)(A) of the Code;

5. Whether the excess assets transferred from terminated Plan X to Amended Plan Y may be used to pay reasonable plan expenses for Amended Plan Y;

6. Whether the excess assets transferred from terminated Plan X to Amended Plan Y will be treated as a contribution for deduction purposes under section 404 of the Code and whether such amounts will offset the maximum deductible amount otherwise available to the Employer; and

7. Whether the excess assets transferred from terminated Plan X to Amended Plan Y will be treated as annual additions under section 415 of the Code prior to such amounts being allocated to individual participant accounts established under Amended Plan Y.

Title I of the Employee Retirement Income Security Act (ERISA) provides specific protections regarding employee benefit rights including fiduciary responsibility applicable to employee benefit plans.

Section 401(a)(4) of the Code provides that contributions or benefits under a plan may not discriminate in favor of highly compensated employees.

Section 401(k)(12) of the Code provides that a cash or deferred arrangement shall be treated as meeting the requirements of section 401(k)(3)(A)(ii) of the Code (satisfaction of the actual deferral percentage test) if it meets the notice requirements of section 401(k)(12)(D) of the Code and either the matching contribution requirement of section 401(k)(12)(B) of the Code or the nonelective contribution requirement of section 401(k)(12)(C) of the Code.

Section 401(k)(12)(B) of the Code provides that the requirements of section 401(k)(12) of the Code are met if, under the plan, the employer makes matching contributions to all non highly compensated employees at a minimum rate.

Section 401(m)(4)(A) of the Code provides that matching contributions are considered as employer contributions on behalf of an employee.

Section 1.401(m)-1(a)(2)(i) of the Income Tax Regulations ("Regulations") provides that matching contributions are, (A) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an employee contribution to a plan maintained by the employer; (B) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an elective deferral; and (C) Any forfeiture allocated on the basis of employee contributions, matching contributions, or elective deferrals.

Section 1.401(m)-1(a)(2)(ii) of the Regulations provides, in pertinent part, that whether an employer contribution is made on account of an employee contribution or an elective deferral is determined on the basis of all the relevant facts and circumstances, including the relationship between the employer contribution and employee actions outside the plan.

Section 1.401(m)-1(a)(2)(iii)(A) of the Regulations provides generally that employer contributions are not matching contributions made on account of elective deferrals if they are contributed before the cash or deferred election is made or before the employees' performance of services with respect to which the elective deferrals are made (or when the cash that is subject to the cash or deferred elections would be currently available, if earlier). In addition, an employer contribution is not a matching contribution made on account of an employee contribution if it is contributed before the employee contribution.

Section 1.401(m)-1(a)(2)(iii)(B) of the Regulations provides in pertinent part that the rule of 1.401(m)-1(a)(2)(iii)(A) does not apply to a forfeiture that is allocated as a matching contribution.

Section 4980(a) of the Code provides for a 20 percent excise tax on the amount of any employer reversion from a qualified plan.

Section 4980(c)(2) of the Code generally defines "employer reversion" as the amount of cash and the fair market value of other property received (directly or indirectly) by an employer from the qualified plan.

Section 4980(d)(1) of the Code provides that the excise tax under section 4980(a) of the Code is increased to 50 percent with respect to any employer reversion from a qualified plan unless the employer establishes or maintains a qualified replacement plan or the plan provides pro rata benefit increases described in section 4980(d)(3) of the Code.

Section 4980(d)(2) of the Code provides that a qualified replacement plan means a qualified plan established or maintained by the employer in connection with a qualified

plan termination which satisfies the requirements of sections 4980(d)(2)(A), 4980(d)(2)(B) and 4980(d)(2)(C) of the Code.

Section 4980(d)(2)(A) of the Code requires that at least 95 percent of the active participants in the terminated plan who remain as employees of the employer after the termination be active participants in the replacement plan.

Sections 4980(d)(2)(B)(i) and 4980(d)(2)(B)(ii) of the Code together provide that a direct transfer from the terminated plan to the replacement plan must be made before any employer reversion, and the amount of the transfer must equal the excess (if any) of 25 percent of the maximum amount which the employer could receive as an employer reversion without regard to this subsection, over an amount equal to the present value of the aggregate increases in the accrued benefits under the terminated plan of any participants or beneficiaries pursuant to a plan amendment which is adopted during the 60-day period ending on the date of termination of the qualified plan, and takes effect immediately on the termination date.

Section 4980(d)(2)(B)(iii) of the Code provides that, in the case of any amount transferred under section 4980(d)(2)(B)(i) of the Code from a terminated plan to a qualified replacement plan, such amount (I) shall not be includible in the gross income of the employer, (II) no deduction shall be allowable with respect to such transfer, and (III) such transfer shall not be treated as an employer reversion for purposes of section 4980 of the Code.

Section 4980(d)(2)(C)(i) of the Code provides that the portion of the amount transferred to a defined contribution qualified replacement plan must either be allocated to the accounts of participants in the plan year in which the transfer occurs, or credited to a suspense account and allocated from such account to participants' accounts no less rapidly than ratably over the 7-plan-year period beginning with the year of the transfer.

Section 4980(d)(2)(C)(ii) of the Code provides that if by reason of any limitation imposed under section 415 of the Code, any amount allocated to the suspense account may not be allocated to a participant before the close of the 7-year period, such amount shall be allocated to the accounts of other participants and, if any portion of such amount may not be allocated to other participants by reason of any such limitation, shall be allocated to the participant as provided under section 415 of the Code.

Section 4980(d)(2)(C)(iii) of the Code provides that any income on any amount credited to a suspense account under clause (i)(II) shall be allocated to participants' accounts no less rapidly than ratably over the remainder of the period determined under such clause (after application of clause (ii)).

Section 4980(d)(2)(C)(iv) of the Code provides that if any amount credited to a suspense account under clause (i)(II) is not allocated as of the termination date of the replacement plan, (I) such amount shall be allocated to the accounts of the participants as of such date, except that any amount which may not be allocated by reason of any limitation under section 415 shall be allocated to the accounts of other participants, and (II) if any portion of such amount may not be allocated to other participants under

subclause (I) by reason of such limitation, such portion shall be treated as an employer reversion to which this section applies.

Section 4980(d)(4)(A) of the Code provides, in part, an amount may not be allocated to a participant under section 4980(d)(2)(C) of the Code if such allocation would result in a failure to meet any requirement under sections 401(a)(4) or 415 of the Code.

Section 4980(d)(4)(B) of the Code provides, in pertinent part, that the allocation of any amount (or income allocable thereto) to any account under section 4980(d)(2)(C) of the Code shall be treated as an annual addition for purposes of section 415 of the Code.

Revenue Ruling 2003-85, 2003-32 I.R.B. 291, provides that in accordance with section 4980(d)(2)(B)(iii) of the Code, the direct transfer of an amount that is at least 25 percent of the maximum amount which the employer could receive as an employer reversion from a terminated plan which was transferred to a " qualified replacement plan" is not includible in the employer's gross income. In addition, the Service held that no deduction was allowable with respect to the amount transferred, and the amount transferred was not treated as an employer reversion. Further, the Service concluded that the amount that the employer received was subject to the 20 percent excise tax under section 4980 (a) of the Code and was includible in income under section 61.

Ruling Request 1

Section 4980(d)(2)(B)(iii) of the Code, and Revenue Ruling 2003-85, 2003-32 I.R.B. 291, provides that the direct transfer from a terminated plan to a qualified replacement plan of an amount that is at least 25 percent of the maximum amount which the employer could receive as an employer reversion, is not treated as an employer reversion for purposes of section 4980 of the Code. Therefore if at least 25% of the maximum amount which would otherwise revert to the Employer after satisfaction of all benefit liabilities of a terminated defined benefit plan is transferred to a qualified replacement plan, this amount would not be treated as a reversion under section 4980 of the Code. Accordingly a direct transfer from terminated Plan X to Amended Plan Y of an amount that is at least 25 percent of the maximum amount which the Employer could receive as an employer reversion is not treated as an employer reversion for purposes of section 4980 of the Code.

Ruling Request 2

Section 4980(d)(2)(B)(iii) of the Code, and Revenue Ruling 2003-85, 2003-32 I.R.B. 291, provide that the direct transfer of an amount that is at least 25 percent of the maximum amount which the employer could receive as an employer reversion from a terminated plan which was transferred to a " qualified replacement plan" does not constitute taxable income to the Employer. Accordingly the direct transfer from terminated Plan X to Amended Plan Y (providing that Plan Y constitutes a qualified replacement plan within the meaning of section 4980(d)(2) of the Code) of an amount equal to at least 25 percent of the maximum amount which the Employer could receive as an employer reversion does not constitute taxable income to the Employer. As this

is a transfer from one qualified trust to another the transfer in and of itself, will not result in taxable income to participants of Amended Plan Y.

Ruling Request 3

You have represented that the amount to be transferred to Amended Plan Y will be credited to a suspense account in Amended Plan Y for allocation to participants' accounts in Amended Plan Y with the balance to be allocated at least ratably over a seven-plan-year period, and such allocations are to be coordinated with the limitations of section 415 of the Code as they may apply to certain participants. Accordingly this transaction, generally satisfies the allocation requirements of section 4980(d)(2)(C) of the Code. Section 4980(d)(2)(C) of the Code does not specify a method for allocating amounts from a suspense account to participant accounts therefore the use of amounts transferred to Amended Plan Y to make nonelective contributions satisfies the requirements of section 4980(d)(2)(C) of the Code.

Treasury regulation 1.401(m)-1(a)(2)(iii)(A) generally prohibits an employer from contributing employer matching contributions before employees' cash or deferred election is made or before the employees' performance of services with respect to which the elective deferrals are made (or when the cash that is subject to the cash or deferred elections would be currently available, if earlier). Treasury regulation 1.401(m)-1(a)(2)(iii)(B) provides that this rule does not apply to a forfeiture that is allocated as a matching contribution. Accordingly surplus amounts contributed to a suspense account of a qualified replacement plan cannot be used as matching contributions on account of elective deferrals to the extent that the amounts are contributed to the plan before the cash or deferred election is made or before the employees' performance of services with respect to which the elective deferrals are made.

It is important to note that section 4980(d)(2)(C)(i) of the Code requires that the amount transferred to a defined contribution qualified replacement plan (and earnings thereon) must either be allocated to the accounts of participants in the plan year in which the transfer occurs, or credited to a suspense account and allocated from such account to participants' accounts no less rapidly than ratably over the seven-plan-year period beginning with the year of the transfer. The allocations will be coordinated with the limitations under section 415 of the Code that may apply to certain participants. The seven-plan-year period for allocation of the amount transferred to defined contribution qualified replacement (and earnings thereon) plan may not, under any circumstances, be extended. If as a result of the application of the limitations under section 415 of the Code or for any other reason, at the end of the seven-plan-year allocation period required under section 4980 of the Code or upon termination of Amended Plan Y if earlier, a portion of the transferred amount (and earnings thereon) remains, such amount will be treated as a reversion to the Company subject to the applicable excise taxes under section 4980 of the Code at that time.

Therefore amounts transferred to Amended Plan Y which are credited to a suspense account in Amended Plan Y and are allocated at least ratably over a seven-plan-year period (subject to the limitations of Code section 415) to the accounts of the participants

in Amended Plan Y including but not limited to former Plan X participants, at the time amounts are released from the suspense account will generally satisfy the allocation requirements of section 4980(d)(2)(C) of the Code. Section 4980(d)(2)(C) of the Code does not specify a method for allocating amounts from a suspense account to participant accounts therefore the use of amounts transferred to Amended Plan Y to make nonelective contributions satisfies the requirements of section 4980(d)(2)(C) of the Code.

However in accordance with section 1.401(m)-1(a)(2)(iii) of the Regulations, the surplus amounts contributed to the suspense account under Amended Plan Y cannot be used as matching contributions on account of elective deferrals to the extent that the amounts are contributed to the plan before the cash or deferred election is made or before the employees' performance of services with respect to which the elective deferrals are made. Also, the amounts cannot be used as matching contributions with respect to any employee contribution to the extent that the amounts are contributed to Amended Plan Y before the employee contribution is made. Accordingly, the amounts transferred to the suspense account established in Amended Plan Y may not in any case be allocated as matching contributions.

Allocation of transferred excess assets (and earnings thereon) from the suspense account of Amended Plan Y must be done no less rapidly than ratably over the seven-plan-year period beginning with the year of the transfer, subject to the constraints of sections 401(a)(4) or 415 of the Code. Any amounts that have not been allocated within the seven-plan-year period for allocation under section 4980 of the Code or upon termination of Amended Plan Y, if earlier, will be treated as a reversion to the Company subject to the applicable excise taxes under Code section 4980 at that time.

Ruling Request 4

Section 4980(d)(4)(A) of the Code provides that any such restrictions designed to prevent discrimination (described in section 401(a)(4) of the Code and the associated regulations) in contributions or benefits in favor of highly compensated employees which are applied to participants of a qualified replacement plan who are highly compensated employees would not cause such participants to cease being active participants in a qualified replacement plan for purposes of the 95% coverage requirement of section 4980(d)(2)(A) of the Code. Therefore, if a qualified replacement plan so limits allocations from the suspense account, this will not cause the plan to fail the requirements of section 401(a)(4) of the Code.

Therefore any plan restrictions designed to prevent discrimination (described in section 401(a)(4) of the Code and the associated regulations) in contributions or benefits in favor of highly compensated employees which are applied to participants of Amended Plan Y who are highly compensated employees, would not cause such participants to cease being active participants in Amended Plan Y for purposes of the 95% coverage requirement of section 4980(d)(2)(A) of the Code.

Ruling Request 5

The use of amounts transferred from terminated Plan X to the suspense account under Amended Plan Y (and earnings thereon) to pay reasonable administrative expenses of Plan Y does not violate section 4980(d)(2)(C) of the Code. However, we do not express an opinion regarding whether such use is permitted under Title I of the Employee Retirement Income Security Act.

Ruling Request 6

Section 4980(d)(2)(B)(iii) of the Code, and Revenue Ruling 2003-85, 2003-32 I.R.B. 291 provide that no deduction is allowable under section 404 of the Code with respect to the amount transferred from a terminated plan to a qualified replacement plan and such transfer will not offset the maximum deductible amount otherwise available to the employer. Accordingly no deduction is allowable to the Employer under section 404 of the Code with respect to the amount transferred from terminated Plan X to Amended Plan Y and such transfer will not offset the maximum deductible amount otherwise available to the Employer.

Ruling Request 7

Section 4980(d)(4)(B) of the Code provides, in part, that the allocation of any amount (or income allocable thereto) from a suspense account described in section 4980(d)(2)(C)(II) of the Code to a participant shall be treated as an annual addition for purposes of section 415 of the Code. Amounts released from the suspense account of a qualified replacement plan attributable to the amount transferred from a terminated plan and income thereon will be treated as annual additions under section 415 of the Code for the plan year in which the amounts are allocated to the accounts of participants of the qualified replacement plan.

Accordingly the allocation of any amount from the suspense account of Amended Plan Y (attributable to the amount transferred from terminated Plan X and income thereon) will be treated as an annual addition under section 415 of the Code for the plan year in which the amount is allocated to the participant accounts of Amended Plan Y.

These rulings are based on the assumptions that the Plans X, Y, Z, and Amended Plan Y are qualified under section 401(a) of the Code, that their related trusts are tax-exempt under section 501(a) of the Code at all times relevant to this ruling, that the proposed amendment to Plan Y is adopted prior to the termination of Plan X, and that the Amended Plan Y meets all of the requirements to constitute a "qualified replacement plan" within the meaning of 4980(d)(2) of the Code. Please note that we have not been asked to rule on these issues and accordingly we have not.

This ruling letter is directed solely to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

A copy of this ruling letter is being sent to your authorized representative in accordance with a power of attorney on file in this office.

If you have any questions regarding this matter, please contact

Sincerely yours,

David M. Ziegler, Manager
Employee Plans Actuarial Group 2