



OFFICE OF
CHIEF COUNSEL

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

SEP 09 2002

CC:TEGE:EB:EC:STackney
PRENO-137700-02

MEMORANDUM FOR ALAN PIPKIN

Manager, Technical Group 4
T:EP

Attn: Neil Sandhu

FROM:

Cate Fernandez *C Fernandez*
Chief, Executive Compensation Branch
CC:TEGE:EB:EC

SUBJECT: [REDACTED]

This replies to your July 10, 2002 request for assistance regarding the [REDACTED] ("Plan"). We understand that the Plan recently received a determination letter.

We have spoken with the taxpayer's representative. Our understanding is that the Plan intends to allow participants to defer certain payments that would otherwise be made at termination of employment, referred to as Termination Pay. The deferrals will either be mandatory contributions or voluntary contributions. As explained by the taxpayer representative, it is intended that the exact amount or percentage of Termination Pay that must be deferred under the plan as a mandatory contribution will be determined in the collective bargaining process to take place in the future. A mirror provision will be subsequently adopted by the City Council to cover non-union participants. The amount or percentage will range from none to all of the Termination Pay. Any amount or percentage of Termination Pay that is not contributed as a mandatory contribution will be available for the participant to contribute as a voluntary contribution.

Mandatory Contributions

Under the terms of the Plan, contributions of some or all of the Termination Pay may be required to be made to the Plan rather than received by a participant in cash. These contributions are referred to as mandatory contributions. Any amount required to be contributed to the Plan as a mandatory contribution will not be available to the participant in cash. The amount of Termination Pay that must be contributed will be determined under the collective bargaining agreement for covered employees and by city ordinance for other employees. The actual contribution will be the lesser of the amount provided for in the

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agreement or ordinance, or the maximum amount available under the section 415 limits. Any contribution to the Plan will reduce a participant's Termination Pay.

Employer and Employee Discretion

The plan document states only that mandatory contributions will be made where the collective bargaining agreement provides that some or all of the Termination Pay shall be contributed to the Plan. The taxpayer representative has stated that it is intended that this amount will be a fixed percentage or amount, not subject to employer or employee discretion. Because the exact language of a future collective bargaining agreement and city ordinance cannot be confirmed, an appropriate caveat should be included. For this purpose, we recommend the following:

For purposes of this ruling, it is assumed that mandatory contributions provided for in any collective bargaining agreement or city ordinance will state a set amount or percentage of Termination Pay to be contributed to the Plan as a mandatory contribution without any allowance for participant or employer discretion in determining the amount.

Section 415 Adjustments

Section 3.02(d) of the Plan allows the Plan Administrator to make mandatory contributions to the Plan in the year before a participant's anticipated retirement date if the Plan Administrator has determined that the section 415 limits could materially reduce the amount of the mandatory contribution. If a participant retains discretion regarding whether this calculation occurs or the contribution is made, the participant has retained some control of the amount of the mandatory contribution versus the cash available at termination of employment. Therefore, it is our recommendation that a representation be provided that neither the employer nor the participant will retain any discretion to request or decline (1) the determination of whether the section 415 limits could materially reduce the amount of a mandatory contribution in the year of termination of employment, or (2) the contribution of Termination Pay to the Plan as a mandatory contribution in the year preceding the year of the employee's anticipated retirement date due to such a determination.

Subject to these concerns, we do not have any further comments concerning the mandatory contributions to the Plan. As contributions to a qualified plan, participants will be taxed in accordance with rules governing qualified plans.

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Voluntary Contributions in Lieu of Receiving Amounts in Cash

The Plan also permits participant voluntary contributions of Termination Pay that has not already been contributed as a mandatory contribution. [REDACTED]

[REDACTED]

Income Tax Withholding

The taxpayer has also requested rulings that (1) contributions to the Plan will be considered employer contributions; and (2) any amounts contributed to the Plan will not be subject to income tax withholding. As discussed with Neil Sandhu of your office, characterization of contributions as employer contributions is not within the subject matter jurisdiction of our Branch. However, if you require counsel assistance on this issue, please contact either Michael Roach, Chief, CC:TEGE:EB:QP1 or Bob Patchell, Chief, CC:TEGE:EB:QP2. Once that determination has been made, CC:TEGE:EOEG:ET2 would determine whether these amounts should be considered wages for purposes of income tax withholding. We have alerted Lynne Camillo, Chief, CC:TEGE:EOEG:ET2, to expect an inquiry on this issue from your office. Ms. Camillo may be contacted at (202) 622-6040.

If we can be of further assistance, please do not hesitate to contact us. If you have any questions, please contact Stephen Tackney at (202) 622-.

cc: Paul T. Shultz
Director, Employee Plans
T:EP:RA