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LEGEND:

Company =

Date 1 =

Date 2 =

Year 3 =

X% =

Y% =

Z% =

Period T =

U =

This letter is in response to the letter dated September 1, 2000, submitted on behalf of Company requesting rulings under section 280G of the Internal Revenue Code. Specifically, rulings were requested concerning whether, and to what extent, the amounts paid due to the acceleration of various benefits are contingent on a corporate change in ownership or control. The facts, as submitted, are set forth below.

Company maintains an Executive Long Term Stock Benefit Plan (ELTSBP); an Executive Retiring Allowance Plan (ERAP); and an Executive Medium Term Bonus Plan (EMTBP). Company represents that no amendments or modifications were made to

the provisions of these plans within the one year period before the change in control date. Company also represents that no accruals or contributions under these plans were made in contemplation of a change in control.

Under all three plans, if a “fundamental change” occurs, as described in the plans, certain payments to executives become fully vested or the timing of the distributions are accelerated. Company is required by certain employment agreements with various executives to make certain “gross up” payments to executives to the extent that any payments received by an executive under these plans is considered an excess parachute payment under section 280G of the Code and triggers an excise tax under section 4999.

On Date 1, Company experienced a change in ownership or control within the meaning of section 280G of the Code and the regulations thereunder. This change in ownership or control was also considered a “fundamental change” of Company under the provisions of the ELTSBP, ERAP, and EMTBP. Certain change in control payments were thus made to Company executives. The actual payment of benefits under the ELTSBP, ERAP, and EMTBP occurred on Date 2. Company stock in the ELTSBP was cashed out on Date 1. Two executives, Executive A and Executive B, are disqualified individuals within the meaning of section 280G(c).

Under the ELTSBP, Company set up a trust for Executives A and B and made contributions on behalf of Executives A and B to the trust. Benefits under ELTSBP normally vest based on a combination of age and years of service. However, as previously indicated, when a “fundamental change” occurs, as described in the ELTSBP, the vesting schedule accelerates and all benefits becomes become immediately vested. The ELTSBP also requires that gross-up payments will be made to Executives A and B. The full amount of the gross-up payments has been treated as contingent on the change in control for purposes of section 280G.

Under the ELTSBP, payments are made to executives, at Company’s discretion, on or before the 25th anniversary of the executive’s date of termination of employment from Company. Company represents that distributions to an executive typically commence shortly after retirement and continue for 20 to 25 years. During the executive’s employment with Company, plan assets are invested in Company stock. On retirement, the plan assets are invested in Company stock or government bonds pursuant to the executive’s direction. The balance in the executive’s individual account continues to accrue earnings and/or losses based on investments until the entire balance has been distributed. Year 3 contributions to the plan were made in cash and were not invested in Company stock prior to the distribution of this cash to executives. No amendments or modifications were made to the plan within the one-year period beginning before Date 1 and no accruals or contributions were made under the plan in contemplation of the change in control.

Based on the ELTSBP, Executive A would have been X% vested in his benefits if he had voluntarily terminated employment on Date 2 in the absence of the “fundamental change.” Under the vesting schedule contained in the ELTSBP, Executive A would have vested in an additional Z% of the benefits under the ELTSBP in January of each of the two subsequent years following the change in control if he had continued to perform services for Company. Executive B would have been Y% vested under the ELTSBP.

The ERAP is designed as a supplementary retirement allowance. The benefits under the ERAP are subject to a vesting schedule based on age and years of service. As previously indicated, however, on the occurrence of a “fundamental change,” the vesting schedule is accelerated and all benefits become immediately vested. The ERAP also requires that a gross-up payment will be paid with respect the entire payment. The full amount of the gross-up payment has been treated as contingent on the change in control for purposes of section 280G.

Under the ERAP, payments are made, at the discretion of Company, on or before the 25th anniversary of the date of the executive’s termination of employment with Company. Company represents that distributions typically commence shortly after retirement and continue for 5 to 10 years. The plan assets are credited with interest. Amounts in an executive’s individual account continue to accrue interest until the entire balance is distributed. No amendments or modifications were made to the plan provisions within the one-year period beginning before Date 1, and no accruals or distributions were made in contemplation of the change in control.

Based on the ERAP provisions, Executive A would have been X% vested in his ERAP benefits if he would have voluntarily terminated employment on Date 2. Executive A would have vested in an additional Y% in January of each of the two subsequent years following the change in control if he had continued to perform services for Company. Based on the ERAP provisions, Executive B would have been Y% vested in his benefits.

The EMTBP provides certain key management personnel with the opportunity to earn long-term incentive compensation based on the attainment of Company performance goals. The EMTBP operates on a three-year performance cycle. The performance cycle that is the subject of this ruling is for Period T. At the beginning of a performance period, a participant is granted performance units based on a specified percentage of annual base salary as of the first day of the performance period.

The performance measures used in the EMTBP are Company’s average annual return on equity (ROE) and the annual average rate of growth in earnings per share (EPS growth) for the calendar years included in the performance period. A performance factor is determined based on the combined results of the performance measures. The performance factor is applied to the performance units to determine the

bonus amounts under the plan. On completion of the performance period, the bonuses are paid out as soon as possible after the performance factor and bonus amounts have been determined. Company represents that payments under the plan are made within 31 days of the end of the performance period. On a “fundamental change,” the EMTBP provides that the bonuses will become immediately vested and payable. No amendments or modifications were made to the above-described plan provisions within the one-year period beginning before Date 1, and no accruals or contributions were made under the plan in contemplation of the change in control.

Section 280G of the Code provides that no deduction will be allowed for any excess parachute payment. Section 280G(b)(1) defines “excess parachute payment” as an amount equal to the excess of any parachute payment over the portion of the base amount allocated to such payment.

Section 280G(b)(2)(A) of the Code defines “parachute payment” as any payment in the nature of compensation to (or for the benefit of) a disqualified individual if (i) such payment is contingent on a change in the ownership or effective control of the corporation or in the ownership of a substantial portion of the assets of the corporation and (ii) the aggregate present value of the payments in the nature of compensation to (or for the benefit of) such individual which are contingent on such change equals or exceeds an amount equal to three times the base amount.

Section 4999(a) of the Code imposes on any person who receives an excess parachute payment a tax equal to 20 percent of the amount of the payment.

Section 1.280G-1 of the Proposed Income Tax Regulations, published in the Federal Register on May 5, 1989 (54 Fed. Reg. 19,390), provides guidance concerning parachute payments.

Q&A 22(a) of section 1.280G-1 of these proposed regulations provides that a payment is treated as contingent on a change in ownership or control if the payment would not, in fact, have been made had no change in ownership or control occurred. A payment generally is to be treated as one which would not, in fact, have been made in the absence of a change in ownership or control unless it is substantially certain, at the time of the change, that the payment would have been made whether or not the change occurred. Property that becomes substantially vested as a result of a change in ownership or control will not be treated as a payment which was substantially certain to have been made whether or not the change occurred.

A payment is also treated as contingent on the change in ownership or control under Q&A 22(b) if (1) the payment is contingent on an event that is closely associated with a change in ownership or control, (2) a change in ownership or control actually occurs, and (3) the event is materially related to the change in ownership or control. A payment is treated as contingent on a change in ownership or control unless it is

substantially certain, at the time of the event, that the payment would have been made whether or not the event occurred. An event is considered closely associated with a change in ownership or control if the event is of a type often preliminary or subsequent to, or otherwise closely associated with, a change in ownership or control. An event will be presumed to be materially related to a change in ownership or control if the event occurs within the period beginning one year before and ending one year after the date of change in ownership or control.

Under Q&A 22(c) a payment that would in fact have been made had no change in ownership or control occurred is treated as contingent on a change in ownership or control if the change accelerates the time at which the payment is made. Thus, for example, if a change in ownership or control accelerates the time of payment of vested deferred compensation, the payment may be treated as contingent on the change.

Q&A 24(a) generally provides that the full amount of the payment is treated as contingent on a change in ownership or control. However, in certain circumstances, described in Q&A 24(b) and (c), only a portion of the payment is treated as contingent on the change.

Q&A 24(b) applies if it is substantially certain, at the time of the change, that the payment would have been made whether or not the change occurred, but the payment is treated as contingent on the change solely because the change accelerates the time at which the payment is made. In such a case, the portion of the payment that is treated as contingent on the change in ownership or control is the amount by which the amount of the accelerated payment exceeds the present value of the payment absent the acceleration. If the amount of such a payment absent the acceleration is not reasonably ascertainable, and the acceleration of the payment does not significantly increase the present value of the payment absent the acceleration, the present value of the payment absent the acceleration is treated as equal to the amount of the accelerated payment.

Q&A 24(c)(1) applies in the case of a payment that is accelerated by a change in ownership and control and that was substantially certain, at the time of the change, to have been made without regard to the change if the disqualified individual had continued to perform services for the corporation for a specified period of time. In such a case, the portion of the payment that is treated as contingent on the change in ownership or control is the lesser of (i) the amount of the accelerated payment or (ii) the amount by which the payment exceeds the present value of the payment that was expected to be made absent the acceleration (determined without regard to the risk of forfeiture for failure to continue to perform services), plus an amount, as determined in Q&A 24(c)(2), to reflect the lapse of the obligation to continue to perform services.

Under Q&A 24(c)(2), the amount reflecting the lapse of the obligation to continue to perform services depends on all the facts and circumstances. In no event, however,

will such amount be less than 1 percent of the amount of the accelerated payment multiplied by the number of full months between the date that the individual's right to receive the payment is not subject to any requirement or condition which would be treated as resulting in a substantial risk of forfeiture (within the meaning of section 1.83-3(c)) and the date that, absent the acceleration the individual's right to receive the payment would not have been subject to any requirement or condition which would be treated as resulting in a substantial risk of forfeiture.

Regarding the vested portion of the ELTSBP and ERAP benefits paid to Executives A and B, based on the facts presented, it was substantially certain at the time of the change in control that the ELTSBP and ERAP benefits that were previously vested would have been paid to Executives A and B in absence of the change in control and would have continued to accrue earnings and/or losses until paid in full. Because the amount of these payments absent the acceleration is not reasonably ascertainable, and the acceleration of the payments does not significantly increase the present value of the payment absent the acceleration, the present value of the payment absent the acceleration is treated as equal to the amount of the accelerated payment. Thus, under Q&A 24(b), the acceleration of the vested ELTSBP and ERAP benefits are not contingent on the change in control.

Regarding the unvested portion of the ELTSBP and ERAP benefits paid to Executive A, based on the facts it was substantially certain that the remaining two 2% portions of the ELTSBP and ERAP benefits would have vested in each succeeding January had Executive A continued to perform services for Company. Thus, the contingent portion of these payments to Executive A is determined under Q&A 24(c).

As for the unvested portion of the ELTSBP and ERAP benefits paid to Executive B, the amount determined under this methodology nearly equals or exceeds the amount of the accelerated payment. Thus, the entire amount of the accelerated payments for ELTSBP and ERAP benefits paid to Executive B that was not previously vested is treated as a contingent payment and considered a parachute payment for purposes of section 280G.

Regarding the EMTBP benefits paid to Executives A and B, each calendar year in Period T has a separate ROE and EPS growth percentage calculated that is averaged with the other years in the cycle. Thus, it can be mathematically demonstrated that it was substantially certain, at the time of the change in control, that the payment of bonuses under the EMTBP would have been made without regard to the change if Executives A and B continued to perform services for Company through the end of Period T. Based on the facts presented, the contingent portion of the benefit attributable to Company's actual performance during the first two years of Period T (averaged over three years and assuming 0% award percentage during the third year) is determined under Q&A 24(c). However, the full value of any additional amount is treated as contingent on the change in control.

Based on the facts submitted and Company's representations, we rule as follows regarding the payments made to Executives A and B on the change in control:

1. The acceleration of the payment of the portion of the ELTSBP benefit that was previously vested, based on the plan's vesting schedule in effect prior to the change in control, will not be treated as contingent upon the change in control under Q&A 24(b) given that (1) absent the acceleration in the timing of such payment, the amount of the payment is not reasonably ascertainable, and (2) the acceleration of the payment does not significantly increase the present value of the payment absent the acceleration;
2. The acceleration of the vesting and payment of a portion of the ELTSBP benefit that was previously nonvested is treated as contingent on the change in control under Q&A 24(c) given that it was substantially certain, at the time of the change, that the payment would have been made without regard to the change if the affected executive had continued to perform services for Company for a specified period of time. Therefore, such portion of the ELTSBP benefit that will be treated as contingent on the change in control is determined under Q&A 24(c) as (1) the amount by which the amount of the accelerated payment exceeds the present value of the payment that was expected to be made absent the acceleration, plus (2) the amount reflecting the lapse of the obligation to continue to perform services (i.e., no less than 1% of the accelerated amount per each full month that the payment was received prior to the original vesting date);
3. The acceleration of the payment of the portion of the ERAP benefit that was previously vested, based on the plan's vesting schedule in effect prior to the change in control, will not be treated as contingent on the change in control under Q&A 24(b) given that (1) absent the acceleration in the timing of such payment, the amount of the payment is not reasonably ascertainable and (2) the acceleration of the payment does not significantly increase the present value of the payment absent the acceleration;
4. The acceleration of the vesting and payment of a portion of the ERAP benefit that was previously unvested is treated as contingent on the change in control under Q&A 24(c) given that it was substantially certain, at the time of the change, that the payment would have been made without regard to the change if the affected executive had continued to perform services for Company for a specified period of time. Therefore, such portion of the ERAP benefit that will be treated as contingent on the change in control is determined under Q&A 24(c) as (1) the amount by which the amount of the accelerated payment exceeds the present value of the payment that was expected to be made absent the acceleration, plus (2) the amount reflecting the lapse of the obligation to continue to perform services (i.e., no less than 1% of the accelerated amount per each full month that the payment was received prior to the original vesting date); and

5. The contingent portion of the EMTBP benefit attributable to Company's actual performance during the first two years of the award performance period (averaged over three years and assuming a 0% award in the third year) is determined in accordance with Q&A 24(c) as (1) the amount by which the amount of the accelerated payment exceeds the present value of the payment that was expected to be made absent the acceleration, plus (2) the amount reflecting the lapse of the obligation to continue to perform services (i.e., no less than 1% of the accelerated amount per each full month that the payment was received prior to the original vesting date), and the full value of any additional amount is treated as contingent on the change in control.

Except as specifically ruled on above, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or reference above. Specifically, no opinion is expressed or implied concerning any payments made by Company in connection with the change in control to individuals other than Executives A and B.

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not been adopted. Therefore, this ruling will be modified or revoked by the adoption of temporary or final regulations to the extent that the regulations are inconsistent with any conclusion in the ruling. However, when the criteria in section 12.05 of Rev. Proc. 00-4, 2000-1 I.R.B. 4, 47 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.

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. The taxpayer should attach a copy of this ruling to any income tax return to which it is relevant.

Sincerely,

Robert Misner
Assistant Branch Chief
Executive Compensation Branch
Office of the Division Counsel/Associate Chief
Counsel (Tax Exempt and Government
Entities)

Enclosure:
Copy for 6110 purposes

CC: