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December 5, 2005

Key

The Plan =

The Employer =

The Union =

Dear _____ :

This is in reply to the ruling request dated July 25, 2005, which you submitted as authorized representative of the Plan. Based on the information submitted, we understand the relevant facts to be as follows.

Pursuant to collective bargaining agreements with the Union, the Employer provided group health plan coverage to eligible retired employees and their dependents. The Employer became the subject of a bankruptcy proceeding under Title 11 of the United States Code. In connection with the Employer's bankruptcy, the Employer and the Union renegotiated the retiree health benefits. The Plan was established to provide the renegotiated benefits and a trust was established to fund the benefits. The Employer is required to make ongoing contributions to the trust pursuant to a negotiated formula. The Plan is administered by a committee, half of the members of which are

appointed by the Employer and half of the members of which are appointed by the Union. The Employer continues to provide a group health plan to active employees.

The Plan provides current benefits for current retirees and future benefits for future retirees. The Plan was required to provide benefits to existing retirees for a short period following the effective date of the renegotiated benefits that were identical to the benefits before renegotiation. Other than a 12-month period of guaranteed benefits immediately following retirement for certain retirees, since the expiration of that short period the Plan committee has had discretion to determine benefits that will be paid under the Plan. Currently the Plan is not providing benefits to otherwise eligible retirees who are eligible for the Health Coverage Tax Credit (HCTC). In addition, currently retirees under age 65 are required to pay less than 50 percent of the cost of coverage.

You have represented that the Plan committee is considering the modification of benefits so that otherwise eligible retirees who are eligible for the HCTC would be eligible for benefits under the Plan and that the contribution rate for all retirees under age 65 would be increased so that they would be paying more than 50 percent of the cost of coverage. These changes would be made only if we rule favorably that (1) the coverage provided under the Plan to Union retirees in settlement of whatever obligations the Employer may have had by eliminating the existing retiree benefits is qualified health insurance for purposes of section 35 of the Code; (2) the coverage the Union retirees receive under the Plan will not be treated as other subsidized coverage within the meaning of section 35(f)(1) as long as they pay more than 50 percent of the cost of their coverage under the Plan; and (3) the Plan constitutes a group health plan within the meaning of section 4980B(g)(2) and is subject to the continuation coverage requirements of section 4980B(f).

Section 35 provides a 65 percent tax credit for amounts paid by an eligible individual for qualified health insurance during eligible coverage months for coverage of the individual and qualifying family members.

Section 35(e) defines ten categories of health coverage that are qualified health insurance, including coverage under a COBRA continuation provision (as defined in section 9832(d)). Section 9832(d)(1) defines a COBRA continuation provision as section 4980B (other than subsection (f)(1) insofar as it relates to pediatric vaccines), part 6 of subtitle B of Title I of the Employee Retirement Income Security Act of 1974 (other than section 609), or Title XXII of the Public Health Service Act.

Under section 35, an eligible individual is not entitled to the HCTC for a month in which the eligible individual has other specified coverage (and is not entitled to the HCTC with respect to a family member for a month in which the family member has other specified coverage). Section 35(f)(1) provides that a plan under which an employer pays or incurs at least 50 percent of the cost of coverage is other specified coverage for any individual receiving coverage under the plan. Section 35(f)(1) also

provides additional circumstances under which eligible alternative TAA recipients are considered to have other specified coverage, namely, if the employer pays or incurs any portion of the cost of coverage under certain plans or if the eligible alternative TAA recipient is merely eligible for coverage under certain plans for which an employer pays or incurs at least 50 percent of the cost of coverage.

Section 4980B requires group health plans (with some exceptions) to make COBRA continuation coverage available to qualified beneficiaries in connection with the occurrence of qualifying events. A bankruptcy proceeding under Title 11 of the United States Code with respect to an employer that, but for the COBRA continuation coverage required under section 4980B, results in a loss of coverage for a retired employee (or a spouse, dependent child, or surviving spouse of a retired employee) is one of the qualifying events. Under §54.4980B-4 Q&A-1(c) of the Miscellaneous Excise Tax Regulations, to lose coverage in this context means to cease to be covered under the same terms and conditions as in effect immediately before the qualifying event.

Section 54.4980B-7 of the regulations sets forth the rules for how long a plan must make COBRA continuation coverage available. In connection with a qualifying event that is the bankruptcy of the employer, under Q&A-4(e) of §54.4980B-7 a plan may be obligated to make COBRA continuation coverage available to the retired employee until the retired employee's death, and, in the case of any other qualified beneficiary, until the earlier of the qualified beneficiary's death or the date that is 36 months after the retired employee's death. However, under Q&A-1 of §54.4980B-7, the obligation to make COBRA continuation coverage available can end on various earlier dates, including the date that the employer ceases to provide a group health plan to any employee.

Under Q&A-1 of §54.4980B-5 of the regulations, the coverage that must be made available to a qualified beneficiary is the same coverage that is made available to similarly situated nonCOBRA beneficiaries.

Under section 4980B(g)(2) of the Code, a group health plan has the same meaning under section 4980B as under section 5000(b)(1). Under section 5000(b)(1), a group health plan is a plan of, or contributed to by, an employer or employee organization to provide health care to one or more listed classes of individuals, including current and former employees.

The Plan was established by an employer (the Employer) and an employee organization (the Union) to provide health care to former employees of the Employer. The Employer contributes to the Plan. The Plan is clearly a group health plan within the meaning of sections 5000(b)(1) and 4980B(g)(2) of the Code.

There is nothing in the facts to indicate that any of the exceptions to the COBRA continuation coverage requirements of section 4980B applies to either the Plan or to

any other group health plan maintained by the Employer for any relevant period described in this ruling. The benefits the Union retirees are receiving from the Plan are different from the benefits they were receiving before those benefits were renegotiated. Any change in the terms or conditions under which benefits are provided constitutes a loss of coverage for purposes of the COBRA continuation coverage requirements of section 4980B. Accordingly, the bankruptcy of the Employer is a qualifying event for any Union retiree who was receiving retiree coverage before the change in benefits occurred (and for any spouse or dependent child or surviving spouse of such a retired employee receiving benefits under a group health plan of the Employer on the day before the bankruptcy proceeding commenced with respect to the Employer).

The bankruptcy of the Employer is not a qualifying event with respect to future retirees (nor with respect to their spouses, dependent children, or surviving spouses). Thus, although the future retirees or their family members may receive coverage under the Plan, that coverage will not be COBRA continuation coverage nor will it be in settlement of any obligation the Employer may have had to make COBRA continuation coverage available to them.

The obligation of the Employer under section 4980B is to make available to the qualified beneficiaries in connection with the employer's bankruptcy the same coverage it makes available to similarly situated beneficiaries who have not experienced a qualifying event. It is not clear from the facts that coverage under the Plan satisfies this requirement. Coverage that does not satisfy the requirements of section 4980B can nevertheless be considered coverage provided pursuant to section 4980B if the coverage is made available in settlement of an obligation to make COBRA continuation coverage available. Under the facts described, coverage made available under the Plan to those individuals who are qualified beneficiaries in connection with the Employer's bankruptcy is being made available at least in part in settlement of whatever obligations the Employer may have had under the COBRA continuation coverage requirements by changing the terms under which retiree coverage would be made available. Because the bankruptcy proceeding is a qualifying event and the Employer is obligated under section 4980B to make continuation coverage available to qualified beneficiaries, the coverage made available under the Plan to qualified beneficiaries in connection with the Employer's bankruptcy is in settlement of an obligation to make COBRA continuation coverage available.

In general, it is inconsistent with the policies reflected in the rules of section 4980B to allow an effective waiver of an individual's future rights as a potential qualified beneficiary before a qualifying event for that individual has occurred. If such a waiver could be effective, a plan could avoid any COBRA continuation coverage obligation merely by requiring all enrolling participants to waive all COBRA continuation coverage rights as a condition of enrollment. The regulations acknowledge the right of a qualified beneficiary to waive the right to COBRA continuation coverage once a qualifying event has occurred, and the right to revoke that waiver before the end of the election period.

Although the regulations do not acknowledge the possibility of a waiver before the right to elect COBRA continuation coverage arises, we believe that in limited circumstances such a waiver can be effective. If a waiver is entered into shortly before and in anticipation of a qualifying event, with the waiving party being fully informed of the right to COBRA continuation coverage in connection with the anticipated qualifying event, then the waiver is not contrary to the policies reflected in section 4980B. In these limited circumstances in which an anticipatory waiver of COBRA continuation coverage is not contrary to public policy, the provisions in the regulations allowing revocation of the waiver until the end of the election period apply. Thus, although an individual may effectively waive some or all of the individual's COBRA continuation coverage rights shortly before the occurrence of the qualifying event that gives rise to those rights, under the Code provisions and regulations relating to COBRA continuation coverage the individual may revoke that waiver at any time before the end of the COBRA election period. However, the effect of other law (such as law under Title 11 of the United States Code) may affect the individual's right under the Code to revoke the waiver.

In the facts described, the Union negotiated the terms of the Plan with the Employer after the bankruptcy proceeding commenced but before it had resulted in a loss of health coverage for the retirees, and thus before a qualifying event had occurred. The terms of the Plan (because the coverage is not necessarily the same as that provided to similarly situated nonCOBRA beneficiaries) do not satisfy the requirements for COBRA continuation coverage. The agreement by the Union to accept the Plan in lieu of the coverage required under section 4980B was an effective waiver of the retirees' COBRA continuation coverage rights. The Code and the regulations alone would not have prevented an individual subject to the agreement negotiated by the Union from revoking that waiver at any time before the end of the COBRA election period. However, applicable law under Title 11 of the United States Code may have prevented such a revocation from taking effect.

Coverage provided pursuant to the requirements of section 4980B is coverage provided under a COBRA continuation provision within the meaning of section 9832(d) even if the coverage does not satisfy the requirements of section 4980B. Such coverage is also qualified health insurance within the meaning of section 35.

Accordingly, based on the information presented and representations made, we rule as follows:

1. Coverage under the Plan, while not satisfying the requirements of section 4980B, is qualified health insurance for purposes of section 35 with respect to those individuals to whom the Employer had the obligation to make COBRA continuation coverage available under section 4980B in connection with the Employer's bankruptcy.
2. If coverage under the Plan is modified so that Union retirees under age 65 pay more than 50 percent of the cost of coverage, that coverage will not be considered

other specified coverage within the meaning of section 35(f)(1) for anyone who is not an eligible alternative TAA recipient.

3. The Plan is a group health plan under section 4980B(g)(2) and is subject to the COBRA continuation coverage requirements of section 4980B(f).

Except as specifically ruled, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. No opinion is expressed about how the Employee Retirement Income Security Act of 1974 applies to the facts described in this letter.

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

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

Sincerely,

Harry Beker
Branch Chief, Health and Welfare (Employee
Benefits)
(Tax Exempt & Government Entities)