OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
February 3, 1999

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MEMORANDUM FOR District Counsel,
Attn:

FROM: Chief, Branch 7, Office of Associate Chief Counsel
(Employee Benefits and Exempt Organizations)

SUBJECT:
Request for Nondocketed Significant Advice Review

LEGEND:

TP =
Plan =

Pursuant to your request, we have reviewed your memorandum, dated January 15, 1999, to EP Group Manager, regarding the Plan. As mentioned in a conversation on February 1, 1999, between Robert Walsh of this office and of your office, we agree with your primary conclusion in that memorandum that the one percent Basic Contribution provided for in the Plan is neither an elective contribution nor a qualified nonelective contribution but rather a mandatory employee contribution. Further, we also agree with your conclusion that the one percent Basic Contribution cannot be used in running the ADP test but should instead be applied to the ACP test.

We are concerned, however, with respect to your second conclusion stated at the bottom of page 4 of your memorandum. You state that the terms of the Plan do not require all employees to make the one percent Basic Contribution but rather only all participants. Thus, you conclude that TP has failed to follow the terms of its Plan by requiring all employees to make the one percent contribution. In support of this position, you state that the Plan does not require all employees to become participants upon hiring. You note, to the contrary, that the Plan imposes a one year of service requirement on employees to become eligible to participate in the Plan, except for the Salary Investment Account feature.

Notwithstanding the above, however, we believe that the Plan can be reasonably construed to provide that all employees must make the one percent contribution. As you properly noted, section 2.1 of the Plan provides a one year of service requirement for eligibility under the Plan but creates an exception for the Salary Investment Account feature. As to the Salary Investment Account feature, "each Employee shall become eligible to participate in the Salary Investment Account features of the Plan upon becoming an Employee, and the term 'Participant' shall apply to an Employee with less than one (1) year of Service only to the extent of such participation." In turn, the Salary Investment Account is defined by section 1.36 as the account maintained to record contributions made pursuant to a Compensation reduction agreement described in section 3.1(d). Section 3.1(d) provides for a cash or deferred arrangement of up to fifteen percent of a participant's compensation. Under sections 3.1(a) and (b), the Compensation reduction agreement also applies to the one percent contribution required by TP. In short, it does not appear that the one year of service requirement applies to the one percent Basic Contribution. Rather, the service requirement appears to apply to other employer contributions such as the profit sharing contribution made under section 3.2.

Alternatively, it may be argued that the above sections require the employee to make an election in order to become a "Participant" in the Salary Investment Account. Section 3.1(c) states, however, that in the event "a Participant fails to make an election as to the amount of his Basic Contribution, such Participant shall be deemed to have agreed to a two percent (2%) Compensation reduction under the provisions of Section 3.1(a)...." Accordingly, we believe that the Plan can be reasonably construed as requiring a one percent Basic Contribution to the Salary Investment Account by all employees. In effect, all of the employees are required to be participants in the Account since, if they fail to make an appropriate election, the election will be deemed to be made. Such a construction is consistent with the Summary Plan Description and the operation of the Plan.

Notwithstanding the above, we also believe that TP may have violated the terms of the Plan in another respect. Section 3.3 of the Plan provides that the Actual Deferral Percentage shall mean the ratio of the sum of elective deferrals and "Qualified Employer Deferral Contributions" to the participant's compensation. The term "Qualified Employer Deferral Contributions" means Qualified Nonelective Contributions (QNECs) and Qualified Matching Contributions. TP contends that the one percent Basic Contribution is a QNEC and thus may be used in the ADP test. Section 3.3(l) of the Plan defines a QNEC, in part, as a contribution made by TP. As your memorandum establishes, however, the one percent Basic Contribution is an employee contribution and not an employer contribution. Accordingly, the terms of the Plan suggest that the one percent Basic Contribution could not be used in running the ADP test but it appears that TP did so.

In sum, we agree that the terms of the Plan may have been violated in operation, but for a different reason than the one specified in your memorandum.

If you have any questions regarding either this memorandum or our views in general with respect to your memorandum, please contact Individual B at 202-622-6090.