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

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OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR: JAMES W. CLARK, AREA COUNSEL
(COMMUNICATIONS, TECHNOLOGY, AND MEDIA: OAKLAND) CC:LM:CTM:SF

FROM: CHARLES B. RAMSEY, CHIEF BRANCH 6
(PASSTHROUGHS AND SPECIAL INDUSTRIES) CC:PSI:6

SUBJECT: NONDOCKETED SIGNIFICANT ADVICE REVIEW

Re:

This Chief Counsel Advice responds to your memorandum dated July 10, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

The issue presented in the nondocketed significant advice review was whether the financing contingency contained in the taxpayer's stock purchase agreement prevent that agreement from constituting a "binding contract" as of the relevant effective date of section 197 of August 10, 1993, where the financing was not finalized until after that date. Because other factors are relevant in determining the amortization period of the covenant not to compete, the issue should be more generally presented as to whether the covenant not to compete must be amortized over 15 years pursuant to section 197.

The conclusion assumes facts not included in the background information. We do not take any exception to the discussion involving whether a contract is considered "binding" or to the survey of Illinois contract cases. There is no mention, however, about whether the taxpayer made any elections pursuant to section 1.197-1T. Therefore, we decided to provide a general discussion about the effect of the elections under section 197.

A taxpayer may only amortize the covenant not to compete under prior law if: (1) the acquisition is pursuant to a written binding contract in effect on August 10, 1993, and at all times thereafter before such acquisition; (2) an election is made under section 1.197-1T(d) to apply prior law to property acquired pursuant to such written binding contract; and (3) no election is made under section 1.197-1T(c) to retroactively apply the provisions of section 197 to property acquired after July 25, 1991 and before August 10, 1993. In general, the election must be made by the due date (including

extensions of time) of the electing taxpayer's Federal income tax return for the election year.

Thus, if the taxpayer fulfills all three conditions enumerated in the previous paragraph, then the taxpayer may amortize the covenant not to compete under prior law. Under prior law, the covenant not to compete would be amortized according to the provisions of sections 167 and 1.167(a)-3. Since the covenant not to compete was effective for a period of 4 years, then the amount allocated to the covenant not to compete may be amortized over a period of 4 years.

However, if the taxpayer did not make a valid election under section 1.197-1T(d) on its Federal income tax return for the taxable year including August 10, 1993, (or if the taxpayer did make a valid election under section 1.197-1T(c) on its return for the taxable year including August 10, 1993) the Taxpayer must amortize the covenant not to compete over 15 years pursuant to section 197. Nevertheless, it may be possible for the taxpayer to request an extension of time under section 301.9100-3 to make the election under section 1.197-1T(d).

If you have any further questions, please contact