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Date:
March 22, 2011

Employer =

Successor Employer =

Union =

VEBA =

Date A =

Date B =

Date C =

Date D =

Dear :

This is in reply to the ruling request dated November 19, 2010, which was submitted by your authorized representative. Based on the information submitted, we understand the relevant facts to be as follows.

Pursuant to collective bargaining agreements with Union, Employer provided group health plan coverage to eligible retired employees and their dependents. Employer became the subject of a bankruptcy proceeding under Title 11 of the United States Code on Date A. In connection with the bankruptcy, Employer negotiated the sale of substantially all of its assets to Successor Employer on Date B, resulting in Employer's liquidation. In connection with Employer's bankruptcy and liquidation,

Employer and Union entered into a shutdown agreement on Date C. As part of the shutdown agreement, Employer and Union renegotiated the retiree health benefits. VEBA was established to fund the renegotiated benefits. Successor Employer is required to make ongoing contributions to VEBA pursuant to a negotiated formula. The contributions made by Successor Employer are less than 50% of the cost of coverage. The plan and VEBA are administered by a board of trustees, the members of which are independent of Employer.

Successor Employer and Union entered into a modified collective bargaining agreement to provide health care coverage to Employer's retirees and dependents who were represented by Union. The modified collective bargaining agreement creates a VEBA that funds plans providing health benefits to Employer's retirees, effective Date D. The VEBA is independent of Employer and Successor Employer and managed by an independent board of trustees. Coverage under the proposal is less generous than pre-bankruptcy coverage provided by Employer. Coverage is offered to Employer's retirees as of the date of the asset sale to Successor Employer and those employee's who retired on the date of the asset sale. These two classes of individuals are eligible individuals for purposes of section 35 because they are receiving pension benefits from the Pension Benefit Guaranty Corporation.

Section 35 provides an 80 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 through February 2011. Under current law, the credit is 65 percent for eligible coverage months beginning March 1, 2011.

Section 35(e) defines 11 categories of health coverage that are qualified health insurance, including coverage under a COBRA continuation provision (as defined in section 9832(d)) and, for eligible coverage months beginning before February 13, 2011, coverage under an employee benefit plan funded by a VEBA (as defined in section 501(c)(9)) established pursuant to an order of a bankruptcy court. 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 Health Coverage Tax Credit (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, as is the termination (other than by reason of gross misconduct) of the covered employee's employment. 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. In connection with a qualifying event that is the termination of the covered employee's employment, a plan is generally required to make COBRA continuation coverage available for up to 18 months, but in some circumstances the 18-month period may be extended to up to 29 or 36 months. 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-8 of §54.4980B-9 of the regulations, a purchaser of substantial assets has the obligation to offer COBRA continuation coverage to M&A qualified beneficiaries of the seller if the seller ceases to provide a group health plan to any employee in connection with the sale and if the purchaser continues the business operations associated with the assets purchased from the seller without interruption or substantial change.

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 Employer and Union to provide health care to former employees of Employer. Successor 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 Employer or Successor Employer for any relevant period described in this ruling. The benefits the retirees of Union are receiving from the plan are different from the benefits they were receiving before those benefits were renegotiated and are not the same as those being made available to (potential) similarly situated nonCOBRA beneficiaries of Successor Employer. 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 (unless the change is the same change that is being made for similarly situated nonCOBRA beneficiaries). Accordingly, the bankruptcy of 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 Employer on the day before the bankruptcy proceeding commenced with respect to Employer). For those employees who retired on the date of the sale of assets and who had health coverage from the plan of Employer through that date, their retirement constitutes a qualifying event that is the termination (for a reason other than the employee's gross misconduct) of the covered employee's employment.

It is not clear from the facts described if Successor Employer would have the obligation to offer COBRA continuation coverage to M&A qualified beneficiaries of Employer, but it is also not clear that Successor Employer would not have such an obligation. Because of the legal uncertainty as applied to these facts, it is certainly reasonable for Successor Employer to take steps to discharge such a potential obligation.

The obligation of Employer or of Successor Employer under section 4980B is to make available to the qualified beneficiaries in connection with the employer's bankruptcy or the termination of employment the same coverage it makes available to similarly situated beneficiaries who have not experienced a qualifying event. Coverage under the plan does not satisfy 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 Employer's bankruptcy and to those who retired on the date of the sale of assets is being made available at least in part in settlement of whatever obligations Employer and Successor 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 and the individual retirements of employees on the date of the sale of assets are qualifying events and Employer or Successor Employer may have been 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 Employer's bankruptcy or in connection with the retirement of the individual on the date of the sale of assets 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 laws (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, Union negotiated the terms of the plan with 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 the same as that provided to similarly situated nonCOBRA beneficiaries) did not satisfy the requirements for COBRA continuation coverage. The agreement by 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 prevent an individual subject to the agreement negotiated by 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 prevent 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 retirees and their family members to whom Employer or Successor Employer had the obligation to make COBRA continuation coverage available under section 4980B in connection with Employer's bankruptcy or in connection with the retirement of an employee on the date of the sale of assets.

2. Management of the VEBA trust by the Board of Trustees, which is independent of Employer, Successor Employer, or any other entity, will not affect the status of the health coverage as qualified health insurance under section 35.

3. Election of the health coverage in advance of the applicable COBRA continuation period will not affect the health coverage's status as qualified health insurance under section 35.

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. Further, no opinion is expressed concerning the tax-exempt status of the VEBA.

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.

Sincerely,

Harry Beker, Branch Chief
Health and Welfare Branch
Office of Associate Chief Counsel/Division Counsel (Tax Exempt & Government Entities)