

September 30, 1976

Dear :

Thank you for your letter concerning the Employee Retirement Income Security Act of 1974 (ERISA) as it relates to the (named) Stock Plan (Plan). We regret that we were unable to reply to your inquiry earlier.

In your letter you request a determination that the Plan is not an employee pension benefit plan covered by the ERISA.

The Plan has been established by the (named) Company for the purpose of encouraging the long-term investment in Company stock by a select group of officers and employees in order to provide such persons with additional incentive to improve the Company's performance and to remain in the employ of the Company. The Board of Directors selects the officers and employees of the Company to participate in the Plan and specifies the amount of stock each participant may purchase. Other than prohibiting discrimination between officers or employees on the basis of age or length of service, the plan agreement provides that the Board may use any criteria it deems appropriate in determining whom it wishes to select to participate.

The purchase price of the stock is set at forty percent of book value, and provision is made in the Plan for payment on an installment basis by the participants. In the event that a participant desires to dispose of some stock he has purchased under the Plan, or if he terminates his employment with the Company for any reason, the Company has the right to repurchase the stock from the participant.

Section 3(2) of the ERISA defines an "employee pension benefit plan" as any plan, fund or program established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program provides retirement income to employees, or

P/OPINION 76-113

results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Under the terms of the Plan as set forth in your letter, a participant upon purchase of a share of stock becomes sole owner of such share even though the Company retains a security interest in the share of stock in the case of an installment sale. Furthermore, the Company retains the right to repurchase the share of stock or designate a purchaser if the participant desires to sell the share or terminates employment with the Company. However, despite these restrictions, the participant, as sole owner, has the right, which may be exercised at any time, to sell, assign or otherwise dispose of his interest in the Plan. Thus, any deferral of income by a participant until termination results solely from his or her decision to retain ownership of the stock. Due to the elements of ownership and control by the participant, the Plan does not fall within the definition of an "employee pension benefit plan" contained in section 3(2) of the ERISA because the Plan does not provide retirement income nor contain provisions which result in the deferral of income for periods extending to the termination of covered employment and beyond.

Sincerely,