U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 14, 2001

FLSA2001-5

Dear ***Name****,

This is in response to your letter requesting an opinion regarding the application of section 7(e)(3)(b) of the Fair Labor Standards Act (FLSA) to the 401(k) profit sharing plan[1] of ***Name****. Specifically, you are seeking the Administrator's approval of your profit sharing plan.

Effective October 1, 1997, ***Name**** restated the 401(k) profit sharing plan for its employees per the adoption of a current union contract. Under the plan, an eligible participant is any employee of ***Name**** who on the earliest date on or after October 1, 1997, has met one of the following eligibility requirements:

1) For an employee who is clerical, he has completed 60 days of eligibility service before his entry date;

2) For an employee who is a technician, he has completed 90 days of eligibility before his entry date; and

3) For an employee who is classified as level 4 and above, he has completed 150 days of eligibility service before his entry date.

Such participant may elect to defer a minimum of 3% or up to a maximum of 14% of his or her pay. Pay is defined as all of the employee's W-2 earnings which is actually paid or made available for a specified period plus elective deferrals. Based on information provided to a member of my staff, the amount of each matching employer contribution for a participant shall be equal to 200% or 2 times the 3% minimum contribution for a cap of 6% of the elective deferral contributions made for participating employees for the pay period. This contribution could cause the total contributions in some cases to exceed the total amount saved or invested by the participating employees during the year.

The issue of concern is whether the plan meets the requirements for a bona fide thrift or savings plan as defined in 29 CFR 547 so that the **employer's contributions** under the plan may be excluded in calculating FLSA overtime for participating employees. You are of the view that the plan meets the requirements in 29 CFR §547.1(b) - (f), except that under certain conditions the employer's contributions can exceed the total amount deferred by the participants. We agree. We also agree that none of the disqualifying provisions specified in §547.2 appear to be present in the plan.

Since the plan generally meets the requirements in §547.1, and has no disqualifying provisions described in §547.2, it is approved as a "bona fide thrift or saving plan" within the meaning of §7(e)(3)(b) of the FLSA and, thus, PRSS' contributions may be excluded in calculating employees' regular rates of pay for FLSA overtime compensation purposes.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying or requiring compliance with the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

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[1] While payments made by ***Name**** under the plan are not necessarily based on "profits," the plan uses the Internal Revenue Code nomenclature. For FLSA purposes, the plan in considered to be a "thrift or savings plan" as defined in 29 CFR Part 547.

Sincerely,

Thomas M. Markey
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy.*