Uniform Issue List No. 0403.04-00

200317031

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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

NOV - 4 2002

****
****
****

T:EP:RA:T4

Attention: **********
****

Legend:

Employer A = **********

Plan X = **********
****
****
****

Custodian C = **********

Ladies and Gentlemen:

This is in response to a request for a letter ruling dated December 29, 2000, submitted on your behalf by your authorized representative concerning the above-named matched savings plan ("Plan X") under section 403(b) of the Internal Revenue Code (the "Code"). That request was supplemented by letters dated April 1, 2001, June 28, 2002, and September 23, 2002.

The following representations have been submitted on your behalf:

****

Employer A was determined to be exempt from Federal income tax as an organization described in section 501(c)(3) of the Code in a letter dated January 13, 1966.

Employer A established Plan X, which was intended to meet the requirements of section 403(b) of the Code, effective July 1, 1999. Plan X was amended and restated, effective January 1, 2002. Plan X provides for salary deferral contributions, matching contributions and rollover contributions. Contributions to Plan X are paid to Custodian C pursuant to an agreement between Employer A and Custodian C.

Section 2.12 of Plan X provides that "Company" means Employer A or any successor. Section 2.25 defines "Employer" as the Company and any commonly controlled entity that is described in Code section 501(c)(3) and is exempt from tax under Code section 501(a). Section 2.11 of Plan X, in effect, defines "Commonly Controlled Entity" as an Employer and any corporation required to be aggregated with the Company under Code sections 414(b), 414(c), 414(m) and 414(o). Appendix A lists eight Employers that have adopted Plan X.

Under section 2.23 of the Plan an eligible employee means any employee of an employer, but excluding any employee who is a member of a collective bargaining agreement.

Under section 2.16 of Plan X employees may elect to reduce their compensation in an amount equal to the percentage of their compensation and to have such amount allocated to his salary deferral account.

Section 5.1 of Plan X provides that any eligible employee who desires to have a salary deferral contribution made on his behalf by the employer shall file a contribution election with the committee specifying his contribution percentage of not less than 1% nor more than 85% and authorizing the compensation otherwise payable to him to be reduced accordingly. A contribution election shall be effective only with respect to compensation not yet earned as of the date the contribution election is effective. A participant's contribution election shall become effective on the first day of the next payroll period after it is received and processed by the committee that was appointed to administer Plan X.

****

Elective deferrals are limited under section 5.4(a) of Plan X to the dollar amounts imposed by Code section 402(g)(1)(B) (plus the special catch-up contributions described in section 5.6 of Plan X and section 402(g)(7) of the Code).

Section 5.4(b) of Plan X provides that in the case of a participant who is a qualified employee of a qualified organization, the limitation on elective deferrals in any calendar year shall be increased by the lesser of (i) $3,000, (ii) $15,000 reduced by amounts not included in gross income for prior taxable years, or (iii) the excess of $5,000 times the participant's number of years of service with the qualified organization over the elective deferrals made by the qualified organization on behalf of the participant for prior taxable years.

Section 4.1(b) of Plan X provides for matching contributions for an employee who has attained age 21 and completed 1,000 hours of service. The Board of Directors may establish a matching formula that provides for different levels of matches based on the employees' years of service. Under section 10.3 of Plan X, matching contributions vest over a six-year period.

Section 10.3(a) of Plan X provides in part that the vested portion of a participant's accrued benefit is the entire balance of the participant's salary deferral account and rollover account, and the vested portion of the participant's matching account. Under section 4.3(c) of Plan X, forfeitures will be used to reduce the employers matching contributions or, in the discretion of the Committee, to pay reasonable administrative expenses.

Section 2.19 of Plan X provides that "Custodial Agreement" means the agreement between Employer A and the Custodian to provide for holding of assets received by the Custodian under the Plan pursuant to Article IX.

Sections 9.1 of Plan X provides that Employer A may enter agreements for holding, investing, and payment of Plan X assets, or direct by execution of an insurance contract for all or a specified portion of Plan X assets be held, invested and paid under such contract. All of the assets shall be

****

invested either in one or more annuity contracts which satisfy the requirements of Code section 403(b) and the regulations thereunder or in one or more custodial accounts which satisfy the requirements of Code section 401(f)(2) and which hold only stock of one or more regulated investment companies (as such term is defined in section 851(a) of the Code).

Section 10.5(f) of Plan X provides that no accrued benefit shall be paid or made available to any distributee before the participant dies, attains age 59 ½, incurs a severance from employment, becomes disabled (within the meaning of section 72(m)(7) of the Code, or in the case of contributions made pursuant to a salary reduction agreement (as defined in Code section 3121(a)(1)(D)), encounters financial hardship.

Section 4.4 of Plan X provides that the maximum annual additions to a participant's account with respect to any limitation year shall not exceed the lesser of (1) 100 percent of the participant's section 415 compensation, and (2) $40,000, as adjusted in accordance with section 415(d) of the Code.

Section 10.5(c) of Plan X provides that the required beginning date for the commencement of distributions to a participant is a date not later than April 1 of the calendar year following the later of the calendar year in which the participant attains age 70 ½ or the calendar year in which the participant incurs a severance from employment.

Additionally, section 10.5(f) of Plan X provides that distributions will be made in accordance with Code sections 401(a)(9) and 403(b)(10).

Section 10.7 of Plan X provides for trustee-to-trustee transfers in accordance with section 401(a)(31) and section 403(b)(10) of the Code.

Section 15.1 of Plan X provides that no benefit payable at any time shall be subject to alienation, sale, transfer, assignment, pledge, attachment or other legal process or encumbrance of any kind (except payments pursuant to a qualified domestic relations order).

****

Section 10.2(f) of Plan X provides that the committee may direct the custodian to purchase a nontransferable annuity contract. Such contract shall not contain any provisions that conflict with the provision of the plan and shall provide the optional forms of payment available to a beneficiary under the plan at the date of the participant's death and any notification, election, consent or other requirements provided by the plan in satisfaction of the obligation to which the annuity contract shall relate.

Based on the foregoing facts and representation, a ruling was requested that Plan X satisfies the requirements of section 403(b) of the Code.

Section 403(b)(1) of the Code as amended by the Economic Growth and Tax Relief and Reconciliation Act of 2001 ("EGTRRA"), and applicable for years beginning after December 31, 2001, provides that amounts contributed by an employer to purchase an annuity contract for an employee are excludable form the gross income of the employee in the year contributed, provided (1) the employee performs services for an employer which is exempt from tax under section 501(a) as an organization described in section 501(c)(3), or the employee performs services for an educational institution (as defined in section 170(b)(1)(A)(ii)) which is a state, a political subdivision of a state, or an agency or instrumentality of one or more of the foregoing; (2) such annuity contract is not subject to section 403(a); (3) the employee's rights under the contract are nonforfeitable, except for failure to pay future premiums; (4) such contract is purchased under a plan which meets the nondiscrimination requirements of paragraph 12, and (5) in the case of a contract purchased under a plan which provides a salary reduction agreement, the contract meets the requirements of section 401(a)(30).

Section 403(b)(1) of the Code provides further that the employee shall include in his gross income the amounts actually distributed under such contract in the year distributed as provided in section 72 of the Code. In addition, except as provided in section 403(b)(7)(B), a custodial account described in section 403(b)(7) is treated as an annuity contract for all purposes of the Code.

****

Section 403(b)(10) of the Code requires that arrangements pursuant to section 403(b) must satisfy requirements similar to those of section 401(a)(9) and similar to the incidental death benefit requirements of section 401(a) with respect to benefits accruing after December 31, 1986, in taxable years ending after such date. In addition, this section provides that, for distributions made after December 31, 1992, the requirements of section 401(a)(31) are met, regarding direct rollovers.

Section 401(a)(9) of the Code, in general, provides that the required beginning date for commencement of benefits is April 1 of the calendar year following the later of the calendar year in which the employee attains age 70 ½, or the calendar year in which the employee retires. Section 401(a)(9) specifies required minimum distribution rules for the payment of benefits from qualified plans.

Section 403(b)(11) of the Code provides, in general, that section 403(b) annuity contract distributions attributable to contributions made pursuant to a salary reduction agreement (within the meaning of section 402(g)(3)(C)) may be paid only when the employee attains age 59 ½, incurs a severance from employment, becomes disabled (within the meaning of section 72(m)(7) of the Code), or encounters financial hardship. Such contract may not provide for the distribution of any income attributable to such contributions in the case of hardship.

Section 401(g) of the Code requires that the contract be nontransferable.

Section 403(b)(1)(E) of the Code provides that in the case of a contract purchased under a salary reduction agreement, the contract meets the requirements of section 401(a)(30). Section 401(a)(30) of the Code requires a section 403(b) arrangement which provides for elective deferrals to limit such deferrals under the arrangement, in combination with any other qualified plans or arrangements, of an employer maintaining such plans or arrangements, providing for elective deferrals, to the limitation in effect under section 402(g)(1) for taxable years beginning in such calendar year.

****

Section 403(b)(7) of the Code provides that the amounts paid by a qualifying employer to a custodial account which satisfies the requirements of section 401(f)(2) shall be treated as amounts contributed by the employer for an annuity contract for his employee if the amounts are to be invested in regulated investment company stock to be held in that custodial account, and under the custodial account no such amounts may be paid or made available to any distributee before the employee dies, attains age 59 ½, severs from employment, becomes disabled (within the meaning of section 72(m)(7)), or in the case of contributions made pursuant to a salary reduction agreement, encounters financial hardship.

Section 403(b)(7)(B) of the Code states that a custodial account which satisfies the requirements of section 401(f)(2) shall be treated as an organization described in section 401(a) solely for purposes of subchapter F and subtitle F with respect to amounts received by it (and income from investments thereof).

Section 401(f)(2) of the Code provides that a custodial account shall be treated as a qualified trust under section 401(a) if the assets thereof are held by a bank (as defined in section 408(n)) or another person who demonstrates to the satisfaction of the Secretary that the manner in which he holds the assets will be consistent with the requirements of section 401.

Section 402(g)(1) of the Code provide, generally, that the elective deferrals of any individual for any taxable year shall be included in such individual's gross income to the extent the amount of such deferrals exceeds $11,000, on amounts set forth in the schedule under section 402(g)(1)(B).

Section 402(g)(8) of the Code provides that, in the case of a qualified employee of a qualified organization, with respect to employer contributions used to purchase an annuity contract under section 403(b) under a salary reduction agreement, the limitation of section 402(g)(1), as modified by section 402(g)(4), for any taxable year shall be increased by whichever of the following is the least: (i) $3,000, (ii) $15,000 reduced by amounts not included in gross income for prior taxable years by reason of this paragraph, or (iii) the

****

excess of $5,000 multiplied by the number of years of service of the employee with the qualified organization over the employer contributions described in paragraph (3) made by the organization on behalf of such employee for prior taxable years (determined in the manner prescribed by the Secretary). A "qualified organization" for these purposes means any educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches and included any organization described in section 414(e)(3)(B)(ii) and a "qualified employee" means any employee who has completed 15 years of service with the qualified organization.

Section 415(a)(2) of the Code provides, in relevant part, that an annuity contract described in section 403(b) shall not be considered described in section 403(b) unless it satisfies the section 415 limitations. In the case of an annuity contract described in section 403(b), the preceding sentence applies only to the portion of the annuity contract exceeding the section 415(b) or 415(c) limitations. Under section 415(c)(1) of the Code, contributions to a section 403(b) plan for a limitation year are generally limited to the lesser of $40,000 or 100% of compensation.

In this case, Employer A and the other members of the controlled group listed in appendix A are employers described in section 403(b)(1)(A)(i) of the Code because these employers are described in section 501(c)(3) and exempt from tax under section 501(a). All employee contributions and earnings thereon are fully vested and nonforfeitable at all times. Plan X does not meet the requirements of a section 403(a) annuity plan. The restrictions of nontransferability are present in Plan X as required by section 401(g) of the Code.

Plan X satisfies the limits under section 403(b)(11) of the Code that amounts attributable to elective deferrals shall not be distributed earlier than the employee's attains age 59 ½, severance from employment, death, disability, or hardship. In addition, Plan X satisfies the section 403(b)(10) requirements and limits contributions in accordance with sections 402(g) and 415 of the Code. Plan X contains language that demonstrates compliance with the applicable salary reduction rules in section 1.403(b)-1(b)(3) of the regulations.

****

Therefore, with respect to the ruling request, we conclude that Plan X satisfies the requirements of section 403(b) of the Code.

This ruling is based on the assumption that an official or officials of Employer A formally execute Plan X. This letter does not address whether Plan X satisfies the nondiscrimination and coverage requirements of Code section 403(b)(12). Also, this letter is not a ruling as to whether any specific annuity contract purchased under Plan X satisfies the requirements of section 403(b) of the Code.

This letter ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

A copy of this ruling is being sent to your authorized representative in accordance with a power of attorney on file in this office.

Any questions concerning this ruling should be addressed to ********** (ID **-*****) at (***) ***-**** (not a toll free number).

Sincerely yours,

Alan Pipkin, Manager
Employee Plans Technical Group 4

Enclosures:
Deleted copy of this letter
Notice of Intention to Disclose, Notice 437