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Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Uniform Issue List No. 401.29-02

Contact Person:

Telephone Number:
OP:E:EP:T:4

In Reference to:

Date:
MAY 10 1999

Att'n:

LEGEND:

Company A =

Company B =

Company C =

Company D =

Company E =

Company F =

Plan X =

Plan Y =

Dear

This is in response to a ruling request dated April 3, 1998, submitted by your authorized representative, as supplemented by correspondence dated September 17, December 8, and December 28, 1998. The original ruling request of April 3, 1998 is superceded and replaced by the ruling request of December 28, 1998 relating to the distribution of assets from Plan X under section 401(k)(10)(A)(i) of the Internal Revenue Code ("Code").

In support of your ruling request your authorized representative has presented the following facts:

Plan X is a profit sharing plan containing a cash or deferred arrangement described in section 401(k) of the Code

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which was instituted by Company A in 1983. Employees of Company A and employees of affiliated companies (Company B, Company C and Company D) participated in Plan X.

On June 1, 1995, Company A and Company B were acquired by Company E, a wholly owned subsidiary of Company F. The sale was structured as a stock sale and the majority of rank and file employees remained employed in their present positions, and Company A continued to exist as a wholly owned subsidiary of Company E. As a condition of the sale, Company E required Company A to terminate Plan X. The Board of Directors of Company A signed a resolution on December 31, 1996, designating that date as the date of termination of Plan X. Company A submitted Plan X to the appropriate key district office for a determination that it was qualified upon termination prior to distributing the assets. On February 20, 1998, the key district office issued a determination letter to Plan X indicating that the termination of the plan did not adversely affect the plan's qualification and stating that this favorable determination applies to the termination date of December 31, 1996. Plan X assets were distributed in August 1998.

At the time of the sale, Company F maintained Plan Y, a defined contribution plan containing a cash or deferred arrangement described in section 401(k) of the Code. Plan Y provides retirement benefits for the employees of Company F and the employees of Company F's subsidiaries. Under the terms of Plan Y, employees of Company A and Company B are not eligible to participate in Plan Y until twelve months after all assets are distributed from Plan X. A representation has been made that less than two percent of the participants in Plan X have participated in Plan Y during the 24 month period beginning one year prior to the termination of Plan X and ending one year after the termination.

Based on the aforementioned facts and representations, you have requested a ruling, that for purposes of the two percent rule under section 1.401(k)-1(d)(3) of the Income Tax Regulations, the date of termination of Plan X is December 31, 1996.

Section 401(k)(2)(B)(i)(II) of the Code provides, in part, that amounts held by a trust which are attributable to employer contributions made pursuant to the employee's election may not be distributable to participants or other beneficiaries earlier than an event described in paragraph (10).

Section 401(k)(10)(A)(i) provides, generally, that distributions may be made upon the termination of the plan

without the establishment or maintenance of another defined contribution plan.

Under section 1.401(k)-1(d)(3) of the regulations, a distribution of amounts attributable to elective contributions under a qualified cash or deferred arrangement may not be made upon plan termination if the employer establishes or maintains a successor plan. Section 1.401(k)-1(d)(3) further provides that the definition of the term "employer" contained in paragraph (g)(6) of this section is applied as of the date of plan termination, and a successor plan is any other defined contribution plan maintained by the same employer. Section 1.401(k)-1(d)(3) also contains an exception to the "successor plan" rule which provides that if at all times during the 24 month period beginning 12 months before the termination, fewer than two percent of the employees who were eligible under the defined contribution plan that includes the cash or deferred arrangement as of the date of plan termination are eligible under the other defined contribution plan, the other plan is not a successor plan.

Section 1.401(k)-1(g)(6) of the regulations provides that the term "employer" means the employer within the meaning of section 1.410(b)-9.

Section 1.410(b)-9 of the regulations provides, in part, that "employer" means the employer maintaining the plan and those employers required to be aggregated with the employer under sections 414(b), (c), (m) or (o) of the Code.

Revenue Ruling 89-87, 1989-2 C.B. 81, provides that in order for a qualified plan to terminate, the date of termination must be established, the benefits of the plan participants and other liabilities under the plan must be determined as of the date of plan termination, and all assets must be distributed to satisfy those liabilities in accordance with the terms of the plan as soon as administratively feasible after the date of termination.

Rev. Rul. 89-87 further provides that a determination of whether the assets have been distributed as soon as administratively feasible is based upon all the facts and circumstances of a given case.

The date of termination for Plan X, designated by resolution by the Board of Directors of Company A, was December 31, 1996. As of this date, Company A and Company B were wholly owned subsidiaries of Company E, and as such, Company A and Company B are aggregated with Company E for purposes of determining whether the "employer" maintains or establishes a successor plan under section 1.401(k)-1(d)(3) of the regulations. Since Company F,

the parent of Company E, maintained Plan Y, a defined contribution plan, on the date Plan X terminated, Plan Y would be a successor plan within the meaning of section 1.401(k)-1(d)(3) of the regulations unless Plan Y meets the requirements of the exception to the "successor plan" rule provided in section 1.401(k)-1(d)(3). The exception to the "successor plan" rule is herein referred to as the two percent rule under section 1.401(k)-1(d)(3).

It is represented that less than two percent of the participants in Plan X have participated in Plan Y during the 24 month period beginning one year prior to the termination of Plan X and ending one year after the termination. It is also represented that the Board of Directors of Company A signed a resolution establishing December 31, 1996 as the date of termination for Plan X. Company A requested and received a determination letter dated February 20, 1998, in which the key district office determined that the termination of Plan X on December 31, 1996, did not adversely affect the qualified status of the plan. Company A distributed the assets of Plan X in August 1998.

Accordingly, we conclude with respect to your ruling request, that for purposes of the two percent rule under section 1.401(k)-1(d)(3) of the Income Tax Regulations, the date of termination of Plan X is December 31, 1996.

This ruling expresses no opinion on the qualified status of Plan Y.

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

Sincerely yours,

John G. Riddle, Jr.

John G. Riddle, Jr.
Chief, Employee Plans
Technical Branch 4

Enclosures:
Deleted copy of letter
Notice of Intention to Disclose