TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

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MAY 29 2002

Uniform Issue List: 401.00-00, 402.00-00, 404.00-00; 4975.00-00

T:EP:RA:T3

Attention:

Legend:

Company A =

Company B =

Company C =

Company D =

Company E =

Company F =

Corporation G =

Investment Manager M =

Plan W =

Plan X =

Plan Y =

Plan Z =

Dear

This is in response to your request for a ruling, dated December 15, 2000, submitted by your authorized representative, in which you ask for several rulings under sections 401(a)(28), 402(e)(4), 409(a)(2) and 4975(e)(7) of the Internal Revenue Code (the "Code"). Correspondence dated April 13, 2001, February 7, 2002, February 15, 2002, and May 24, 2002, supplemented the request.

Plan X was originally adopted by Company B, a subsidiary of Company C, as Plan W. Effective **********, Company B merged its two profit-sharing plans, Plan Y and Plan Z into Plan X.

Plan X is qualified under section 401(a) of the Code and consists of a cash or deferred arrangement described in section 401(k) and a employee stock ownership plan ("ESOP component") that is intended to qualify under section 4975(e)(7). Plan X acquired shares of Company C which constituted qualifying employer securities within the meaning of section 4975(e)(8), with the proceeds of exempt loans made by Company C. In addition Company C shares were acquired by Plan X prior to these exempt loans, when Plan X was a tax credit employee stock ownership plan ("TRASOP") as defined in section 409 (the "TRASOP portion" of the ESOP component). Company C shares acquired by Plan X with the exempt loan proceeds constitute the "non-TRASOP portion" of the ESOP component.

On ********** (the "Disposition Date"), Company A acquired Company C. The transaction (the "Transaction") was structured as a merger of Company A's acquisition subsidiary, Corporation G, into Company C, followed by mergers of two of Company C's subsidiaries, Company B and Company D, into Company C, and a merger of Company C into Company A. In connection with these mergers, on the Disposition Date, each outstanding share of Company C common stock, including each share held by Plan X, was converted into a right to receive cash in the amount of $***.

As of the Disposition Date, Plan X held approximately ********* shares of Company C common stock, including approximately ********* shares of Company C common stock that were held as collateral in Plan X' s suspense account and approximately ********* shares of Company C common stock that were allocated to participant accounts under Plan X. As of the Disposition Date, over 90% of the assets of Plan X's ESOP component were invested in Company C common stock. Thus, immediately following the Disposition Date, Plan X held approximately $********** in cash, $********** of which was credited to Plan X's suspense account with respect to unallocated shares of Company C common stock that were tendered on the Disposition Date, and $********** of which was credited to participant accounts under Plan X with respect to allocated shares of Company C common stock that were tendered on the Disposition Date.

In connection with the Transaction, the Second Amendment to Plan X was adopted. Under the provisions of the Second Amendment, Plan X's definition of company was changed from Company C to Company A, effecting a change in Plan X's definition of employer securities from the common stock of Company C to the common stock of Company A. As a

result of the Transaction, after the Disposition Date, shares of Company A common stock constitute qualifying employer securities under section 4975(e)(8) of the Code.

In addition, the Second Amendment to Plan X provides that (i) cash received by Plan X with respect to shares of Company C common stock allocated to participant accounts under Plan X on the Disposition Date is to be reinvested by the Plan X trustee in Company A common stock, and (ii) cash received by Plan X with respect to unallocated shares of Company C common stock held in Plan X's suspense account on the Disposition Date is to be reinvested by the Plan X trustee in shares of Company A common stock, which are to serve as collateral for Plan X' s outstanding Loan. Based on the market value of the Company A common stock, reinvestment of the cash received by Plan X pursuant to the Transaction would require the purchase of approximately ********** shares of Company A common stock. During the reinvestment period the cash proceeds described in (i) and (ii) were placed in a money market fund.

Company A has engaged Investment Manager M to provide discretionary investment management services with respect to Plan X assets that represent the proceeds of the sale of Company C common stock, to develop and execute a program of prudent management pursuant to which such proceeds will be reinvested in shares of Company A common stock over a reasonable period of time, and in a manner that minimizes market impact and that is in accordance with applicable securities laws (the "Reinvestment Plan"). Based on the Investment Manager's conclusions, it was estimated that approximately **** days would be required, after the Disposition Date, to reinvest, in shares of Company A common stock, the cash received by Plan X in connection with the Transaction. Factors that Investment Manager M considered in reaching this conclusion included, without limitation, (i) Company A's market capitalization, (ii) historical average daily trading volume of Company A common stock, (iii) estimated future trading activity of Company A common stock, (iv) market fluctuations due to economic, monetary and general market conditions that may occur during the execution of the Reinvestment Plan, and (v) trading days versus calendar days.

On **********, ******* calendar days following the Disposition Date, the Investment Manager M completed the implementation of the Reinvestment Plan, by reinvesting in Company A common stock, the proceeds that Plan X received in exchange for Company C common stock.

Based on the foregoing, you request the following rulings:

1. The shares of Company A common stock acquired by Plan X with the proceeds of the sale of shares of Company C common stock that were acquired by Plan X before January 1, 1987, will be deemed to have been acquired before January 1, 1987, so that such shares of Company A common stock will not be subject to the diversification rules of section 401(a)(28) of the Code, provided that the reinvestment of such proceeds in shares of Company A common stock is accomplished within 90 days of the Disposition Date or within an extended period approved by the Commissioner pursuant to the fourth ruling request, set forth below.

2. Plan X participants who receive distributions of Company A common stock from Plan X following the Disposition Date will receive net unrealized appreciation treatment on such distributions pursuant to section 402(e)(4) of the Code, and the net unrealized appreciation on Company A common stock acquired by Plan X with proceeds of the sale of shares of Company C common stock will be calculated using the basis of Company C common stock at the Disposition Date, without regard to any interim investments of the proceeds of such sale of shares of Company C common stock, provided that the reinvestment of such proceeds in shares of Company A common stock is accomplished within 90 days of the Disposition Date or within an extended period approved by the Service pursuant to the fourth ruling request, set forth below.

3. To the extent Plan X reinvests the proceeds of the sale of shares of Company C common stock in shares of Company A common stock, the TRASOP and non-TRASOP portions of the ESOP component of Plan X will continue to be considered invested primarily in employer securities, provided that the reinvestment of such proceeds in shares of Company A common stock is accomplished within 90 days of the Disposition Date or within an extended period approved by the Commissioner pursuant to section 1.46-8(e)(10) of the Income Tax Regulations as ruled upon in the fourth ruling request, as set forth below.

4. Pursuant to Question and Answer 3 of Notice 88-56 (1998-1 C.B. 540), section 402(j)(2)(B) of the Code and section 1.46-8(e)(10) of the regulations, respectively, for purposes of ruling requests one, two, and three, with respect to sections 401(a)(28), section 402(e)(4), sections 409(a) and 4975(e)(7) of the Code, respectively, the reinvestment period will commence on the Disposition Date and end 118 days later.

With respect to your first ruling request, section 401(a)(28) of the Code generally provides, in regards to an ESOP within the meaning of section 4975(e)(7) or a TRASOP within the meaning of section 409(a) that any employee who has attained age 55 and completed ten years of participation in an employee stock ownership plan is entitled annually to direct diversification of at least 25 percent of the participant's account balance in the employee stock ownership plan (50 percent in the sixth year). The diversification requirement is effective with respect to shares acquired by the employee stock ownership plan after December 31, 1986.

Pursuant to Question and Answer 3 of Notice 88-56, employer securities acquired by an employee stock ownership plan or a tax credit employee stock ownership plan after December 31, 1986, will be deemed, for purposes of section 401(a)(28) of the Code, to have been acquired by or contributed to the employee stock ownership plan on or before December 31, 1986, under certain circumstances. One such circumstance is when cash or other assets derived from the disposition of employer securities pursuant to a corporate reorganization or acquisition attempt (whether or not successful) which are used to purchase other employer securities will be treated as acquired by or contributed to the employee stock ownership plan on or before December 31, 1986, if the period between the disposition and the reinvestment does not exceed 90 days or such longer period as may be granted by the Commissioner under rules similar to those of section 1.46-8(e)(10) of the regulations.

In the present case, the cash derived from the sale of Company C common stock (including the Company C stock purchased prior to January 1, 1987) pursuant to a corporate acquisition will be reinvested in shares of Company A common stock. Thus, with respect to your first ruling request, we conclude that the shares of Company A common stock acquired by Plan X with the proceeds of the sale of shares of Company C common stock that were acquired by Plan X before January 1, 1987, will be deemed to have been acquired before January 1, 1987, so that such shares of Company A common stock will not be subject to the diversification rules of section 401(a)(28) of the Code, provided that the reinvestment of such proceeds in shares of Company A common stock is accomplished within 90 days of the Disposition Date or within an extended period approved by the Commissioner pursuant to the fourth ruling request, set forth below.

With respect to your second ruling request, section 402(a) of the Code provides, generally, that the amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to him in the year in which so distributed under section 72 (relating to annuities). Section 402(e)(4) provides, generally, that the amount actually distributed to any distributee shall not include net unrealized appreciation in securities of the employer corporation. *See sections 402(e)(4)(A) and (B).*

Section 1.402(a)-1(b)(2)(i) of the regulations states that the amount of net unrealized appreciation in securities of the employer corporation which are distributed by the trust is the excess of the market value of such securities at the time of distribution over the cost or other basis of such securities to the trust.

Section 402(e)(4)(E) of the Code provides that the term "securities of the employer corporation" includes securities of a parent or subsidiary corporation (as defined in subsections (e) and (f) of section 424) of the employer corporation.

Section 402(j)(1) of the Code provides that for purposes of section 402(e)(4), in the case of any transaction to which this subsection applies, the determination of net unrealized appreciation will be made without regard to such transaction. Pursuant to section 402(j)(2)(B), included among the transactions covered by section 402(j)(1) is any disposition by a plan trustee of employer securities in which the proceeds are used to acquire employer securities within 90 days, or such longer period as the Secretary may prescribe, except that this shall not apply to any employee with respect to which a distribution of money was made after such disposition and before such acquisition.

In this case, the proceeds of the disposition of shares of Company C common stock are being used by the Plan X trustee to acquire shares of Company A common stock. Accordingly, we conclude with respect to your second ruling request that Plan X participants who receive distributions of Company A common stock from Plan X following the Disposition Date will receive net unrealized appreciation treatment on such distributions pursuant to section 402(e)(4) of the Code, and the net unrealized appreciation on Company A common stock acquired by Plan X with proceeds of the sale of shares of Company C common stock will be calculated using the basis of Company C common stock as of the Disposition Date, without regard to any interim investments of the proceeds of such sale of shares of Company

C common stock, provided that the reinvestment of such proceeds in shares of Company A common stock is accomplished within 90 days of the Disposition Date or within an extended period approved by the Service pursuant to the fourth ruling request, set forth below.

With respect to your third ruling request, section 4975(e)(7) of the Code provides, in part, that the term "employee stock ownership plan" ("ESOP") means a defined contribution plan which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a) and which are designed to invest primarily in qualifying employer securities.

Section 4975(e)(8) of the Code provides that the term "qualifying employer security" means any employer security within the meaning of section 409(l). Section 409(l) states that the term "employer securities" means common stock issued by the employer (or by a corporation which is a member of the same controlled group within the meaning of section 1563(a) determined without regard to sections 1563(a)(4) and 1563(e)(3)(C)) which is readily tradable on an established securities market.

TRASOPs are described in section 409(a), in part, as defined contribution plans which are designed to invest primarily in employer securities. Section 1.46-8(e)(10) of the regulations provides that the requirement that a TRASOP be designed to invest primarily in employer securities is a continuing obligation. Therefore, a transaction changing the status of a corporation as an employer may require the conversion of certain plan assets into other securities.

Section 1.46-8(e)(10) of the regulations also provides that cash or other assets derived from the disposition of employer securities held by a TRASOP must be reinvested in employer securities not later than the 90th day following the date of disposition. However, the Commissioner may grant an extension of the period for reinvestment in employer securities depending on the facts and circumstances of each case. Based on the facts of this case, we believe that it is appropriate also to apply this period of reinvestment for the non-TRASOP shares held in Plan X, in addition to the TRASOP shares held in Plan X.

Accordingly, with respect to your third ruling request, we conclude that, to the extent Plan X reinvests the proceeds of the sale of shares of Company C common stock in shares of Company A common stock, the TRASOP portion of the ESOP component of Plan X will continue to be considered invested primarily in employer securities, as required by section 409(a)(2) of the Code and section 1.46-8(e)(10) of the regulations, provided that the reinvestment of such proceeds in shares of Company A common stock is accomplished within 90 days of the Disposition Date or within an extended period approved by the Commissioner pursuant to the fourth ruling request, set forth below. We also rule that the non-TRASOP portion of the ESOP component of Plan X will continue to be considered be treated as being invested primarily in employer securities for purposes of section 4975(e)(7), provided that the reinvestment of such proceeds in shares of Company A common stock is accomplished within 90 days of the Disposition Date, or within an extended period approved by the Commissioner pursuant to the fourth ruling request, set forth below.

With respect to your fourth ruling request, after careful analysis of the facts considered by the Investment Manager, we have determined that a 28 day extension of the 90 day period under Question and Answer 3 of Notice 88-56, section 402(j)(2)(B) and section 1.46-8(e)(10) is reasonable.

Thus, with respect to your fourth ruling request, we conclude that for purposes of ruling requests one, two, and three, with regard to section 401(a)(28), section 402(e)(4) and sections 409(a) and 4975(e)(7) of the Code, respectively, the applicable reinvestment period will commence on the Disposition Date and end *** days thereafter.

The above rulings are based on the assumptions that Plan X is otherwise qualified under sections 4975(e)(7), 409, and 401(a) of the Code, as applicable, and that the related trust is tax-exempt under section 501(a) at the time of the relevant transactions.

Please note that Plan X's compliance with the applicable requirements of Code sections 401(a), 409, and 4975 is subject to verification upon audit by the appropriate Key District Office of the Service.

We also note that the Department of Labor has jurisdiction with respect to the provisions of part 4 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), including the requirement in ERISA section 404(a)(1)(B) that fiduciaries discharge their duties prudently. Therefore, we express no opinion in regard to such issues.

If you have any questions regarding this private letter ruling, please contact ****** ********** (ID No.: **-*****) at (***) ***-**** (not a toll free number).

Pursuant to a power of attorney on file in this office, a copy of this letter ruling is being sent to your authorized representative.

Sincerely yours

Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans, Technical Group 3
Tax Exempt and Government Entities Division

Enclosures:
Deleted copy of letter
Notice of Intention to Disclose

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