Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Contact Person:

199915064

Telephone Number:

In Reference to:
OP:E:EP:T:3
Date:

Attention:

JAN 22 1999

Legend

Company A =

Company B =

Fund M =

Plan X =

Dear

This is in response to your request for a ruling, dated February 27, 1998, submitted by your authorized representative, under section 404(k) of the Internal Revenue Code of 1986 (the "Code") with respect to qualified plan amendments. The request was supplemented by letters dated August 20, 1998, October 7, 1998, October 19, 1998, December 18, 1998, December 24, 1998, and January 6, 1999.

Company A adopted and maintains Plan X for the benefit of the employees of Company A and related entities. Plan X is qualified under section 401(a) of the Internal Revenue Code, and the related trust is exempt under section 501(a). Plan X was a profit sharing plan with a qualified cash or deferred arrangement under section 401(k) of the Code. Effective as of January 1, 1998, Plan X has been amended and restated to become a stock bonus plan under section 401(a) of the Code and an employee stock ownership plan ("ESOP") under Section 4975(e)(7) of the Code and section 407(d)(6) of the Employee Retirement Income Security Act of 1974 ("ERISA"). Plan X continues to contain a qualified cash or deferred arrangement under Section 401(k) of the Code.

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Effective, October 1, 1998 Company A reorganized under a holding company structure. Under the reorganization, a new holding company, Company B, was created. Company A became a wholly-owned subsidiary of Company B. All outstanding shares of Company A were exchanged for shares of Company B.

In general, all employees are eligible to participate in Plan X after age 18. An employee may reduce his or her current compensation and make deferral contributions (on a pre-tax basis) or after-tax contributions as of the beginning of any pay period. Deferral contributions are allocated to participants' Deferral Contribution Accounts, and after-tax contributions are allocated to participants' After Tax Contribution Accounts. Plan X also holds assets from participants' rollover contributions that are held in their Rollover Accounts.

For a participant who has completed 12 months of continuous service, Company A makes matching contributions based on the amount of the participant's deferral contributions and after-tax contributions to Plan X. Matching contributions are allocated to participants' Matching Contribution Accounts. Matching contribution is equal to 100% of a participant's deferral contributions and after-tax contributions, up to the first 2% of such participant's compensation (as defined in Plan X), and 50% of his deferral contributions and after-tax contributions, up to the next 4% of the participant's compensation (as defined in Plan X).

Participants are fully vested in their Deferral Contribution, After-Tax, Rollover and Matching Contribution Accounts. Under Plan X, employees can elect to invest these Accounts in one of several investment funds, including Fund M, consisting of Company B common stock.

In connection with the restatement of Plan X as an ESOP, Plan X has been amended to provide that, if so determined by the Plan X Administrator, any cash dividends payable on Company B common stock in Fund M that are allocated to the Accounts of participants may be paid currently (or within 90 days after the end of the plan year in which the dividends are paid to the Trust) in cash to such participants or their beneficiaries on a nondiscriminatory basis, or Company A may pay such dividends directly to participants or their beneficiaries.

The Administrative Procedure of Plan X provides for the following specific dividend pass through methods:

(a) Cash dividends paid during the plan year on shares of Company B common stock in Fund M that are allocated to the Accounts of terminated participants (as defined below), will automatically be passed through to such participants (at such time as determined by the administrator, but no later than 90 days following the end of the plan year in which the dividends are paid to the trust).

(b) Cash dividends paid during the plan year on shares of Company B common stock in Fund M that are allocated to the Matching Contribution Accounts of active participants (as defined below) will automatically be passed through to such participants (at such time as determined by the administrator, but no later than 90 days following the end of the plan year in which the dividends are paid to the trust).

For purposes of the above pass through methods, an "active" participant is a participant who is employed by Company A (or a related entity) on the first day of the quarter for which a dividend is paid and distributed, and a "terminated" participant is a participant who terminated employment (or the beneficiary of a participant who died) prior to the first day of any such quarter for which a dividend is paid and distributed.

Plan X provides that a participant who is an active employee may elect to make deferral contributions to Plan X (in whole percentages) for any pay period, and may adjust the amount of such contributions at any time by executing a new salary reduction agreement. Thus, a participant will have the opportunity to adjust the amount of his or her salary deferrals to offset any additional dividend income that the individual may have as a result of the dividend pass through, subject to Plan X's annual percentage limits on deferral contributions (15% of compensation), the Plan X's combined annual percentage limits on deferral and after-tax contributions (20% of compensation), as well as the limits of sections 402(g) and 415 of the Code.

Based on the foregoing, you request a ruling that cash dividends on shares of Company B common stock held in the Fund M that are paid directly to the trustee of Plan X and are then distributed to participants or beneficiaries no later than 90 days after the close of the plan year in which they are paid to the trustee will be deductible by Company A under section 404(k) of the Code in the taxable year of Company A in which the dividends are received by such participants or beneficiaries.

Section 404(k)(1) of the Code provides that, in the case of a corporation, there shall be allowed as a deduction for a taxable year the amount of any applicable dividend paid in cash by such corporation during the taxable year with respect to applicable employer securities. Such deduction is in addition to the deductions allowed under section 404(a).

Section 404(k)(2) of the Code provides, in relevant part, that the term "applicable dividend" means any dividend which, in accordance with the plan provisions is paid to the plan and is distributed in cash to the participants in the plan, or their beneficiaries, not later than 90 days after the close of the plan year in which paid.

Section 404(k)(3) of the Code provides that for purposes of this subsection, "applicable employer securities" means, with respect to any dividend, employer securities which are held on the record date for such dividend by an employee stock ownership plan which is maintained by - (A) the corporation paying such dividend, or (B) any other corporation which is a member of a controlled group of corporations (within the meaning of section 409(e)(4) which includes such corporation).

Section 404(k)(5)(A) of the Code provides that the Secretary may disallow the deduction under paragraph (1) for any dividend if the Secretary determined that such dividend constitutes, in substance, an evasion of taxation.

Based upon your representations, the subject dividends on Company B stock allocated to the plan participants' accounts will be paid to the plan participants within 90 days of the close of the plan year.

Accordingly, we conclude that, under Plan X, that cash dividends on shares of Company B common stock held in the Fund M that are paid directly to the trustee of Plan X and are then distributed to participants or beneficiaries no later than 90 days after the close of the plan year in which they are paid to the trustee will be deductible by Company A under section 404(k) of the Code in the taxable year of Company A in which the dividends are received by such participants or beneficiaries.

The above ruling is based on the assumption that Plan X will be qualified under sections 401(a), 401(k), 409, and 4975(e)(7) of the Code, and the related trust will be tax exempt under section 501(a) at the time that the above transaction takes place. In addition, we are assuming that the subject shares allocated to the participants' accounts in Plan X are "applicable employer securities", within the meaning of section 404(k)(3) with respect to the subject dividends.

In addition, this ruling is also based on the assumption that the proposed dividend does not constitute, in substance, an evasion of taxation within the meaning of section 404(k)(5)(A) of the Code. We are expressing no opinion as to whether or not the disallowance of deductions provided for in that section would be applicable here.

A copy of this letter has been sent to your authorized representative in accordance with a power of attorney on file in this office

Sincerely yours,

Frances V. Sloan

Frances V. Sloan
Chief, Employee Plans
Technical Branch 3

Enclosures:
Deleted copy of letter
Notice of Intention to Disclose

cc :