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Internal Revenue Service

Uniform Issue List No. 402.07-00

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OP:E:EP:T:4

Department of the Treasury

Washington, DC 20224

Contact Person:

Telephone Number:

In Reference to:

Date:

OCT 29 1999

Legend:

Corporation A = **********

Plan X = **********
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Dear **********:

This is in response to a ruling request submitted to this office on your behalf by your authorized representative by letter dated February 10, 1999, as supplemented by letters dated February 19, 1999, May 13, 1999, July 27, 1999, and August 10, 1999. You have requested rulings under section 402(e)(4)(B) of the Internal Revenue Code ("Code"). The following facts and representations have been submitted in support of your ruling request.

You are over age 60 and, up to your retirement on July 1, 1998, you were an employee of Corporation A and a participant in Plan X. Your authorized representative asserts that Plan X is qualified under section 401(a) of the Code. You were not a participant in any other plan of Corporation A that would be required to be aggregated with Plan X under section 402(d)(4)(C) of the Code.

Your account balance in Plan X consists of both Corporation A stock ("Employer Stock") and other assets. All of your pre-tax and after-tax contributions have been invested in Employer Stock.

You wish to have all Plan X assets allocated to your account, other than the Employer Stock, transferred to an individual retirement account ("IRA") qualified

307

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under section 408(a) of the Code. Consistent with the terms of Plan X, you will elect to receive a distribution from Plan X within one taxable year of all Employer Stock credited to your account and, in addition, you will elect to have all other Plan X assets to the credit of your account transferred within the same taxable year to an IRA, either by a rollover described in section 402(c) of the Code or by a direct trustee-to-trustee transfer described in section 401(a)(31) of the Code.

You separated from service with Corporation A on July 1, 1998, and you believe that the distribution of Employer Stock and other Plan X assets standing to the credit of your account within the same taxable year will constitute a "lump sum distribution" as defined in section 402(d)(4)(A) of the Code, thus allowing you to receive deferral of income recognition on the Employer Stock until the time the Employer Stock is disposed of. You further believe that a rollover of part of the lump sum distribution from Plan X to an IRA would qualify as a tax-free rollover and would not affect the status of the distribution as a "lump sum distribution" for purposes of excluding net unrealized appreciation in securities of the employer corporation under section 402(e)(4)(B) of the Code.

Based on the above facts and representations, your authorized representative requests the following rulings:

1. That where a distribution is made directly to you within one taxable year of all the Employer Stock credited to your account under Plan X and, within the same taxable year, all remaining Plan X assets to your credit other than the Employer Stock are, pursuant to your election under section 401(a)(31) of the Code, paid directly to an eligible retirement plan, the distribution may properly be treated in the aggregate as constituting a qualifying lump sum distribution under section 402(e)(4)(B) of the Code, thus allowing you to receive deferral of income recognition on unrealized appreciation in the Employer Stock until the time you dispose of the stock, and
2. That for purposes of satisfying the requirement under section 402(e)(4)(B) of the Code that any gain associated with net unrealized appreciation in employer stock is eligible to receive deferral of income recognition until the time of the disposition of the employer stock only if the distribution of employer stock is made as part of a lump sum distribution qualifying under section 402(d)(4) of the Code (without reference to the five-year plan participation requirement under section 402(d)(4)(F)), you in receiving your total account balance within one taxable year may transfer the Plan X assets received other than the Employer Stock on a tax-free rollover basis to an IRA without affecting

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the status of the distribution as a qualifying lump sum distribution under section 402(e)(4)(B).

Section 402(a) of the Code provides that, except as otherwise provided in this section, any 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 the distributee, in the year of the distributee in which distributed, under section 72 (relating to annuities).

Section 402(e)(4)(B) of the Code provides that, for purposes of subsection (a) and section 72, in the case of any lump sum distribution which includes securities of the employer corporation, there shall be excluded from gross income the net unrealized appreciation attributable to that part of the distribution which consists of securities of the employer corporation. Section 402(e)(4)(C) of the Code provides that, for purposes of subparagraphs (A) and (B), net unrealized appreciation and the resulting adjustments to basis shall be determined in accordance with regulations prescribed by the Secretary.

Section 402(e)(4)(D) of the Code provides that, for purposes of this paragraph, the term "lump sum distribution" has the meaning given such term by subsection (d)(4)(A) (without regard to subsection (d)(4)(F)).

Section 402(d)(4)(A) of the Code provides that, for purposes of this section, the term "lump sum distribution" means the distribution or payment within 1 taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient (i) on account of the employee's death, (ii) after the employee attains age 59 ½, (iii) on account of the employee's separation from the service, or (iv) after the employee has become disabled (within the meaning of section 72(m)(7)), from a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501.

Section 402(c)(4) of the Code provides that, for purposes of this subsection, the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include (A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made (i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or (ii) for a specified period of 10 years or more, (B) any distribution to the extent such distribution is required under section 401(a)(9), and (C) any hardship distribution described in section 401(k)(2)(B)(i)(IV).

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Section 402(c)(8)(B)(i) of the Code defines "eligible retirement plan" to include an IRA described in section 408(a).

Section 401(a)(31)(A) of the Code provides that if the distributee of any eligible rollover distribution (i) elects to have such distribution paid directly to an eligible retirement plan, and (ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Section 401(a)(31)(C) of the Code provides that, for purposes of this paragraph, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A). Section 402(f)(2)(A) provides that the term "eligible rollover distribution" has the same meaning as when used in subsection (c) of that section.

Section 1.401(a)(31)-1, Q&A 5, of the Income Tax Regulations ("regulations") provides that an eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover is not currently includible in the distributee's gross income under section 402(c) of the Code and is exempt from the 20-percent withholding imposed under section 3405(c)(2).

With respect to your ruling requests, section 402(e)(4)(D) of the Code defines the term "lump sum distribution" as having the same meaning given such term by section 402(d)(4)(A) without regard to the minimum period of service requirement. Section 402(d)(4)(A) provides, in pertinent part, that the term "lump sum distribution" means the distribution or payment within one taxable year.

Plan X provides for the distribution to an employee of the balance to the credit in his or her account upon his or her separation from service, an event described in section 402(d)(4)(A) of the Code which can trigger a lump sum distribution, and you have separated from service on July 1, 1998. You intend to notify the plan administrator that you elect to receive a distribution from Plan X within one taxable year of all the Employer Stock in your account and, in addition, to have all of the remaining Plan X assets credited to your account transferred within the same taxable year to an IRA pursuant to either a rollover described in section 402(c) or a trustee-to-trustee transfer described in section 401(a)(31).

Pursuant to section 402(d)(4)(K) of the Code, the portion of a lump sum distribution that is not rolled over or transferred does not receive forward income averaging treatment. However, this requirement is not included with respect to the calculation of taxes under section 402(e)(4). Therefore, a rollover of part of a lump

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sum distribution from a qualified plan to another eligible plan, including an IRA, would not affect the status of the distribution as a qualifying lump sum distribution for purposes of section 402(e)(4)(B).

Section 1.402(c)-2, Q&A 13(b), of the regulations provides that if an eligible rollover distribution is paid to an individual retirement plan in a direct rollover at the election of the distributee, the distributee is deemed to have irrevocably designated that the direct rollover is a rollover contribution.

A review of section 401(a)(31)(C) of the Code and section 1.401(a)(31)-1, Q&A 5, of the regulations shows that a trustee-to-trustee transfer is a type of rollover which is exempt from the 20-percent withholding imposed under section 3405(c)(2). However, if a distributee of an eligible rollover distribution does not elect to have the eligible rollover distribution paid directly from the plan to an eligible retirement plan in a direct rollover under section 401(a)(31), the eligible rollover distribution is subject to 20-percent income tax withholding under section 3405(c). Therefore, for purposes of determining whether a distribution is a qualifying lump sum distribution for purposes of section 402(e)(4)(B), whether part of the lump sum distribution was rolled over or transferred by a trustee-to-trustee transfer would not change the conclusion reached on whether a distribution is a qualifying lump sum distribution for the purposes of section 402(e)(4)(B).

Accordingly, we conclude as follows:

1. That where a distribution is made directly to you within one taxable year of all the Employer Stock credited to your account under Plan X and, within the same taxable year, all remaining Plan X assets to your credit other than the Employer Stock are, pursuant to your election under section 401(a)(31) of the Code, paid directly to an eligible retirement plan, the distribution may properly be treated in the aggregate as constituting a qualifying lump sum distribution under section 402(e)(4)(B) of the Code, thus allowing you to receive deferral of income recognition on unrealized appreciation in the Employer Stock until the time you dispose of the stock, and
2. That for purposes of satisfying the requirement under section 402(e)(4)(B) of the Code that any gain associated with net unrealized appreciation in employer stock is eligible to receive deferral of income recognition until the time of the disposition of the employer stock only if the distribution of employer stock is made as part of a lump sum distribution qualifying under section 402(d)(4) of the Code (without reference to the five-year plan participation requirement under section 402(d)(4)(F)), you in receiving your total account balance within one

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taxable year may transfer the Plan X assets received other than the Employer Stock on a tax-free rollover basis to an IRA without affecting the status of the distribution as a qualifying lump sum distribution under section 402(e)(4)(B).

These rulings are based on the assumption that Plan X is qualified under section 401(a) of the Code and its related trust is tax-exempt under section 501(a) at all times relevant to these rulings. These rulings assume further that you will receive the balance to your credit under Plan X within one taxable year and that the distribution is made in accordance with the terms of the plan. This letter ruling expresses no opinion as to the qualified status of the IRA under section 408(a) that you intend to establish.

Please be aware that the taxable portion of an "eligible rollover distribution" described in section 402(c)(4) of the Code is subject to the 20-percent income tax withholding requirement under section 3405(c). However, where an eligible rollover distribution includes employer securities, to the extent that net unrealized appreciation in employer securities is currently excludible from gross income pursuant to section 402(e)(4) of the Code, net unrealized appreciation is not included in the amount of an eligible rollover distribution that is subject to the 20-percent withholding.

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

The original and a deleted copy of this letter have been sent to your authorized representative in accordance with the instructions in a power of attorney on file with this office.

Sincerely yours,

John G. Riddle, Jr.

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

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

3/2