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Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Person To Contact

Telephone Number:

Refer Reply To:
T:EP:RA:T3

Date:
APR 12 2001

Attention:

Legend:

Corporation A =

Corporation B =

Corporation C =

Investment Manager D =

Exchange E =

Stock M =

Stock N =

Plan X =

Dear

This is in response to your request for a ruling dated January 12, 2001, submitted by your authorized representative in which you request a ruling for an extension of the 90-day period in which the trustee of Plan X may use the cash proceeds from a tender of shares of Corporation B common stock ("Stock M") pursuant to an exchange offer and merger, to purchase shares of Stock N for purposes of the net unrealized appreciation rules under sections 402(e)(4) and 402(j) of the Internal Revenue Code (the "Code").

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Pursuant to an Agreement and Plan of Merger, dated as of ********** (the "Merger Agreement"), among Corporation A, Corporation B and Corporation C, Corporation A, through its wholly owned subsidiary, Corporation C, offered to exchange $******* in cash and .****** shares of Stock N (Corporation A Common Stock) for each outstanding share of Stock M (Corporation B Common Stock), including the associated rights to purchase preferred stock, that is validly tendered and not properly withdrawn (the "exchange offer). On **********, the exchange offer expired, and over **% of the outstanding shares of Stock M were validly tendered to Corporation A. Following the completion of the exchange offer, Corporation C merged with and into Corporation B, and the separate corporate existence of Corporation C ceased. As a result, Corporation B became a wholly-owned subsidiary of the Corporation A on **********. Each outstanding share of Stock M which had not been exchanged or accepted for exchange in connection with the exchange offer was converted in the merger into the same amount of cash and the same number of shares of Stock N as was paid in the exchange offer.

Corporation B maintained Plan X, a 401(k) plan with a number of investment funds, including a company stock fund invested in Stock M (the "Stock M Fund"). Corporation A assumed liability for Plan X in connection with the merger. Through the exchange offer, the Plan X trustee, pursuant to participant elections, tendered a total of ********** shares of Stock M to Corporation A, representing ***% of the shares of Stock M held by the Stock M Fund. As a result of the tender, Plan X received $********** and ********** shares of Stock N on **********.

Plan X provides that all net income that is earned on investments in an investment fund described in Plan X shall be reinvested by the Trustee in that investment fund. As the cash proceeds realized by the tender and exchange of Stock M by the Plan X trustee constitute income with respect to the Stock M Fund, the Plan X trustee is required to reinvest the cash proceeds in the Stock M Fund. Following the merger, however, shares of Stock M were no longer available as an investment alternative in Plan X's company stock fund, as all such shares were either exchanged or canceled as part of the Merger Agreement. Following the merger, Corporation B and Corporation A became part of the same controlled group of corporations. Since Corporation B is a subsidiary of the Corporation A, Plan X can invest in Stock N, and such stock will constitute securities of the employer corporation for purposes of the net unrealized appreciation rules. Thus, Plan X has been amended to define company stock as Stock N and the company stock fund as the Stock N Fund.

To reinvest the cash consideration received by Plan X trustee with respect to the exchange offer, the Corporation B Corporation Employee Benefit Committee hired Investment Manager D to reinvest the cash proceeds in Stock N. Investment Manager D has indicated that it will reinvest the cash proceeds in Stock N through a combination of open market purchases and off-market trading (or crossing). Stock N is widely held and publicly traded on Exchange E. The cash consideration received by the Plan X Trustee with respect to the shares of Stock M held by Plan X totaled $**********. Based on the closing price of the Stock N as of the date of the merger, Plan X's Investment Manager D would be required to purchase in excess of ********** shares of Stock N, representing approximately **% of the outstanding shares of Corporation A.

In addition to the cash consideration to be reinvested in Stock N by Investment Manager D as a result of the exchange offer, Investment Manager D will also be required to purchase additional shares of Stock N as a result of normal Plan X operations. Plan X Participants have the ability to direct the investment of their accounts in Plan X and may

direct the trustee to invest 100% of contributions in the Stock N Fund. In addition to directing the investment of contributions in the Stock N Fund, Participants have the ability to move account balances from other investment funds into the Stock N Fund.

Investment Manager D has stated that off-market trading opportunities are limited and that there is no guarantee of the amount of cash proceeds that can be reinvested in this manner. Investment Manager D has also indicated that open market purchases should not exceed a stated percentage of the shares of Stock N traded for a given day. Based on this Investment Manager D has stated that a total of 85 trading days would be required to fully reinvest the cash proceeds in Stock N under normal trading conditions and without taking into consideration Stock N purchases resulting from normal plan operations. It is further represented that the share price of Stock N, in the open market, has been subject to substantial price fluctuations, and the considerable number of shares to be purchased by Investment Manager D could create even greater volatility with respect to Stock N. Given this volatility, the investment manager has determined there may be times during the re-investment period in which it would not be prudent to acquire Stock N.

Based on the foregoing, you request the following rulings:

1. Pursuant to the authority granted to the Secretary under Code section 402(j), the 90-day period described in Code section 402(j)(2)(B) for purposes of reinvesting the proceeds from the tender of Stock M to Corporation A, pursuant to the exchange offer in Stock N be extended for a period of 60 days, so that the determination of net unrealized appreciation under Code section 402(e)(4) shall be made without regard to the transactions in which Plan X's trustee disposed of Stock M and Investment Manager D uses the proceeds to acquire Stock N.

2. To the extent that Plan X exchanged Stock M for Stock N or reinvested the proceeds of the tender of Stock M in Stock N within 90 days of such exchange or tender, or within an extended period approved by the Secretary pursuant to ruling request 1, the basis of the Stock N for purposes of determining net unrealized appreciation under Code section 402(e)(4) will be equal to the basis of the Stock M exchanged or tendered.

Section 402(j)(2) provides that for purposes of 402(e)(4), the determination of net unrealized appreciation shall be made without regard to any transaction in which – (A) the plan trustee exchanges the plan's securities of the employer corporation for other such securities, or (B) the plan trustee disposes of securities of the employer corporation and uses the proceeds of such disposition to acquire securities of the employer corporation within 90 days (or such longer period as the Secretary may prescribe), except that this subparagraph shall not apply to any employee with respect to whom a distribution of money was made during the period after such distribution and before such acquisition.

Section 402(e)(4)(A) of the Code states, in part, that in the case of a distribution, other than a lump sum distribution, the amount actually distributed to any distributee from a trust described in section 401(a) of the Code and exempt from trust under section 501(a) shall not be include any net unrealized appreciation attributable to amounts contributed by the employee.

Section 402(e)(4)(B) of the Code provides that in the case of any lump sum distribution which consists of 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

With respect to the subject transaction, we have determined that the plan trustee's disposal of Stock N and the use of these proceeds commencing on **********, to acquire Stock M is a type of transaction contemplated under section 402(j)(2)(B). In addition the exchange of Stock N for Stock M meets the requirements of section 402(j)(2)(A). We have also determined, based on the facts as submitted relating to the considerable number of shares that must be purchased, the particular volatility problems inherent in such a large undertaking and the investment manager's determination as to the number of trading days needed to prudently reinvest the cash proceeds, that the 90 day period provided for under section 402(j)(2)(B) is insufficient and that it is reasonable to extend such period by 60 days.

Accordingly we conclude as follows:

1.Pursuant to the authority granted to the Secretary under Code section 402(a), the 90-day period described in Code section 402(j)(2)(B) for purposes of reinvesting the proceeds from the tender of Stock M to Corporation A, pursuant to the exchange offer in Stock N be extended for a period of 60 days, so that the determination of net unrealized appreciation under Code section 402(e)(4) shall be made without regard to the transactions in which Plan X's trustee disposed of Stock M and Investment Manager D uses the proceeds to acquire Stock N.

2. To the extent that Plan X exchanged Stock M for Stock N or reinvested the proceeds of the tender of Stock M in Stock N within 90 days of such exchange or tender, or within the extended period approved by the Secretary pursuant to ruling request 1, the basis of the Stock N for purposes of determining net unrealized appreciation under Code section 402(e)(4) will be equal to the basis of the Stock M exchanged or tendered.

This ruling is based on the assumption that Plan X is qualified under section 401(a) of the Code at all relevant times relating to the described transaction.

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

Pursuant to a power of attorney on file with the service, the original 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
Copy of Letter to Authorized Representative