199928039

Internal Revenue Service

Department of the Treasury

Uniform Issue List: 401.00-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply to:
OP:E:EP:T:3,

Date:
APR 19 1999

Att'n:

Legend:

Corporation A =

Subsidiary B =

Buyer C =

Unit D =

Plan X =

Dear

This is in response to your request for a ruling, dated October 23, 1998, supplemented by a letter dated January 7, 1999, submitted by your authorized representative concerning distributions from a plan described in section 401(k) of the Internal Revenue Code. Your authorized representative submitted the following facts and representations in support of the requested ruling.

Plan X, a profit-sharing plan which includes a cash or deferred arrangement ("CODA") as described in section 401(k) of the Code, is maintained for the benefit of the employees of Subsidiary B. Plan X is qualified under section 401(a) of the Code. Corporation A sponsors Plan X.

Subsidiary B, a wholly-owned subsidiary of Corporation A, is a corporation which operates an airline, and owns Unit D. Prior to the sale of Unit D, it was a separate function of Subsidiary B. Employees of Unit D participated in Plan X. Unit D was responsible for the operation and maintenance of all information and communications technology services throughout Subsidiary B. Unit D divided its functions into the following categories: customer services, finance, flight

179

operations, human resources, information services, maintenance operations and marketing. Unit D provided Subsidiary B with technological support in each of the above-named functions. Unit D had its own centralized management, separate facilities, facilities management, and budgeting. Unit D handled its own personnel functions, and maintained a separate work force comprised of its own management, professional, operational, clerical, and support staff.

On January 1, 1998, Unit D was sold to Buyer C, an unrelated corporation. The sale consisted of at least 95 percent of the assets of Unit D.

Plan X provides, generally, for the distribution of a participant's vested account balance under the Plan upon the sale by Corporation A, or a subsidiary, of substantially all of the assets used by such corporation in a trade or business of the corporation, to an unrelated corporation which does not maintain the Plan, but only with respect to a participant who continues employment with the corporation acquiring such assets. Plan X also provides that such distributions shall be made in the form of a lump sum to the affected participants no later than the end of the second calendar year after the calendar year in which the sale occurred. In accordance with this provision, Corporation A intends to make distributions to former employees of Unit D who continue employment with Buyer C. Corporation A will continue to maintain Plan X following the sale. Buyer C has not adopted or assumed Plan X, nor will there be any transfer of assets between Plan X and any plan maintained by Buyer C.

Based on the foregoing facts and representations, you have requested the following rulings:

(1) That the disposition of the assets of Unit D by Subsidiary B is the disposition of substantially all the assets used by Subsidiary B in a trade or business within the meaning of section 401(k)(10)(A)(ii) of the Code.

(2) That Plan X distributions attributable to employer contributions to former employees of Subsidiary B who continue employment with Buyer C are made in accordance with section 401(k)(2)(B) of the Code.

Section 401(k)(2)(B)(i) of the Code provides, in relevant part, that distributions from a qualified cash or deferred arrangement may not be made earlier than the occurrence of certain stated events. Section 401(k)(2)(B)(i)(II) of the Code, when read together with section 401(k)(10)(A)(ii), further provides that one of these distributable events is the disposition by a corporation of substantially all its assets (within the meaning of section 409(d)(2)) used by the corporation in a trade or business of such corporation to an unrelated corporation, but only with respect to an employee

who continues employment with the corporation acquiring such assets.

Section 1.401(k)-1(d)(4) of the Income Tax Regulations provides rules applicable to distributions upon the sale of assets. Section 1.401(k)-1(d)(4) of the regulations provides, in relevant part, that (i) the seller must maintain the plan, and the purchaser may not maintain the plan after the disposition; (ii) the employee receiving the distribution must continue employment with the purchaser of the assets; (iii) the distribution must be in connection with the disposition of the assets; and (iv) the sale of substantially all the assets used in a trade or business means the sale of at least 85 percent of the assets, and an unrelated entity is one that is not required to be aggregated with the seller under Code sections 414(b), (c), (m), or (o) after the sale or other disposition. Section 1.401(k)-1(d)(5) of the regulations provides, in part, that a distribution may be made only if it is a lump sum distribution within the meaning of section 402(d)(4) of the Code.

You have represented that Unit D has been operated independently of Corporation A and its wholly-owned subsidiary, Subsidiary B. In this case, Subsidiary B disposed of Unit D, which, based on all the facts and circumstances presented herein, has been determined to be a trade or business as that term is used in section 401(k)(10)(A)(ii) of the Code.

In this case, Subsidiary B sold to Buyer C, a corporation unrelated to Corporation A, at least 95 percent of Unit D's assets. You have represented that Corporation A has continued to maintain Plan X after the sale and that Buyer C will not maintain Plan X. You have represented that these amounts are being distributed as a lump sum distribution to former employees who continue employment with Buyer C in accordance with the terms of Plan X.

Accordingly, with respect to rulings one and two, we conclude that (1) the sale of Unit D by Subsidiary B, a wholly-owned subsidiary of Corporation A, resulted in a disposition by Subsidiary B of substantially all the assets used by it in a trade or business within the meaning of section 401(k)(10)(A)(ii) of the Code, and (2) that distributions by Plan X to former employees of Subsidiary B who continue employment with Buyer C are made in accordance with section 401(k)(2)(B) of the Code.

This ruling is based on the assumption that Plan X continues to be qualified under section 401(a) of the Code at all relevant times. This ruling is also based on the assumption that any consent or election required under Code sections 411(a)(11) or 417 is obtained.

A copy of this ruling 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
Copy of Letter to Authorized Representative

cc: