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TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

JUN - 8 2004

Uniform Issue List: 419.00-00

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LEGEND:

Fund A= * * *
* * *

Union B= * * *

Employer C= * * *

Employer D= * * *

Dear * * *:

In a letter dated December 23, 2003, supplemented by letters dated April 8, 2004 and April 26, 2004, your authorized representative requested a ruling on your behalf concerning the applicability of the provisions of sections 419 and 419A of the Internal Revenue Code ("Code") to contributions made to Fund A in the event that Employer C's bargaining unit employees become participants in Fund A.

The following facts and representations have been submitted under penalties of perjury to support the ruling request.

Fund A was originally established in , to provide medical and other welfare benefits to employees of employers that have collective bargaining agreements with Union B. Fund A is funded almost exclusively by employer contributions required by those collective bargaining agreements.

Union B represents employees in a variety of industries, in which it negotiates with employers concerning wages, benefits, and other terms and conditions of employment of

the covered employees. Approximately employers contribute to Fund A and no single employer contribution makes up or more of the total employer contributions to Fund A. Fund A provides medical, dental, vision, life insurance, and weekly disability payments to covered employees of contributing employers and their dependents.

The Board of Trustees ("Trustees"), which constitutes Fund A's sponsor, is made up of two trustees appointed by Union B, two trustees appointed by the contributing employers, and one neutral trustee chosen by the other four trustees. The Trustees make all decisions about the benefits that Fund A will provide. The contributing employers and Union B negotiate the amount of the contributions, but have no input into the design of Fund A, except through their respective trustees.

In , the Trustees decided to permit contributing employers that had collective bargaining agreements with Union B to allow their non-bargaining unit employees to participate in Fund A by making the same contributions on behalf of their non-bargaining unit employees as they make for the bargaining unit employees. The Trustees established that participation of a contributing employer's non-bargaining unit employees must be approved by them and the contributing employer's obligations with respect to making contributions for its non-bargaining unit employees are identical to its obligations with respect to its bargaining unit employees. The benefits under Fund A received by a contributing employer's bargaining unit employees and non-bargaining unit employees are identical. Should the contributing employer fail to contribute to Fund A for its bargaining unit employees for any reason, it may not contribute to Fund A for its non-bargaining unit employees. The Trustees also forbid the participation of sole proprietors, partners in the contributing employers, or anyone else who would be prohibited by law from participating.

Since the Trustees decided to permit the participation of the non-bargaining unit employees of contributing employers, the Trustees have approved the participation of non-bargaining unit employees employed by contributing employers. These non-bargaining unit employees make up less than percent of the total number of participants in Fund A. Since the inclusion of these non-bargaining unit employees in , Fund A has at all times continued to meet the requirements of section 419A(f)(6) of the Code to be exempt from sections 419 and 419A of the Code.

You propose to have the approximately bargaining unit employees of Employer C participate in Fund A. However, if those employees were added to Fund A it would no longer qualify under section 419A(f)(6) of the Code for an exemption from sections 419 and 419A of the Code.

You have represented that the Secretary of Labor would hold that the agreement between Union B and the contributing employers was a collective bargaining agreement. Your authorized representative has submitted the agreement between Employer C and Union B ("Agreement"), and various letters and memoranda between Employer C and Union B, between Union B and its members, and between Union B and the U. S. Department of Labor representing the extensive negotiation process which was only overcome after a seven-week strike (which is also evidenced from the submitted documentation). You have

also represented that Union B employs business representatives who spend the majority of their time representing Employer C's employees and there are also approximately Union B shop stewards who also represent other employees in disputes or matters of concern between the employees and Employer C. Article 4 of the Agreement sets out the procedures for an employee to file a grievance and Union B's option of submitting the grievance to arbitration.

You have also submitted a current collective bargaining agreement between Union B and Employer D (one of the contributing employers to Fund A), article of this agreement states that contributions to Fund A shall be held in trust by a Board of Trustees consisting of trustees representing Union B, two trustees representing the contributing Employer and neutral trustee. The agreement goes on to state that failure of the contributing employer to comply with the provisions of this agreement constitute a material violation of the entire agreement entitling Union B, at its option, to engage in a strike or work stoppage against the contributing employer who is in violation. You have also submitted various letters, memoranda between Union B and Employer D, between Union B and its members, and between Union B and the Federal Mediation and Conciliation Service, which evidences the arm's length nature of the process. Based on the foregoing, you have represented that Fund A has at all times met the requirements of section 419A(f)(5)(A) for exemption from the account limits, in that it has met the requirements of section 1.419A-2T, Q&A 2, paragraph 2 of the regulations.

The date of the last determination by the Internal Revenue Service that Union B was exempt from federal income taxes under section 501(c)(9) of the Code was March 20, 1987.

Based on the facts and representations, you request that Fund A continue to be a collectively bargained plan within the meaning of section 419A(f)(5) of the Code and section 1.419A-2T, Q&A-2 of the Treasury Regulations ("Regulations").

Section 419 of the Code limits the deduction that may be taken for contributions to a welfare benefit fund to the qualified cost for the year. One element of the qualified cost is the amount that may be added to the qualified asset account of the fund to the extent the limits of section 419A of the Code are not exceeded. In general, in order for an amount to be deductible under section 419 of the Code, the rules of sections 162 and 263 of the Code must be satisfied. Therefore, the addition to a qualified asset account would be required to satisfy the requirements of sections 162 and 263 of the Code.

Section 419(a) of the Code provides that contributions paid or accrued by an employer to a welfare benefit fund shall not be deductible. However, if they would otherwise be deductible such contributions shall (subject to the limitations of section 419(b) of the Code) be deductible under section 419 of the Code for the taxable year in which paid.

Section 419A(f)(5) of the Code provides that no account limits shall apply in the case of any qualified asset account under a separate welfare benefit fund under a collective bargaining agreement.

Section 7701(a)(46) of the Code states that in determining whether there is a collective bargaining agreement between employee representatives and one or more employers, the term "employee representatives" shall not include any organization more than one-half of the members of which are employees who are owners, officers, or executives of the employer. An agreement shall not be treated as a collective bargaining agreement unless it is a bona fide agreement between bona fide employee representatives and one or more employers.

Section 1.419A-2T, Q&A-1 of the Regulations provides that contributions to a welfare benefit fund maintained pursuant to one or more collective bargaining agreements and the reserves of such a fund generally are subject to the rules of sections 419, 419A, and 512 of the Code. However, neither contributions to nor reserves of such a collectively bargained welfare benefit fund shall be treated as exceeding the otherwise applicable limits of sections 419(b), 419A(b), or 512(a)(3)(E) of the Code until the earlier of: (i) The date on which the last of the collective bargaining agreements relating to the fund in effect on, or ratified on or before, the date of issuance of final regulations concerning such limits for collectively bargained welfare funds terminates (determined without regard to any extension thereof agreed to after the date of issuance of such final regulations), or (ii) the date 3 years after the issuance of such final regulations.

Section 1.419A-2T, Q&A-2 of the Regulations provides that:

1. For purposes of Q&A-1, a collectively bargained welfare benefit fund is a welfare benefit fund that is maintained pursuant to an agreement which the Secretary of Labor determines to be a collective bargaining agreement and which meets the requirements of the Secretary of the Treasury as set forth in paragraph 2 below.
2. Notwithstanding a determination by the Secretary of Labor that an agreement is a collective bargaining agreement, a welfare benefit fund is considered to be maintained pursuant to a collective bargaining agreement only if the benefits provided through the fund were the subject of arms-length negotiations between employee representatives and one or more employers, and if such agreement between employee representatives and one or more employers satisfies section 7701(a)(46) of the Code. Moreover, the circumstances surrounding a collective bargaining agreement must evidence good faith bargaining between adverse parties over the welfare benefits provided through the fund. Finally, a welfare benefit fund is not considered to be maintained pursuant to a collective bargaining agreement unless at least 50 percent of the employees eligible to receive benefits under the fund are covered by the collective bargaining agreement.
3. In the case of a collectively bargained welfare benefit fund, only the portion of the fund (as determined under allocation rules to be provided by the Commissioner) attributable to employees covered by a collective bargaining agreement, and from which benefits for such employees are provided, is considered to be maintained pursuant to a collective bargaining agreement.
4. Notwithstanding the preceding paragraphs and pending the issuance of regulations setting account limits for collectively bargained welfare benefit funds, a welfare benefit

fund will not be treated as a collectively bargained welfare benefit fund for purposes of Q&A-1 if and when, after , the number of employees who are not covered by a collective bargaining agreement and are eligible to receive benefits under the fund increases by reason of an amendment, merger or other action of the employer of the fund. In addition, pending the issuance of such regulations, for purposes of applying the 50 percent test of paragraph (2) to a welfare benefit fund that is not in existence on , ' percent" shall be substituted for . percent".

The addition of employees who were not covered by a collectively bargained agreement to Fund A's coverage in , would not have been different than a closure of Fund A and the immediate creation of a new fund consisting of the assets and liabilities of the terminated Fund A with the additional non-bargaining unit employees. Since a "new" Fund A established in with the additional non-bargaining unit employees would have met the 90% requirement of paragraph (2), as modified by paragraph (4) of section 1.419-2T, Q&A-2 of the Regulations, the closure of Fund A and the transfer of the liabilities and assets to a "new" Fund A would not have been a contravention of paragraph (4) of section 1.419-2T, Q&A-2 of the Regulations.

Therefore, because the addition of non-bargaining unit employees is not substantively different than the above-described alternative formulation that would create the identical end result without affecting the determination of whether the fund is a collectively bargained welfare benefit fund, we conclude that:

Fund A, with the participation of the non-bargaining unit employees continues to be a collectively bargained plan within the meaning of section 419A(f)(5) of the Code and section 1.419A-2T, Q&A-2 of the Regulations.

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

A copy of this letter is being sent to your authorized representative in accordance with a power of attorney on file in this office.

If you wish to inquire about this ruling, please contact * * *, I.D. # * * *, at * * *. Please address all correspondence to SE:T:EP:RA:T3.

Sincerely yours,

Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3

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