



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

200548028

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

SEP - 8 2005

UICs: 401.06-00
401.06-02
402.04-00

SE: T. EP. RA. T3

LEGEND:

Taxpayer A:

Individual B:

Individual C:

Plan X:

Company W:

Date 1:

Date 2:

Date 3:

Date 4:

Date 5:

State F:

Sum 1:

Dear [REDACTED]

This is in response to the [REDACTED], correspondence submitted by your authorized representative, as supplemented by correspondence dated [REDACTED], in which you, through your authorized representative, request a series of letter rulings under sections 401(a)(9) and 402 of the Internal Revenue Code ("Code"). The following facts and representations support your ruling request.

Taxpayer A, whose date of birth was Date 1, 1950, died on Date 2, 2004, a resident of State F, without having attained age 70 1/2. At his death, Taxpayer A was a participant in Plan X, a defined benefit pension plan which your authorized representative

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asserts was/is qualified within the meaning of Code section 401(a). Attached to your ruling request was a favorable "Determination Letter" relating to Plan X dated Date 5, 2003. At his death, the value of Taxpayer A's interest in Plan X approximated Sum 1.

Section 1.10 of Plan X, in relevant part, defines "Beneficiary" as "...the recipient designated by the Participant to receive the Plan benefits payable upon the Participant's death..." Section 1.10(a) of Plan X provides, in relevant part, that "... In the absence of a written Beneficiary designation form, the Participant will be deemed to have designated the following Beneficiaries in the following order...(b) the Participant's issue per stirpes..."

The documentation which accompanied your ruling request includes a beneficiary designation signed by Taxpayer A relating to his interest in Plan X in which he named Individual B and Individual C as equal (50%) beneficiaries of his interest in Plan X. Individual B is Taxpayer A's son, and Individual C is Taxpayer A's daughter. Individual B's date of birth was Date 3, 1979, and Individual C's date of birth was Date 4, 1977. Thus, Individual C is older than Individual B. Taxpayer A was not married at his date of death.

The provisions of Plan X indicate, in relevant part, that distributions to the beneficiary of a plan participant may be made by the purchase of an annuity as long as payments under any purchased annuity are not made over a period extending beyond any period permissible under Code section 401(a)(9).

The trustee of Plan X intends to purchase one individual nontransferable variable annuity contract that your authorized representative asserts will satisfy the requirements of section 401(g) of the Internal Revenue Code with all or a part, of the portion of the benefits standing to Taxpayer A's credit under Plan X that are payable to Individual C (her 50% including pro rata investment gains/losses (if any)). Said purchase will occur no later than December 31, 2005.

The annuity contract will be issued with the trustee of Plan X listed as the owner and Individual C listed as the annuitant thereof. As a result, the annuity contract will be originally owned by the trustee of Plan X. Said annuity contract will subsequently be distributed by the Plan X trustee to Individual C. Said annuity contract will provide for installment distributions over a period certain that will not exceed the life expectancy of Individual C beginning not later than the end of calendar year 2005.

Your authorized representative has asserted, on your behalf, that the term "nontransferable variable annuity contract" means a contract issued by an insurance company that promises to make distributions based upon the investment performance of

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the underlying segregated asset accounts in which the annuity funds are invested. The segregated asset accounts are, generally, mutual funds that are controlled by the insurance company issuing the annuity contract and that are valued at their net asset value on a daily basis. The calculation of the Code section 401(a)(9) minimum required distribution with respect to a calendar year from such a contract will be determined with reference to the net asset value of the various segregated asset accounts in which the annuity funds are invested as of December 31 of the previous calendar year. An owner of a variable annuity contract has unlimited discretion to transfer annuity funds between and among the various segregated asset accounts.

The annuity contract will provide that if the annuitant were to die prior to receiving all of the distributions due under the contract, installment distributions may continue to be made to the individual or entity properly named to receive subsequent annuity distributions. However, said individual or entity will receive annuity distributions over a period certain not extending beyond the remaining, unexpired, unrecalculated life expectancy of Individual C.

The variable annuity contract, referenced above, will contain an endorsement that will provide that once the annuity contract has been distributed from Plan X to the beneficiary, no portion of the owner's interest in the contract may be transferred or assigned. Furthermore, the annuity contract will provide that it may not be sold, discounted or pledged as collateral for a loan or be security for the performance of an obligation.

Based on the above facts and representations, you, through your authorized representative, request the following letter rulings:

1. That the purchase by the trustee of the trust associated with Plan X of one individual nontransferable variable annuity contract issued with the trustee as owner and with Individual C as annuitant with all or a portion of the 50% of Taxpayer A's interest in Plan X payable to Individual C will not result in a taxable distribution to Individual C;
2. that the distribution of the individual nontransferable variable annuity contract referenced in the first letter ruling request from the trustee of Plan X to Individual C shall not result in a taxable distribution to Individual C;
3. that Individual C may be treated as the designated beneficiary, as that term is used for purposes of Code section 401(a)(9), of her 50% interest in Taxpayer A's benefit under Plan X;

4. that, with respect to calendar years beginning with calendar year 2005, Code section 401(a)(9) required distributions with respect to Individual C's 50% percent interest in Taxpayer A's interest under Plan X may be made by means of distributions from the individual nontransferable variable annuity, referenced above, to Individual C over the non recalculated life expectancy of Individual C commencing no later than December 31, 2005. With respect to calendar year 2005, Individual C's life expectancy is 55.3 years (based on the Single Life Table found in section 1.401(a)(9)-1 of the "Final" Income Tax Regulations, Question and Answer-1); and
5. that the Service's responses to the third and fourth ruling requests (above) are contingent upon Plan X's trustee purchasing the annuity contract referenced herein no later than December 31, 2005.

With respect to your ruling requests, section 401(a) of the Internal Revenue Code provides certain requirements applicable to qualified retirement plans. Code section 402 provides the rules governing the taxation of distributions received from the tax-qualified trust associated with a plan qualified within the meaning of Code section 401(a).

Code section 402(a)(1) provides, in general, that amounts distributed from the trust associated with a Code section 401(a) qualified plan which trust is exempt from tax pursuant to Code section 501(a) shall be taxed to the distributee, in the taxable year of the distributee in which distributed, in accordance with the rules of Code section 72.

Section 1.402(a)-1(a)(2) of the Income Tax Regulations provides, in relevant part, that if the trust associated with a Code section 401(a) qualified plan distributes a transferable annuity contract to an employee, the entire cash surrender value of the annuity contract is includible in the gross income of the employee unless the contract is made non-transferable within 60 days of distribution.

Code section 401(g) provides, in relevant part, that, for purposes of Code section 402, the term "annuity" does not include any contract or certificate issued after December 31, 1962, which is transferable, if any person other than the trustee of a trust described in Code section 401(a) which is exempt from tax under Code section 501(a) is the owner of such contract or certificate.

Code section 401(a)(9), in general, sets down the rules governing minimum required distributions from retirement plans qualified within the meaning of Code section 401(a). Code section 401(a)(9)(C)(i) provides, in short, that distributions to a qualified plan participant must begin no later than April 1 of the calendar year following the later of (I) the calendar year in which the employee attains age 70 ½, or (II) the calendar year in

which the employee retires. Subclause (II) of clause (i) does not apply to a "5-percent owner" as that term is defined in Code section 416.

Code section 401(a)(9)(B)(ii) provides that, with respect to an employee/ plan participant who dies prior to his "required beginning date", as that term is defined in Code section 401(a)(9)(C), distributions of that employee's entire interest under a plan must be made within 5 years of the employee's death.

Code section 401(a)(9)(B)(iii) provides an exception to the 5-year rule (above) with respect to distributions made to (or for the benefit of) a designated beneficiary as long as said distributions begin not later than 1 year after the death of the employee and as long as said distributions are made over the life of the beneficiary (or over a period not extending beyond the life expectancy of such beneficiary).

"Final" and Temporary Income Tax Regulations under sections 401(a)(9) and 408(a)(6) were published in the Federal Register at 67 Federal Register 18987-19028 (April 17, 2002) ("Final" Regulations) (Also see 2002-19 I.R.B. 852, May 13, 2002). The Preamble to the "Final" Regulations provides, in relevant part, that the regulations apply for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2003.

In addition, the "Final" Regulations have been modified in part (See 2004-26 I.R.B. 1082, 1098 (June 28, 2004)). The modification to the "Final" Regulations may also be relied upon with respect to required distributions for the 2003 and subsequent calendar years.

Section 1.401(a)(9)-3 of the "Final" Regulations, Question and Answer-3, provides, in relevant part, that in order to satisfy the exception in Code section 401(a)(9)(B)(iii) to the 5-year rule of Code section 401(a)(9)(B)(ii), with respect to a non-spouse beneficiary, distributions must begin no later than the end of the calendar year immediately following the calendar year of the employee's death.

Section 1.401(a)(9)-4 of the "Final" Regulations, Q&A-4(a), provides that an individual must be a beneficiary as of the date of death of a plan participant in order to be treated as a designated beneficiary. Furthermore, in general, a plan participant's designated beneficiary will be determined based on the beneficiaries designated as of the date of death who remain beneficiaries as of September 30 of the calendar year following the calendar year of the employee's death.

Section 1.401(a)(9)-4 of the "Final" Regulations, Q&A-4(c), provides, in general, that for purposes of this A-4, an individual who is a beneficiary as of a plan participant's death but who dies prior to September 30 of the calendar year following the calendar year

of the plan participant's death, is still to be treated as the designated beneficiary for purposes of computing minimum required distributions after the employee's (plan participant's) death.

The Preamble to the "Final" Regulations provides, in relevant part, that the final regulations clarify that if a designated beneficiary dies during the period between the employee's date of death and September 30 of the year following the year of the employee's death, the individual continues to be treated as the designated beneficiary for purposes of determining the distribution period rather than the successor beneficiary.

Section 1.401(a)(9)-5 of the "Final" Regulations, Q&A-5(b), provides, in general, that if an employee dies prior to his required beginning date having designated a beneficiary, in order to satisfy the requirements of Code section 401(a)(9)(B)(iii), the applicable distribution period for distribution calendar years after the distribution calendar year containing the employee's date of death is the remaining life expectancy of the employee's designated beneficiary determined in accordance with either paragraph (c)(1) or paragraph (c)(2) of this A-5.

Section 1.401(a)(9)-5 of the "Final" Regulations, Q&A-5(c)(1), provides, in general, that, with respect to a non-spouse beneficiary, the applicable distribution period measured by the beneficiary's remaining life expectancy is determined using the beneficiary's age as of the beneficiary's birthday in the calendar year immediately following the calendar year of the employee's death. In subsequent calendar years, the applicable distribution period is reduced by one for each calendar year that has elapsed after the calendar year immediately following the calendar year of death.

Section 1.401(a)(9)-4 of the "Final" Regulations, Q&A-3, provides that only individuals may be designated beneficiaries for purposes of section 401(a)(9). A person who is not an individual, such as the employee's estate, may not be a designated beneficiary.

Section 1.401(a)(9)-8 of the "Final" regulations, Qs&As-2 and 3 provide the rules that apply if the benefit attributable to a deceased qualified plan participant is divided into separate accounts for purposes of Code section 401(a)(9).

Section 1.401(a)(9)-8 of the "Final" regulations, Q&A-2(a)(2), provides that if an employee's benefit in a defined contribution plan is divided into separate accounts and the beneficiaries with respect to one separate account differ from the beneficiaries with respect to the other separate accounts of the employee under the plan, for years subsequent to the calendar year containing the date as of which the separate accounts were established, or date of death if later, such separate account under the plan is not aggregated with the other separate accounts under the plan in order to determine whether

the distributions from such separate account under the plan satisfy section 401(a)(9). However, the applicable distribution period for each such separate account is determined disregarding the other beneficiaries only if the separate account is established on a date no later than the last day of the year following the calendar year of the employee's death.

Section 1.401(a)(9)-8 of the "Final" regulations, Q&A-3, defines separate accounts for purposes of Code section 401(a)(9), as separate portions of an employee's benefit reflecting the separate interests of the employee's beneficiaries under the plan as of the date of the employee's death for which separate accounting is maintained. The separate accounting must allocate all post-death investments, gains and losses, contributions, and forfeitures for the period prior to the establishment of the separate accounts on a pro rata basis in a reasonable and consistent manner among the separate accounts.

Section 1.401(a)(9)-8 of the "Final" regulations, Q&A-2(b), provides that the rules of paragraph (a)(2) and (3) of this A-2 also apply to benefits under a defined benefit plan where the benefits under the plan are separated into separate identifiable components which are separately distributed.

Section 1.401(a)(9)-9, of the "Final" regulations, Q&A-1, sets forth the "Single Life Table" used to compute the life expectancy of an individual.

Revised Proposed Income Tax Regulations, were published in the Internal Revenue Bulletin at 2001-11 I.R.B. 865 (March 12, 2001) ("Revised Proposed" Regulations). The Preamble to the "Revised Proposed" Regulations provides, in relevant part, that the "Revised Proposed" Regulations were proposed to be effective for distributions for calendar years beginning on or after January 1, 2002.

Section 1.401(a)(9)-6 of the "Revised Proposed" regulations, Q&A-1(c), provides, in relevant part, that distributions under a variable annuity will not be found to be increasing (and, thus, potentially in violation of the required distribution rules) because the amount of the payments varies with the investment performance of the underlying assets.

Section 1.401(a)(9)-6T of the Temporary Income Tax Regulations, published at 67 Federal Register 18987-19028 (April 17, 2002) ("Temporary" Regulations), provided rules governing required minimum distributions for defined benefit plans and annuity contracts. Said Temporary Regulations have been finalized effective June 15, 2004 for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2003 (see 2004-26 I.R.B. 1082 (June 28, 2004)).

The Preamble to the "Final" and "Temporary" Regulations provides, in relevant part, that the temporary regulations do not permit annuity payments that vary with the value of the underlying assets of the plan to be provided by a defined benefit plan with a section 401(a) qualified trust. However, the temporary regulations do not preclude such payments being made under an annuity contract purchased from an insurance contract with an employee's benefit under a plan. Thus, annuity contracts that comply with the language of Q&A-1(c) of the "Revised Proposed" Regulations, above, purchased from an insurance company will satisfy the requirements of Code section 401(a)(9) as long as the contract also meets the requirements of section 1.401(a)(9)-6 of the "Temporary" Regulations.

Section 1.401(a)(9)-6 of the "Final" Income Tax Regulations Q&A-1(a), provides, in relevant part, that in order to satisfy section 401(a)(9), except as provided in this section, distributions under a defined benefit plan must be paid in the form of periodic annuity payments for the employee's life (or the joint lives of the employee and beneficiary) or over a period certain that does not exceed the maximum length of the period certain determined in accordance with A-3 of this section. Q&A-1(a) further provides that, except as otherwise provided in this section (such as permitted increases described in A-14 of this section), all payments (life, joint lives, or period certain) also must be nonincreasing.

Section 1.401(a)(9)-6 of the "Final" Regulations, Q&A-4, provides, in general, that distributions may be made from an annuity contract which is purchased with an employee's benefit by the plan from an insurance company and which makes payments that satisfy the provisions of this section (-6 which provides the rules governing required annuity distributions from defined benefit plans). Q&A-4 further provides that if the payments actually made under the annuity contract do not meet the requirements of section 401(a)(9), the plan fails to satisfy section 401(a)(9). Q&A-4 refers to A-14 for the rules governing permitted increases under annuity contracts.

Section 1.401(a)(9)-6 of the "Final" Income Tax Regulations, Q&A-13, provides that an annuity payment may be changed in accordance with the provisions set forth in paragraph (b) of this A-13 or in association with an annuity payment increase described in A-14 of this section.

Section 1.401(a)(9)-6 of the "Final" Income Tax Regulations, A-13(b), in conjunction with A-13(c), provides rules that determine when changing annuity payment periods and modifying amounts of annuity payments will not result in violations of the required distribution rules of Code section 401(a)(9).

Section 1.401(a)(9)-6 of the "Final" Income Tax Regulations. Q&A-14(a), provides that, except as otherwise provided in this section, all annuity payments (whether

paid over an employee's life, joint lives, or a period certain) must be nonincreasing or increase only in accordance with one or more of the following:

- (1) With an annual percentage increase that does not exceed the annual percentage increase in a cost-of-living index that as defined in paragraph (b) of this A-14 for a 12-month period ending in the year during which the increase occurs or in a prior year;
- (2) With a percentage increase that occurs at specified times and does not exceed the cumulative total of annual percentage increases in an eligible cost-of-living index as defined in paragraph (b) of this A-14 since the annuity starting date or, if later, the date of the most recent percentage increase;
- (3) To the extent of the reduction in the amount of the employee's payments to provide for a survivor's benefit, but only if there is no longer a survivor benefit because the beneficiary whose life was being used to determine the period described in section 401(a)(9)(A)(ii) over which payments were being made either dies or is no longer the employee's beneficiary pursuant to a qualified domestic relations order within the meaning of section 414(p);
- (4) To pay increased benefits that result from a plan amendment;
- (5) To allow a beneficiary to convert the survivor portion of a joint and survivor annuity into a single sum distribution upon the employee's death; or
- (6) to the extent increases are permitted in accordance with paragraph (c) or (d) of this A-14.

Section 1.401(a)(9)-6 of the "Final" Income Tax Regulations, Q&A-14(c), provides, with respect to annuity payments made from contracts purchased from insurance companies, that, in the case of annuity payments paid from such annuity contract, if the total future expected payments (determined in accordance with paragraph (e)(3) of A-14) exceed the total value being annuitized (within the meaning of paragraph (e)(1) of A-14), the payments under the annuity will not fail to satisfy the nonincreasing payment of A-1(a) of this section merely because the payments are increased in accordance with one or more of the following-

- (1) by a constant percentage, applied not less frequently than annually;
- (2) to provide a final payment upon the death of the employee that does not exceed the excess of the total value being annuitized (within the meaning of

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paragraph (e)(1) of A-14), over the total of payments before the death of the employee;

- (3) as a result of dividend payments or other payments that result from actuarial gains (within the meaning of paragraph (e)(2) of A-14), but only if the actuarial gain is measured no less frequently than annually, and the resulting dividend or other payments are either paid no later than the year following the year for which the actuarial experience is measured or paid in the same form as the payment of the annuity over the remaining period of the annuity (beginning no later than the year following the year for which the actuarial experience is measured); and
- (4) an acceleration of payments under the annuity (within the meaning of paragraph (e)(4) of A-14).

Section 1.401(a)(9)-6 of the "Final" Regulations, Q&A-14(e)(2), provides that "Actuarial gain means the difference between an amount determined using the actuarial assumptions (i.e. investment return, mortality, expense, and other similar assumptions) used to calculate the initial payments before adjustment for any increases and the amount determined under the actual experience with respect to those factors".

The Preamble to section 1.401(a)(9)-6 of the "Final" Regulations provides, in relevant part, that "... the final regulations retain the rules in the temporary regulations allowing an annuity purchased from an insurance company with an employee's account balance under a defined contribution plan to provide for variable and increasing payments and clarify that these rules apply to an annuity contract purchased from an insurance company by a qualified trust for a defined benefit plan. For an annuity contract purchased from an insurance company, these final regulations retain the rule that the total expected future payments (disregarding any payment increases) as of the annuity starting date must exceed the premium being annuitized".

With respect to your ruling requests, Taxpayer A, a participant in Plan X, died on Date 2, 2004. The facts surrounding this ruling request indicate that a portion or all of the amount standing to Taxpayer A's benefit under Plan X payable to Individual C (her 50%), one of two equal beneficiaries of Taxpayer A, will be distributed by means of a purchase of a nontransferable variable annuity contract, as described above, which contract will provide for payments to the appropriate beneficiary or beneficiaries. Said purchase will occur no later than December 31, 2005.

With further reference to your ruling requests, the nontransferable variable annuity contract will provide for installment payments made over a period certain not

exceeding the life expectancy of Individual C. Individual C, who was Taxpayer A's daughter, will be the beneficiary and annuitant of the annuity contract to be purchased.

As noted previously, pursuant to Taxpayer A's beneficiary designation, and consistent with relevant provisions of Plan X, Individual C is a 50% beneficiary of Taxpayer A's interest in Plan X. No later than December 31, 2005, an annuity contract will be purchased by the trustee of Plan X to benefit Individual C, one of Taxpayer A's beneficiaries and the named annuitant of the annuity contract. Individual B will not be an annuitant of the contract or a named beneficiary thereof. Thus, no later than December 31, 2005, Individual B will have no right to receive any portion of the 50% of Taxpayer A's Plan X benefit designated to be paid to Individual C.

Initially, we note that, based on the facts and representations provided above, the nontransferable variable annuity contract described herein will comply with the requirements of Code section 401(a)(9) and section 1.401(a)(9)-6 of the "Final" Regulations.

Thus, consistent with section 1.401(a)(9)-8 of the "Final" regulations, Qs&As-2 and 3, Individual C may be treated as the "designated beneficiary" of the 50% of Taxpayer A's benefit payable to her in accordance with Taxpayer A's beneficiary designation without regard to Individual B. Furthermore, installment payments under the annuity contract referenced herein may be paid over Individual C's non-recalculated life expectancy beginning no later than December 31, 2005.

Thus, with respect to your ruling requests, we have reached the following conclusions:

1. That the purchase by the trustee of the trust associated with Plan X of one individual nontransferable variable annuity contract issued with the trustee as owner and with Individual C as annuitant with all or a portion of the 50% of Taxpayer A's interest in Plan X payable to Individual C will not result in a taxable distribution to Individual C;
2. that the distribution of the individual nontransferable variable annuity contract referenced in the first letter ruling request from the trustee of Plan X to Individual C will not result in a taxable distribution to Individual C;
3. that Individual C may be treated as the designated beneficiary, as that term is used for purposes of Code section 401(a)(9), of her 50% interest in Taxpayer A's benefit under Plan X;

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4. that, with respect to calendar years beginning with calendar year 2005, Code section 401(a)(9) required distributions with respect to Individual C's 50% percent interest in Taxpayer A's interest under Plan X may be made by means of distributions from the individual nontransferable variable annuity, referenced above, to Individual C over the non recalculated life expectancy of Individual C commencing no later than December 31, 2005. With respect to calendar year 2005, Individual C's life expectancy is 55.3 years (based on the Single Life Table found in section 1.401(a)(9)-1 of the "Final" Income Tax Regulations, Question and Answer-1); and
5. that the Service's responses to the third and fourth ruling requests (above) are contingent upon Plan X's trustee purchasing the annuity contract referenced herein no later than December 31, 2005.

This ruling letter assumes that Plan X is, as represented, qualified within the meaning of Code section 401(a) and will remain so qualified at all times relevant thereto. Additionally, it assumes the correctness of all facts and representations contained therein.

This letter is directed only to the taxpayer that requested it and is based solely on the representations made with respect thereto. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

Pursuant to a power of attorney on file with the Service, a copy of this letter ruling is being sent to your authorized representative.

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Any questions regarding this letter ruling should be addressed to [REDACTED]
Esquire [REDACTED] at [REDACTED] phone-not a toll-free number) or [REDACTED]
[REDACTED] (FAX).

Sincerely yours,



Frances V. Sloan, Manager,
Employee Plans Technical Group 3

Enclosures:

Deleted copy of ruling letter
Notice of Intention to Disclose