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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:4 - PLR-116238-00
Date: NOVEMBER 07, 2000

Re:

LEGEND:

Spouse =

Decedent =

C =

D =

Company =

Trust =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

State =

$y =

State Statute =

Dear :

This is in response to your authorized representative's August 14, 2000 letter requesting a ruling concerning proposed disclaimers with respect to interests in Decedent's retirement plan, and a trust established by Decedent.

According to the facts submitted, Decedent, a resident of State, was born on Date 1. Decedent had been employed by Company and was a participant in Plan X. Plan X contains a cash or deferred arrangement described in § 401(k) and an employee stock ownership plan. Decedent, as a participant in Plan X, made contributions to his Plan X account. Company also made contributions to the account.

On Date 5, Decedent executed a Plan X beneficiary designation naming Spouse as the primary beneficiary of Decedent's Plan X interest. The Trustee of the "QTIP Trust" established under Article V of Decedent's Trust, executed on Date 4, is designated as contingent beneficiary.

Under the terms of Plan X , upon a participant's retirement from Company, the participant is required to be paid his or her benefit under the plan not later than April 1 following the calendar year in which the participant attains the age of 70 ½. The participant can elect to receive the plan benefits in any one of the following ways: 1) in a lump sum; 2) over the life of the participant; 3) over the joint lives of the participant and the participant's spouse; 4) over a period not extending beyond the participant's life expectancy; 5) over a period not extending beyond the life expectancy of the participant and the participant's spouse.

Decedent retired from Company in March of 1999. On Date 2, Decedent died. At the time of Decedent's death, the value of Decedent's interest in Plan X was $y. At that time, Decedent had not attained his "required beginning date" within the meaning of § 401(a)(9)(C). Decedent was survived by Spouse, and two children, C and D. Spouse was born on Date 3 and has not attained her "required beginning date."

On Date 4, Decedent executed Trust, a revocable living trust for the benefit of himself, Spouse, C, and D. Spouse and Decedent were co-trustees of Trust during Decedent's lifetime. Upon the death of Decedent, Spouse became the sole trustee of Trust. Under Article III, Section A of Trust, Trust became irrevocable upon Decedent's death.

It is represented that Plan X is a qualified plan within the meaning of § 401(a) of the Internal Revenue Code. It is also represented that Trust is a valid trust under State law and that a copy of Trust has been provided to the Plan X administrator.

Under the terms of Trust, upon Decedent's death, after the payment by Trust of the administration expenses and other costs and expenses of Decedent's estate, Trust is to be administered as provided under Article V (QTIP Trust).

Article V, Section B provides that the trustee is to pay the net income of the QTIP Trust to Spouse, in monthly installments, so long as she shall live. The term "income" shall include all income that may be required to qualify all or part of the trust property for the marital deduction allowable and unproductive property shall not be held as an asset of the trust without the express consent of Spouse. Any income payable through the date of Spouse's death is to pass to Spouse's estate. The trustee is authorized to demand and cause the withdrawal, no less frequently than annually, of all income from any qualified pension or retirement plan or account which designates QTIP Trust as a beneficiary, and to elect to qualify all or part of such plans or accounts for the marital deduction under § 2056(b)(7) or § 2056A of the Internal Revenue Code.

Furthermore, the trustee is to distribute the income portion of any installment payment or other periodic payment received from any such plan or account to or for the benefit of Spouse, regardless of whether such payment is allocated to corpus or income under applicable state law or the terms of the trust. The income portion of any installment or periodic payment from a qualified plan shall be immediately payable to Spouse. The trustee shall cause the distribution of any such payment from such plan not later than the last day of the calendar year in which the trustee receives the payment. In no event, shall any taxes or trust expenses (for example, trustee's fees) incurred by the trust on account of these payments be allocated to these payments. Following the death of Spouse, any remaining payments from any plan or account shall be treated as principal of the QTIP Trust, but any amount constituting income is to be paid to Spouse's estate.

Article V, Section C provides that the trustee may distribute principal of the QTIP Trust to Spouse as is deemed necessary, in the reasonable discretion of the trustee, to satisfy Spouse's needs for health, maintenance and support. In exercising this discretion, the trustee is to take into consideration Spouse's resources or other income.

Upon Spouse's death, pursuant to Article V, Section D, the trustee is to distribute the entire remaining QTIP Trust corpus pursuant to the exercise of Spouse's testamentary special power to appoint trust corpus among Decedent's issue. In default of such exercise, the QTIP Trust property is to be held in further trust for the benefit of Decedent's issue: one equal share for each child surviving Spouse and one equal share for the issue of any deceased child of Decedent.

Within 9 months of Decedent's death, Spouse proposes to disclaim any and all rights and interests as primary beneficiary of Decedent's Plan X interest. As a result of Spouse's disclaimer of her interest as the Plan X primary beneficiary, Decedent's Plan X interest will pass to the QTIP Trust, as the designated contingent beneficiary under

the Plan X beneficiary designation executed by Decedent. Spouse will also disclaim her testamentary power of appointment under Article V, Section D of the trust with respect to Decedent's Plan X interest. It is represented that all distributions attributable to Decedent's Plan X account received by the trustee of the QTIP Trust will be segregated from the other trust assets and held in a separate account. It is also represented that Spouse will not serve as trustee of the QTIP Trust.

Finally, although the QTIP Trust is intended to qualify as qualified terminable interest property under § 2056(b)(7), it is represented that the election under § 2056(b)(7)(B)(v) will not be made with respect to the QTIP Trust.

The following rulings are requested:

1. Decedent's Plan X interest is includible in Decedent's gross estate under § 2039.

2. The proposed disclaimers by Spouse of her interest in Plan X and her power to appoint the QTIP trust assets will qualify as qualified disclaimers under § 2518.

3. If Decedent's executor allocates a sufficient portion of Decedent's generation-skipping transfer tax exemption under § 2631 to the QTIP Trust, the QTIP Trust will have an inclusion ratio of zero under § 2642(a).

4. Distributions from Decedent's interest in Plan X are not required, under § 401(a)(9), to commence until December 31st of the calendar year in which Spouse will have attained the age of 701/2. Additionally, the required distributions will be determined based upon Spouse's life expectancy.

Ruling # 1. Section 2001(a) of the Internal Revenue Code imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2039(a) provides that the value of the gross estate shall include the value of an annuity payment or other payment receivable by any beneficiary by reason of surviving the decedent under any form of contract or agreement entered into after March 1, 1931 (other than as insurance under policies of the life of the decedent), if, under such contract or agreement, an annuity or other payment was payable to the decedent, or the decedent possessed the right to receive such annuity or payment, either alone or in conjunction with another for his or her life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death.

Section 2039(b) provides that § 2039(a) shall apply to only such part of the value of the annuity or other payment receivable under such contract or agreement as is

proportionate to that part of the purchase price thereof contributed by the decedent. For purposes of this section, any contribution by the decedent's employer or former employer to the purchase price of such contract or agreement (whether or not to an employee's trust or fund forming part of a pension, annuity, retirement, bonus or profit-sharing plan) shall be considered to be contributed by the decedent if made by reason of his employment.

We conclude that Decedent's Plan X account is includible in Decedent's gross estate under § 2039.

Ruling #2. Section 2518(a) provides that, if a person makes a qualified disclaimer with respect to any interest in property, the estate, gift, and generation-skipping transfer tax provisions shall apply with respect to such interest as if the interest had never been transferred to such person.

Section 2518(b) provides that a "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property, but only if:

1) the disclaimer is in writing,

2) the disclaimer is received by the transferor of the interest or his legal representative no later than 9 months after the date on which the transfer creating the interest in the person making the disclaimer is made, or the date on which the person making the disclaimer attains age 21,

3) the person making the disclaimer has not received the interest or any of it benefits, and

4) as a result of the disclaimer, the interest passes without any direction on the part of the person making the disclaimer to the decedent's spouse or to a person other than the person making the disclaimer.

Section 25.2518-1(b) of the Gift Tax Regulations provides that if a person makes a qualified disclaimer as described in § 2518(b) and § 25.2518-2, for purposes of the Federal estate, gift, and generation-skipping transfer tax provisions, the disclaimed interest in property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it is considered as passing directly from the transferor of the property to the person entitled to receive the property as a result of the disclaimer. Accordingly, a person making a qualified disclaimer is not treated as making a gift.

Section 25.2518-2(e)(2) provides that in the case of a disclaimer made by a decedent's surviving spouse with respect to property transferred by the decedent, the disclaimer will satisfy the requirements of § 2518(b)(4), if the interest passes as a result

of the disclaimer without any direction on the part of the surviving spouse either to the surviving spouse or to another person. If the surviving spouse, however, retains the right to direct the beneficial enjoyment of the disclaimed property in a transfer that is not subject to Federal estate and gift tax (whether as trustee or otherwise), such spouse will be treated as directing the beneficial enjoyment of the disclaimed property, unless such power is limited by an ascertainable standard.

Section 25.2518-2(e)(5), Example 5, describes a situation where B's will established both a marital trust and a nonmarital trust. B's surviving spouse, A, is an income beneficiary of the marital trust and has a testamentary general power of appointment over trust assets. A also has an income interest in the nonmarital trust and possesses a testamentary nongeneral power to appoint among designated beneficiaries. The will provides that any portion of the marital trust disclaimed is to pass to the nonmarital trust. A disclaimed 30 percent of the marital trust. The example concludes that the requirements of § 2518(b)(4) are not satisfied unless A also disclaims the nongeneral power to appoint the portion of the trust corpus that is attributable to the property that passed to the nonmarital trust as a result of A's disclaimer.

Section 25.2518-3(a) provides that the disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer, even if the disclaimant has another interest in the same property. Under § 25.2518-3(a)(iii) a power of appointment with respect to property is treated as a separate interest in such property and such power of appointment with respect to all or an undivided portion of such property may be disclaimed independently from any other interests separately created by the transferor in the property.

Under State Statute, a beneficiary may disclaim any interest in property that, unless disclaimed, would pass to the beneficiary under any nontestamentary instrument of conveyance or transfer.

A "beneficiary" is defined as a person who would succeed to an interest in property in any manner described above.

Under State Statute, an "interest in property" that may be disclaimed includes: 1) the whole of any property, real or personal, legal or equitable, or any fractional part, share, or portion or property, or specific assets thereof; 2) any estate in such property; or 3) any power to appoint, consume, apply, or expend property or any other right, power, privilege or immunity relating thereto.

The statute further provides that unless the grantor has otherwise provided by a nontestamentary instrument with reference to the possibility of a disclaimer by the beneficiary, the interest disclaimed shall descend, be distributed, or otherwise be disposed of in the same manner as if the disclaimant had died immediately preceding

the death or other event which causes her or him to become finally ascertained as a beneficiary and her or his interest to become indefeasibly fixed both in quality and quantity, and, in any case, the disclaimer shall relate for all purposes to such date, whether filed before or after such death or other event. An interest in property disclaimed shall never vest in the disclaimant.

Finally, under the statute, a disclaimer shall be filed at any time after the creation of the interest but, in any event, within 12 months after the effective date of the nontestamentary instrument creating the interest, or, if the disclaimant is not then finally ascertained as a beneficiary or her or his interest has not then become indefeasibly fixed both in quality and quantity, such disclaimer shall be filed not later than 12 months after the event which would cause her or him so to become finally ascertained and her or his interest to become indefeasibly fixed both in quality and quantity.

In this case, Spouse proposes to disclaim her interest as primary beneficiary of Decedent's Plan X interest. As a result of the disclaimer, under applicable state law, Spouse will be treated as predeceasing the Decedent with respect to the Plan X interest and under the terms of the Plan X beneficiary designation, the QTIP Trust will become the primary beneficiary of the Plan X account. Spouse will also disclaim her testamentary power of appointment under Article V of the trust agreement with respect to the Plan X interest. In this regard, any distributions received by the QTIP Trust from Plan X will be segregated from the other trust assets and held in a separate account. We conclude that the proposed disclaimers will satisfy the requirements of § 25.2518-2(e) and § 25.2518-3(a). Accordingly, assuming the disclaimers are made within the time prescribed under § 2518(b)(2) and the other requirements of § 2518 are satisfied, we conclude that the disclaimers will be qualified disclaimers under § 2518.

Ruling #3. Section 2601 imposes a tax on every generation-skipping transfer (GST) made by a transferor (defined in § 2652(a)) to a skip person (defined in § 2613). Under § 2602, the amount of the tax imposed under § 2601 with respect to every generation-skipping transfer is equal to the taxable amount multiplied by the applicable rate. The applicable rate is defined in § 2641 as the maximum federal estate tax rate multiplied by the inclusion ratio with respect to the transfer. Under § 2642(a)(1), in general, the inclusion ratio with respect to any property subject to a generation-skipping transfer is the excess of one over the applicable fraction with respect to a trust from which the transfer is made. Under § 2642(a)(2), the applicable fraction with respect to a trust is a fraction, the numerator of which is the amount of GST tax exemption under § 2631 allocated to the trust, and the denominator of which is the value of the trust property, with certain specified adjustments.

Under § 2631(a), in determining the inclusion ratio with respect to a GST, each individual is allowed an exemption of $1,000,000, adjusted for inflation as provided in § 2631(c), which may be allocated by such individual (or by his or her executor) to any property with respect to which such individual is the transferor. Under § 2632(a), the

allocation may be made at any time on or before the date prescribed for filing the individual's estate tax return (including extensions).

We conclude that if Decedent's estate allocates a sufficient portion of Decedent's remaining generation-skipping transfer tax exemption under § 2631 to the QTIP Trust so that the applicable fraction of the QTIP Trust as determined under § 2642(a)(2), is equal to one, the QTIP Trust will have an inclusion ratio of zero for purposes of § 2642(a).

Ruling #4. Section 401(a)(9)(A) provides, in general, that a trust will not be considered qualified unless the plan provides that the entire interest of each employee-

(I) will be distributed to such employee not later than the required beginning date, or

(2) will be distributed, beginning not later than the required beginning date, over the life of such employee or over the lives of such employee and a designated beneficiary or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary.

Section 401(a)(9)(C) provides that the term "required beginning date" means April 1 of the calendar year following the calendar year in which the employee (IRA holder) attains age 70 ½.

Section 401(a)(9)(B)(ii) provides that a trust shall not constitute a qualified trust unless the plan provides that, if an employee dies before the distribution of the employee's interest has begun in accordance with § 401(a)(9)(A)(ii), the entire interest of the employee will be distributed within 5 years after the death of such employee.

Section 1.401(a)(9)-1 of the proposed regulations, Q&A C-2, provides that, in order to satisfy the five-year rule in § 401(a)(9)(B)(ii), an employee's entire interest must be distributed as of December 31 of the calendar year which contains the fifth anniversary of the date of the employee's death.

Section 401(a)(9)(B)(iii) provides an exception to the five-year rule. Under the exception, any portion of an employee's interest payable to a designated beneficiary which is to be distributed (in accordance with the regulations) over the life of such designated beneficiary (or over a period not extending beyond the life expectancy of such beneficiary) may be so distributed beginning not later than 1 year after the date of the employee's death or such later date as the Secretary of the Treasury may by regulations prescribe.

Section 401(a)(9)(B)(iv) of the Code provides, in pertinent part, that if the designated beneficiary referred to in clause (iii)(I) is the surviving spouse of the

employee-(I) the date on which distributions are required to begin under clause (iii)(III) shall not be earlier that the date on which the employee would have attained age 70 ½.

Section 1.401(a)(9)-1 of the proposed regulations, Q&A D-4, provides, in relevant part, that for purposes of calculating the distribution period described in § 401(a)(9)(B)(iii) or (iv), the designated beneficiary will be determined as of the employee's date of death. If, as of the date of the employee's death, there is no designated beneficiary under the plan with respect to that employee, distribution must be made in accordance with the five-year rule in § 401(a)(9)(B)(ii).

Section 1.401(a)(9)-1 of the proposed regulations, Q&A C-3(a) provides that, in order to satisfy the exception to the five-year rule for nonspouse beneficiaries, distributions must commence on or before December 31 of the calendar year immediately following the calendar year in which the employee died. This rule also applies to the distribution of the entire remaining benefit if, as of the employee's date of death, an individual is designated as a beneficiary in addition to the employee's surviving spouse.

Section 1.401(a)(9)-1 of the proposed regulations, Q&A C-3(b) provides that, in order to satisfy the rule in § 401(a)(9)(B)(iii) and (iv), if the designated beneficiary is the employee's surviving spouse, distributions must commence on or before the later of (1) December 31 of the calendar year immediately following the calendar year in which the employee died and (2) December 31 of the calendar year in which the employee would have attained age 70 ½.

Section 1.401(a)(9)-1 of the proposed regulations, Q&A D-2A, 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. However, Q&A D-5 of §1.401(a)(9)-1 provides that beneficiaries of a trust with respect to the trust's interest in an employee's benefit may be treated as designated beneficiaries if the following requirements are met:

(1) The trust is valid under state law or would be but for the fact that there is no corpus.

(2) The trust is irrevocable or the trust contains language to the effect it becomes irrevocable upon the death of the employee.

(3) The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's benefit are identifiable from the trust instrument.

(4) The documentation described in D-7 of this section has been provided to the plan administrator.

Section 1.401(a)(9)-1 of the proposed regulations, Q&A D-6, provides that in the case in which a trust is named as the beneficiary of an employee, all beneficiaries of the trust with respect to the trust's interest in the employee's benefit are treated as designated beneficiaries of the employee under the plan for purposes of determining the distribution period under § 401(a)(9)(B)(iii) and (iv) if the requirements in paragraph (a) of D-5 (above) are satisfied as of the date of the employee's death, or, in the case of the documentation described in D-7 of this section, by the end of the ninth month beginning after the employee's death.

Section 1.401(a)(9)-1 of the proposed regulations, Q&A D-7 provides, in general, that the plan administrator be provided with either a list of all trust beneficiaries as of the date of death or with a copy of the trust document for the trust which is named as beneficiary of the plan as of the employee's date of death. In general, with respect to required distributions which commence after death, the necessary documentation must be furnished no later than the end of the ninth month beginning after the death of the employee (IRA holder).

Section 1.401(a)(9)-1 of the proposed regulations, Q&A E-5(a)(1), provides, in pertinent part, that if more than one individual is designated as a beneficiary with respect to an employee as of the applicable date for determining the designated beneficiary, the designated beneficiary with the shortest life expectancy will be the designated beneficiary for purposes of determining the distribution period. The date for determining the designated beneficiary (under D-3 or D-4, whichever is applicable) is the applicable date.

In this case, the facts and representations indicate that the requirements of § 1.401(a)(9)-1 of the proposed regulations, Qs and As D-5 and D-7, have been met. The issue to be determined is whether the rule of § 401(a)(9)(B)(iv) applies to distributions from Plan X.

In this case, Spouse is the income beneficiary of the QTIP Trust and is also entitled to receive principal payments from the trust. In addition, under Article V, Section B, the income portion of any installment or periodic payment from any qualified retirement plan must be paid to Spouse.

With respect to Article V, Section B, your authorized representative has asserted that under applicable State law, any distributions from Plan X made in order to comply with the requirements of § 401(a)(9), must be paid to Spouse. Thus, these required distributions cannot be held in trust or accumulated for the benefit of any other QTIP Trust beneficiary.

Accordingly, based on the above facts, representations, and analysis, we conclude that distributions from Decedent's interest in Plan X are not required, under § 401(a)(9), to commence until December 31st of the calendar year in which Decedent

would have attained age 70 ½. Additionally, these required distributions will be determined based on Spouse's life expectancy.

This ruling request assumes that Plan X has met and will continue to meet the requirements of § 401(a) at all time relevant thereto.

Except as ruled above, we express or imply no opinion concerning the federal tax consequences of this transaction under the cited provisions of the Code or any other provision of the Code.

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

Sincerely yours,

By___________
George Masnik
Chief, Branch 4

Office of the Associate Chief Counsel
(Passthroughs and Special
Industries)

Enclosure
Copy of letter for section 6110 purposes