200350019

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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Uniform Issue List: 0401.00-00

SEP 17 2003

T:EP:RA:T3

Attention:

Legend

Union A =

Association B =

Association C =

Plan X =

Fund Y =

Dear :

This is in response to your request dated May 16, 2003, for a private letter ruling submitted by your authorized representative concerning a method of funding elective deferrals into Plan X. Correspondence dated August 14, 2003 supplemented the request. A conference was held with your authorized representative on August 19, 2003. Your authorized representative has submitted the following facts and representations:

Plan X is an employee benefit plan formed pursuant to a collective bargaining agreement entered into by Union A, Association B, and Association C, and is intended to be qualified under section 401(a) of the Internal Revenue Code and contains a cash or deferred arrangement ("CODA") described under section 401(k) of the Code. Most of the employees eligible to participate in Plan X also are participants in Fund Y, a vacation and holiday fund which is a voluntary employees' beneficiary association described in section 501(c)(9) of the Code. Fund Y was created pursuant to the collective bargaining agreement between Union A, Association B, and Association C. Employer contributions to Fund Y are withheld from

the employees' wages and contributed to Fund Y on a monthly basis as required by the collective bargaining agreement. Fund Y accumulates and invests those funds and distributes the resulting funds in cash to the employees every six months.

You propose to allow the participants in Plan X to redirect their contributions to Fund Y into Plan X's CODA as elective deferrals. An amendment to the collective bargaining agreement would provide that elective deferrals into Plan X's CODA shall be made first from amounts which otherwise would be contributed to Fund Y, to the extent thereof and second from cash compensation.

Based on the foregoing, you request a ruling that the proposed amendment will not affect the status of Plan X's CODA as a qualified CODA under section 401(k)(2) of the Code.

Section 401(k)(2) of the Code states, in part, that a qualified CODA is any arrangement which is part of a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan which meets the requirements of section 401(a), under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash.

Section 1.401(k)-1(e)(2) of the Income Tax Regulations states, in part, that an arrangement is a qualified CODA only if the arrangement provides that the amount that each eligible employee may defer as an elective contribution is available to the employee in cash. It has been represented that amounts which would otherwise be deferred into Plan X's CODA are not distributed from Fund Y until six months after they are contributed to Fund Y. Thus, the requirements of the regulations concerning cash availability are not met under the proposed amendment.

Accordingly, we conclude that Plan X's CODA will not be qualified under section 401(k)(2) of the Code, if the proposed amendment is put into effect.

Also, section 401(k)(4)(A) of the Code provides that benefits (other than matching contributions) must not be contingent on an employee's election to defer. A CODA of any employer shall not be treated as a qualified CODA if any other benefit is conditioned directly or indirectly on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash.

Section 1.401(k)-1(e)(6)(i) of the regulations states, in relevant part, that a CODA will be qualified only if no other benefit is conditioned (directly or indirectly) upon the employee's electing to make or not to make elective contributions under the arrangement.

The term "other benefit" is defined, in part, in section 1.401(k)-1(e)(6)(ii) of the regulations to include vacations or vacation pay and certain nonqualified deferred compensation arrangements are also considered.

Benefits, when provided to employees as vacation pay from Fund Y, will be considered an "other benefit" which is conditioned (directly or indirectly) on the employee electing to have the employer make or not make elective deferrals under Plan X's CODA, within the meaning of section 401(k)(4)(A) of the Code and section 1.401(k)-1(e)(6) of the

regulations. Because the benefit available under Fund Y depends on the elective deferrals made under Plan X, the right to participate in Fund Y is a contingent benefit for purposes of section 401(k)(4)(A) of the Code and section 1.401(k)-1(e)(6) of the regulations.

No opinion is expressed as to the federal tax consequences of the transaction described above under any other provisions of the Code.

This ruling is directed only to the taxpayer who 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 have any questions concerning this private letter ruling, please contact ********** (**ID** **-******) at (***) ***-**** (not a toll-free number).

Sincerely Yours,

/s/

Frances V. Sloan, Manager
Employee Plans Technical Group 3
Tax Exempt and Government Entities Division

Enclosures:
Notice of Intention to Disclose
Deleted Copy of Ruling

CC: