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

200449043

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Uniform Issue List 401.04-01

SEP - 8 2004

SE:T:EP:RA:T3

LEGEND:

Organization A:

Plan X:

Dear

This letter is in response to a request for a ruling letter submitted on your behalf by your authorized representative on January 23, 2004, concerning the application of the pre-termination restrictions of section 1.401(a)(4)-5(b) of the Income Tax Regulations ("regulations"). Your authorized representative has provided the following facts and representations in support of your request.

Organization A is a tax-exempt organization and sponsors Plan X, which is intended to be qualified under section 401(a) of the Internal Revenue Code ("Code"). Plan X is a multiple employer defined benefit plan that is maintained by Organization A for the benefit of its employees and the employees of other tax-exempt organizations which are directly or indirectly affiliated with Organization A. None of these organizations is included in the same controlled group, within the meaning of Code sections 414(b), (c), (m), or (o), with Organization A and none is participating in Plan X pursuant to a collective bargaining agreement. Plan X provides that a participant is eligible to receive payment of benefits in various forms, including a lump sum. All assets of Plan X are available on an ongoing basis to pay benefits to employees who are covered by Plan X and their beneficiaries. There are no separate asset pools.

Plan X restricts the payment of benefits to or on behalf of certain participants to an amount that does not exceed an amount equal to the payments that would be made to or on behalf of the participant in that year under a straight life annuity that is the actuarial equivalent of the accrued

benefit and other benefits to which the participant is entitled under Plan X (the "Restricted Amount"). Plan X also provides that this distribution restriction applies only to those participants who are currently highly compensated employees ("HCEs") of the employer who are benefiting under Plan X as defined in Code section 414(q) or who are former HCEs ("Former HCEs") of the employer as defined in Code section 414(q)(6) and who are among the 25 employees or former employees of the employer (the "High-25 Group") with the largest amount of compensation in the current or any prior plan year. HCEs and Former HCEs are referred to collectively as "Restricted Employees".

Plan X further provides that these restrictions do not apply if the value of the benefits payable under Plan X to the Restricted Employee is less than 1% of the value of the current liabilities of Plan X before the distribution, or if, after taking into account payment to or on behalf of the Restricted Employee of all benefits payable to the Restricted Employee under Plan X, the value of Plan X assets equals or exceeds 110% of the value of current liabilities, as defined in Code section 412(l)(7).

For the plan year ending December 31, he value of Plan X assets has fallen below % of the value of current liabilities. It is anticipated that the value will remain below % of the value of current liabilities for the plan year ending December 31, and possibly for subsequent plan years.

Plan X has one or more Restricted Employees who are currently eligible to receive distributions of their accrued benefits. As to each Restricted Employee, after taking into account the payment of lump sum benefits to him or her under the terms of Plan X, the value of Plan X assets would not equal or exceed % of the value of Plan X's current liabilities. Plan X proposes to make distributions in excess of the Restricted Amount to those participants who are not in the High-25 Group and to those participants who are in the High-25 Group of each participating employer but whose benefits have a value equal to or less than % of Plan X's current liabilities.

Your authorized representative has requested rulings to the effect of the following on your behalf:

1. For purposes of section 401(a)(4) of the Code and section 1.401(a)(4)-5(b)(3)(ii) of the regulations, a "Restricted Employee" in the High-25 Group means one of the 25 nonexcludable HCEs or Former HCEs of each participating employer in Plan X with the largest amount of compensation in the current or any prior plan year.

2. For purposes of section 401(a)(4) of the Code and section 1.401(a)(4)-5(b)(3)(iv) of the regulations, Plan X may determine whether the value of the benefits payable to a Restricted Employee in the High-25 Group for purposes of distributions under Plan X is less than % of all current liabilities of Plan X before the distribution, without mandatory disaggregation of Plan X into separate plans for each participating employer.

Section 401(a)(4) of the Code requires that the contributions or benefits provided under a qualified plan not discriminate in favor of highly compensated employees (within the meaning of section 414(q)).

Section 1.401(a)(4)-5(b)(3)(i) of the regulations provides, in pertinent part, that a plan must provide that, in any year, the payment of benefits to or on behalf of a restricted employee shall not exceed an amount equal to the payments that would be made to or on behalf of the restricted employee in that year under a straight life annuity that is the actuarial equivalent of the accrued benefit and other benefits to which the restricted employee is entitled under the plan.

Section 1.401(a)(4)-5(b)(3)(ii) of the regulations provides that, for purposes of this paragraph (b), the term restricted employee generally means any HCE or former HCE. However, an HCE or former HCE need not be treated as a restricted employee in the current year if the HCE or former HCE is not one of the 25 (or larger number chosen by the employer) nonexcludable employees and former employees of the employer with the largest amount of compensation in the current or any prior year.

Section 1.401(a)(4)-12 of the regulations states that, unless otherwise provided, the definitions in this section govern in applying the provisions of sections 1.401(a)(4)-1 through 1.401(a)(4)-13. This regulation further states that "employer" is defined in section 1.410(b)-9 of the regulations.

Section 1.410(b)-9 of the regulations provides in pertinent part that "employer" means the employer maintaining the plan and those employers required to be aggregated with the employer under sections 414(b), (c), (m), or (o) of the Code.

Section 414(b) of the Code provides in pertinent part that for purposes of sections 401 and 410 of the Code, all employees of all corporations which are members of a controlled group of corporations shall be treated as employed by a single employer.

With respect to ruling request one, Plan X is maintained by Organization A for the benefit of its employees and the employees of affiliated organizations which are not in a controlled group, within the meaning of Code sections 414(b), (c), (m), or (o), with Organization A. Therefore, in accordance with Code section 414(b) and with section 1.410(b)-9 of the regulations, Organization A and its 60 affiliated organizations are each treated as an employer for purposes of Code section 401(a)(4).

Thus, with respect to ruling request one, we conclude that, for purposes of section 401(a)(4) of the Code and section 1.401(a)(4)-5(b)(3)(ii) of the regulations, a "Restricted Employee" in the High-25 Group means one of the 25 nonexcludable HCEs or Former HCEs of each participating employer in Plan X with the largest amount of compensation in the current or any prior plan year. Accordingly, Plan X may have more than Restricted Employees (e.g., participating employers times Restricted Employees for each participating employer equals Restricted Employees).

With respect to ruling request two, section 1.401(a)(4)-5(b)(1) of the regulations states in pertinent part that a defined benefit plan has the effect of discriminating significantly in favor of HCEs or former HCEs unless it incorporates provisions restricting benefits and distributions as described in paragraphs (b)(2) and (3) of this section. Further, this section states that the

restrictions in this paragraph (b) apply to a plan within the meaning of section 1.410(b)-7(b) (i.e., a section 414(l) plan).

Section 1.401(a)(4)-5(b)(2) of the regulations states that a plan must provide that, in the event of plan termination, the benefit of any HCE (and any former HCE) is limited to a benefit that is nondiscriminatory under section 401(a)(4).

Section 1.401(a)(4)-5(b)(3) of the regulations describes the restrictions on distributions for HCEs and former HCEs.

Section 1.401(a)(4)-5(b)(3)(iv) of the regulations provides in pertinent part that the pre-termination restrictions do not apply if the value of the benefits payable to or on behalf of the restricted employee are less than % of the value of current liabilities before distribution.

Section 1.401(a)(4)-12 of the regulations states that, unless otherwise provided, the definitions in this section govern in applying the provisions of sections 1.401(a)(4)-1 through 1.401(a)(4)-13. Section 1.401(a)(4)-12 defines the term "plan" to mean a plan within the meaning of section 1.410(b)-7(a) and (b), after application of the mandatory disaggregation rules of section 1.410(b)-7(c) and the permissive aggregation rules of section 1.410(b)-7(d).

Section 1.410(b)-7(b) of the regulations states in pertinent part that each single plan within the meaning of section 414(l) is a separate plan for purposes of section 410(b) and refers to section 1.414(l)-1(b). It further provides that separate asset pools are separate plans.

Section 1.410(b)-7(c)(4) of the regulations provides that if a single plan within the meaning of Code section 414(l) benefits employees of more than one disaggregation population, the plan must be disaggregated and treated as separate plans, each separate plan consisting of the portion of the plan benefiting the employees of each disaggregation population.

Section 1.410(b)-7(c)(4)(ii)(C) of the regulations provides that if a plan benefits employees of more than one employer, the employees of each employer are separate disaggregation populations. In such case, the portion of the plan benefiting the employees of each employer is treated as a separate plan maintained by that employer, which must satisfy section 410(b) by reference only to that employer's employees.

Section 414(l) of the Code describes requirements for participant benefits in the event of merger or consolidation of plans or transfer of plan assets.

Section 1.414(l)-1(b)(1) of the regulations states that a plan is a "single plan" if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

With respect to ruling request two, all assets of Plan X are available on an ongoing basis to pay benefits to employees who are covered by Plan X and their beneficiaries. There are no separate asset pools. Therefore, in accordance with section 1.410(b)-7(b) of the regulations, Plan X is a

single plan. It is not necessary to apply the mandatory disaggregation rules of section 1.410(b)-7(c)(4) as required in the definition of "plan" under section 1.401(a)(4)-12 of the regulations because that section also states that its definitions only govern unless otherwise provided, and section 1.401(a)(4)-5(b)(1) provides that the pre-termination restrictions apply to a plan within the meaning of section 1.410(b)-7(b).

Accordingly, with respect to ruling request two, we conclude that for purposes of section 401(a)(4) of the Code and section 1.401(a)(4)-5(b)(3)(ii) of the regulations, Plan X may determine whether the value of the benefits payable to a Restricted Employee in the High-25 Group for purposes of distributions under Plan X is less than 1% of all current liabilities of Plan X before the distribution, without mandatory disaggregation of Plan X into separate plans for each participating employer.

This ruling letter is based on the assumption that Plan X is qualified under Code section 401(a) at all times relevant to the transaction described herein.

This ruling letter 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.

No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations that may be applicable thereto.

The original of this ruling letter has been sent to your authorized representative in accordance with a power of attorney on file with this office.

If you have any questions, please contact
Please refer to SE:T:EP:RA:T3.

Sincerely yours,

Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures
Notice 437
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cc: