



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

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

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Uniform Issue List: 402.00-00

T: EP: RA :T3

Legend:

Taxpayer A =

Individual C =

Company W =

Company X =

Company Y =

Division A =

Plan X =

Month 1 =

Month 2 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear :

This is in response to your letter dated \_\_\_\_\_, in which your authorized representative on your behalf requests a waiver of the 60-day rollover requirement contained in section 402(c)(3)(A) of the Internal Revenue Code (the Code).

The following facts and representations have been submitted under penalty of perjury in support of the ruling requested:

Taxpayer A had been an employee of Company W for a number of years. Company W sponsors Plan X, which, it is represented, is qualified within the meaning of section 401(a) of the Code. It has been represented that Plan X does not permit employee contributions thereto.

On Date 1, 2003, Division A of Company W advised Taxpayer A that he would be eligible to receive a "diversification" distribution from Company W during calendar year , and that he would be eligible to diversify up to 25% of the shares in his employee stock ownership ("ESOP") account in Plan X.

On or about Date 2, 2004, Individual C of Company X gave a presentation to Taxpayer A, and other similarly situated taxpayers, regarding the diversification distribution option and associated Federal tax consequences. It has been represented that Individual C is qualified as an investment advisor in the area of retirement plans. During his presentation, Individual C advised Taxpayer A and other similarly situated taxpayers that net unrealized appreciation ("NUA") treatment described in section 402(d)(4) of the Internal Revenue Code was available to them if they received partial distributions of their Plan X ESOP account balances.

Additionally, it has been represented that a Month 1, 2004, summary plan description ("SPD") applicable to Plan X provides that NUA treatment would be available to any distribution of ESOP stock made from Plan X.

After the above referenced presentation, during calendar year , Taxpayer A received a partial distribution of stock from his ESOP account under of Plan X on the understanding said distribution would be eligible for NUA tax treatment.

During Month 2, 2005, Taxpayer A became aware that the information provided during Taxpayer C's presentation and in the Plan X SPD might be inaccurate. On or about Date 3, 2005, Company W E-Mailed Taxpayer A and other affected Plan X participants advising them that Individual C's information concerning the availability of NUA treatment was incorrect. On or about Date 4, 2005, Company W sent a letter to Taxpayer A acknowledging errors made by Individual C during his Date 2, 2004 presentation.

It has been represented that Company Y has issued Forms 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., to Taxpayer A and other affected Plan X participants which forms, in some cases, were erroneous. However, errors in said forms have been corrected and Taxpayer A, as of the date of this ruling request, was aware that the Plan X distribution he received during calendar year . . . . was not eligible for NUA treatment.

It has been represented that Taxpayer A lacked the financial knowledge or experience to know the tax consequences associated with the distribution he received from Plan X, and, for that reason, relied upon Individual C and on Plan X's SPD as to the availability of NUA treatment.

This request for letter ruling was filed with the Internal Revenue Service shortly after the occurrence of the last of the above-referenced actions.

Based on the facts and representations, you request:

- (1) That the Service waive the 60-day rollover requirement with respect to the distribution Taxpayer A received during calendar year \_\_\_\_\_ from Plan X because the failure to waive such requirement would be a hardship and against equity or good conscience; and
- (2) That Taxpayer A be granted a period a time not to exceed 60 days as measured from the date of this ruling letter to either contribute the stock he received during calendar year \_\_\_\_\_ from Plan X, or, in the alternative (if applicable), to roll over the proceeds of sale of said stock, into an IRA set up and maintained in his name.

With respect to your ruling requests, section 402(a)(1) of the Code provides that, except as otherwise provided in section 402, any amount distributed out of an employees' trust described in section 401(a) that is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, in the manner provided under section 72 of the Code (relating to annuities).

Section 402(c) of the Code provides rules governing rollovers of amounts from exempt trusts to eligible retirement plans including IRAs.

Code section 402(c)(3)(A) provides that, except as provided in subparagraph (B), paragraph (1) (which excludes rolled over amounts from gross income) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.

Code section 402(c)(6)(A) provides that the transfer of an amount equal to any portion of the proceeds from the sale of property received in the distribution shall be treated as the transfer of property received in the distribution.

Code section 402(c)(6)(B) provides that the excess of the fair market value of property on sale over its fair market value on distribution shall be treated as property received in the distribution.

Code section 402(c)(6)(D) provides that no gain or loss shall be recognized on any sale described in subparagraph (A) to the extent that an amount equal to the proceeds is transferred pursuant to paragraph (1).

Section 402(c)(3)(B) of the Code provides that the Secretary may waive the 60-day requirement under section 402(c)(3)(A) of the Code where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement. Only distributions that occurred after December 31, 2001, are eligible for the waiver under section 402(c)(3)(B) of the Code.

Section 402(c)(4) of the Code provides that an eligible rollover distribution shall not include any distribution to the extent such distribution is required under section 401(a)(9).

Section 401(a)(31)(A) of the Code provides that a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution-

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Section 401(a)(31)(E) of the Code provides that, for purposes of Code section 401(a)(31), the term "eligible retirement plan" has the meaning given such term by section 402(c)(8)(B) with an exception not pertinent to this ruling request. Thus, a direct transfer defined in Code section 401(a)(31), may be made into an IRA.

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer-5, provides, in relevant part, that a direct rollover described in Code section 401(a)(31) is a distribution and rollover of the eligible rollover distribution and not a transfer of assets and liabilities. Thus, for example, the consent and requirements of Code sections 401(a)(11), 411(a)(11), and 417 apply to transactions described in Code section 401(a)(31).

Revenue Procedure 2003-16, 2003-4 I.R.B. 359 (January 27, 2003), provides that in determining whether to grant a waiver of the 60-day rollover requirement pursuant to section 402(c)(3)(B), the Service will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution; (2) inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country or postal error, (3) the use of the amount distributed (for example, in the case of payment by check, whether the check was cashed); and (4) the time elapsed since the distribution occurred.

Taxpayer A submits that his failure to accomplish a timely rollover was caused both by his reliance on advice given him by Individual C to the effect the Company W stock he received from Plan X was eligible for NUA tax treatment, and by his reliance on Plan X's SPD which, it has been asserted on his behalf, contained similar information. However, in this case, there was

no intent to rollover nor was the erroneous advice given regarding a rollover transaction itself. Rather, Taxpayer A deliberately chose not to roll over his the portion of his Plan X distribution which consisted of shares of Company X stock on the mistaken belief that net unrealized appreciation was available. We do not believe that Congress intended to permit the Service to retroactively correct tax treatment choices which do not produce the expected benefits even though, in this case, these choices were the result of erroneous advice provided to Taxpayer A by Individual C and arguably also the result of incorrect information found in Plan X's SPD.

Thus, based on the above, pursuant to Code section 402(c)(3)(B), the Service hereby declines to waive the 60-day rollover period found in Code section 402(c)(3)(A) with respect to the shares of Company W stock distributed during calendar year 2004 from Plan X to Taxpayer A.

Furthermore, the Service concludes as follows with respect to your additional ruling request:

- (2) That Taxpayer A is not granted any period of time either to contribute either the stock he received during calendar year        from Plan X, or, in the alternative (if applicable), to roll over the proceeds of sale of said stock, into an IRA set up and maintained in his name.

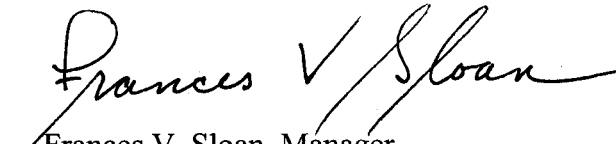
No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations which may be applicable thereto.

This 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 as precedent.

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

If you wish to inquire about this ruling, please contact \_\_\_\_\_ (I.D. # -  
) , at (202) - \_\_\_\_\_ Please address all correspondence to SE:T:EP:RA:T3.

Sincerely yours,

  
Frances V. Sloan, Manager  
Employee Plans Technical Group 3

Enclosures:  
Deleted copy of letter ruling  
Notice of Intention to Disclose