TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

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DEC - 2 2008

Uniform Issue List: 402.08-00

T:EP:RA:T3

Legend:

Administrator A =

Employer B =

Plan X =

Plan Y =

Dear :

This is in response to correspondence dated May 13, 2008, as supplemented by correspondence dated August 28, October 28, and October 31, 2008, in which a request for a letter ruling was submitted with respect to the applicability of rollovers of certain distributions to Roth IRAs described in section 408A of the Internal Revenue Code (Code).

Administrator A administers retirement and disability plans for employees of Employer B. Retired employees of Employer B and their beneficiaries are paid retirement benefits primarily through Plan X and Plan Y. Plan X and Plan Y are qualified plans within the meaning of section 401(a) of the Code and their related trusts are tax exempt within the meaning of section 501(a).

There are several types of employee contributions which can be made to Plan X and Plan Y. The first type is a Mandatory Retirement Deduction. Mandatory Retirement Deductions are mandatory contributions withheld from the basic pay of employees who participate in either Plan X or Plan Y.

The second type of contribution is Discretionary Contributions, permitted in some circumstances, for prior civilian service or prior military service performed that was not covered by Plan X or Plan Y, as explained below.

Certain participants in Plan X or Plan Y have the ability to make Discretionary Contributions, including interest, of amounts equal to the Mandatory Retirement Deductions that would have been withheld from the employee's basic pay during a prior period of service that were previously not withheld because that prior service was originally excluded from coverage. Common types of service excluded from coverage under both Plan X and Plan Y are service pursuant to an appointment of less than one year in duration and service pursuant to an intermittent appointment, i.e., an appointment without either a full-time or part-time regular schedule.

The right to make these contributions is more restrictive under Plan Y than under Plan X. If a Plan X participant had previously excluded service prior to becoming appointed to a position subject to Plan X coverage, that participant may make a Discretionary Contribution equal to the Plan X Mandatory Retirement Deductions which would have been withheld from basic pay for the period of excluded service, plus interest. Under Plan X, a participant may make this Discretionary Contributions regardless of when the noncovered service was performed. However, under Plan Y, Discretionary Contributions and interest may only be made for such noncovered service performed prior to January 1, 1989.

Discretionary Contributions are also available to Plan X participants who terminate employment with Employer B and are subsequently reemployed. If an individual leaves employment with Employer B, has Plan X Mandatory Retirement Deductions to his credit in Plan X, and is at least 31 days away from entitlement to receive an annuity, that individual can apply for a refund of his contributions to Plan X. If that individual has performed at least one year of service but less than five years of service subject to Plan X Mandatory Retirement Deductions, the refund of Mandatory Retirement Deductions includes interest. If the individual is later reemployed by Employer B and participates in Plan X, the individual may make Discretionary Contributions which represent a redeposit of the refunded Mandatory Retirement Deductions plus interest.

Discretionary Contributions can also be made for a period of military service performed after December 31, 1956, and before the date of initial employment with Employer B. Under both Plan X and Plan Y, a contribution for prior military service permits the use of that service in the computation of the annuity if, with certain exceptions, the employee is not receiving a military pension based upon such service. In general, if a contribution for this military service credit is made within two years after the date of the initial employment to a Employer B civilian position, interest is not payable on that contribution. If the contribution is made at a later date, interest is payable on the contribution.

Another type of contribution is a Voluntary Contribution. Voluntary Contributions are made by employees who participate in Plan X to purchase additional amounts of annuity. These voluntary contributions, made in multiples of $25 up to a maximum of 10 percent of all basic pay earned by the employee during his or her creditable service, and interest thereon, may be distributed to an employee or former employee as an alternative to using the contributions to purchase additional amounts of annuity.

In certain circumstances under both Plan X and Plan Y, Mandatory Retirement Deductions and Discretionary Contributions, and interest thereon, may be distributed to eligible employees or former employees, or their beneficiaries, in a single sum distribution. This single sum payment is defined, under both Plans, as a "lump-sum

credit". Under Plan X and Plan Y, an employee who has separated from service with Employer B or an employee whose coverage under Plan Y has terminated at least 31 days prior to eligibility for payment of an immediate annuity may apply to Administrator A for payment of the lump-sum credit. In addition, if an employee or former employee dies before the commencement of an annuity from either Plan, and there are no survivors entitled to be paid a survivor annuity, the lump-sum credit shall be paid to an individual other than the former employee.

Although Voluntary Contributions may be used to purchase additional annuity benefits at retirement, a current or former employee is permitted to receive a distribution of these contributions in a lump sum payment, with interest, before receiving an additional annuity based upon the Voluntary Contributions. Voluntary Contributions are permitted only in Plan X.

Mandatory Retirement Deductions, Discretionary Contributions, and Voluntary Contributions are after-tax contributions.

Based upon the facts and representations stated above, the following rulings are requested:

1. Mandatory Retirement Deductions, Discretionary Contributions, and Voluntary Contributions, and interest thereon, if distributed in a lump sum distribution from Plan X or Plan Y, can be rolled over into a Roth IRA.

2. The related interest of any Mandatory Retirement Deductions, Discretionary Contributions, and Voluntary Contributions distributed from Plan X or Plan Y in a lump sum distribution and rolled over into a Roth IRA is subject to taxation with respect to the tax year of the distributee or recipient in which distributed.

Section 402(a) of the Code provides that except as otherwise provided in this section, any amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under section 72 (relating to annuities).

Section 408A of the Code provides the applicable requirements concerning Roth IRAs. Section 408A(b) provides that the term "Roth IRA" means an individual retirement plan (as defined in section 7701(a)(37)) which is designated (in such manner as the Secretary may prescribe) at the time of the establishment of the plan as a Roth IRA.

Section 408A(c)(6)(A) of the Code states that no rollover contribution may be made to a Roth IRA unless it is a qualified rollover contribution.

Section 408A(e) of the Code provides, in pertinent part, that for purposes of this section, the term "qualified rollover contribution" means a rollover contribution to a Roth IRA from an eligible retirement plan, but only if in the case of any eligible retirement plan (as defined in section 402(c)(8)(B) other than clauses (i) and (ii) thereof), such rollover contribution meets the requirements of section 402(c).

Section 402(c) of the Code provides rules applicable to rollovers from exempt trusts. Section 402(c)(8)(B) provides that the term "eligible retirement plan" means (i) an

individual retirement account described in section 408(a), (ii) an individual retirement annuity described in section 408(b) (other than an endowment contract), (iii) a qualified trust, (iv) an annuity plan described in section 403(a), (v) an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer, and (vi) an annuity contract described in section 403(b).

Section 402(c)(8)(A) of the Code states that the term "qualified trust" means an employees' trust described in section 401(a) which is exempt from tax under section 501(a).

Section 402(c)(4) of the Code provides that the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include—A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or for a specified period of 10 years or more, B) any distribution to the extent such distribution is required under section 401(a)(9), C) any distribution which is made upon hardship of the employee, and D) any qualified disaster-relief distribution (within the meaning of section 72(t)(2)(G)).

Section 408A(d)(3) of the Code concerns rollovers from an eligible retirement plan other than a Roth IRA. Section 408A(d)(3)(A) provides, in relevant part, that notwithstanding section 402(c), in the case of any distribution to which this paragraph applies, there shall be included in gross income any amount which would be includible were it not part of a qualified rollover contribution.

Section 408A(d)(3)(B) of the Code provides that the rules provided in section 408A(d) shall apply to a distribution from an eligible retirement plan (as defined by section 402(c)(8)(B))(other than a Roth IRA) maintained for the benefit of an individual which is contributed to a Roth IRA maintained for the benefit of such individual in a qualified rollover contribution.

Section 408A(c)(3)(B) of the Code provides, with respect to a rollover from an eligible retirement plan, that a taxpayer shall not be allowed to make a qualified rollover contribution to a Roth IRA from an eligible retirement plan (as defined by section 402(c)(8)(B)) other than a Roth IRA during any taxable year if, for the taxable year of the distribution to which such contribution relates—(i) the taxpayer's adjusted gross income exceeds $100,000, or (ii) the taxpayer is a married individual filing a separate return. Section 408A(c)(3)(B) is effective for distributions after December 31, 2007 and before January 1, 2010. Section 408A(c)(3)(C) defines adjusted gross income as adjusted gross income with certain adjustments (modified adjusted gross income).

Notice 2008-30, 2008-12 I.R.B. 638 (March 5, 2008), Miscellaneous Pension Protection Act Changes, Question and Answer-1 provides that distributions from a qualified plan described in section 401(a) of the Code can be rolled over to a Roth IRA. The rollover can be made through a direct rollover from the plan to the Roth IRA or an amount can be distributed from the plan and contributed (rolled over) to the Roth IRA within 60 days. In either case, the amount rolled over must be an eligible rollover distribution (as defined in section 402(c)(4)) and, pursuant to section 408A(d)(3)(A), there is included in gross income any amount that would be includible if the distribution were not rolled over. In

addition, for taxable years beginning before January 1, 2010, an individual can not make a qualified rollover contribution from an eligible retirement plan other than a Roth IRA if, for the year the eligible rollover distribution is made, he or she has modified adjusted gross income exceeding $100,000 or is married and files a separate return.

Notice 2008-30 provides guidance with respect to certain distribution-related provisions of the Pension Protection Act of 2006, P.L. 109-280 (PPA '06), that are effective in 2008. A section of PPA '06 addressed in the Notice relates to rollovers from eligible retirement plans to Roth IRAs. Prior to amendment by PPA '06, section 408A of the Code provided that a Roth IRA could only accept a rollover contribution of amounts distributed from another Roth IRA, from a non-Roth IRA (i.e., a traditional or SIMPLE IRA), or from a designated Roth account described in section 402A. These rollover contributions to Roth IRAs were called "qualified rollover contributions". A qualified rollover contribution from a non-Roth IRA to a Roth IRA was called a "conversion". An individual who rolled over an amount from a non-Roth IRA to a Roth IRA included in gross income any portion of the conversion amount that would have been includible in gross income if the amount were distributed without being rolled over. For distributions before 2010, a conversion contribution is permitted only if the IRA owner's adjusted gross income does not exceed certain limits.

Section 824 of PPA '06 amended the definition of qualified rollover contribution in section 408A of the Code to include additional plans. Under this expansion, in addition to the rollovers described in the preceding paragraph, a Roth IRA can accept rollovers from other eligible retirement plans (as defined in section 402(c)(8)(B)). The amendments made by section 824 of PPA '06 are effective for distributions made after December 31, 2007.

With respect to your first ruling request, effective for distributions made after December 31, 2007, an individual who receives amounts from a tax qualified retirement plan described in section 401(a) of the Code is able to roll over the distribution into a Roth IRA if the rollover requirements are met. However, effective for distributions after December 31, 2007 and before January 1, 2010, an amount distributed from a qualified retirement plan can not be rolled over to a Roth IRA during any tax year if, for the tax year in which the distribution is made from the eligible retirement plan, the individual's modified adjusted gross income exceeds $100,000 or the individual is married and files a separate return.

Therefore, with respect to your first ruling request, we conclude that Mandatory Retirement Deductions, Discretionary Contributions, and Voluntary Contributions, and interest thereon, if distributed in a lump sum distribution from Plan X or Plan Y, can be rolled over into a Roth IRA.

With respect to your second ruling request, the tax-deferred treatment of rollovers that ordinarily applies under section 402(c) of the Code applicable to qualified plans will not apply for distributions rolled over to a Roth IRA. For any distribution from an eligible retirement plan which is contributed to a Roth IRA in a qualified rollover contribution, the individual on whose behalf the Roth IRA is maintained will have to include in gross income any amount which would have been includible were it not part of a qualified rollover contribution. Ordinarily, the distribution of any amount from a Code section 401(a) plan is taxed under the Code section 72 annuity rules. Under these rules, the

portion of a distribution that represents the return of after-tax contributions or other basis will not be includible in income, and the portion that represents income will be taxable.

Therefore, with respect to your second ruling request, we conclude that the related interest of any Mandatory Retirement Deductions, Discretionary Contributions, and Voluntary Contributions distributed from Plan X or Plan Y in a lump sum distribution and rolled over into a Roth IRA is subject to taxation with respect to the tax year of the distributee or recipient in which distributed.

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

This letter assumes that Plan X and Plan Y are and were qualified under section 401(a) of the Code, and their related trusts are and were exempt from tax under section 501(a) at all times relevant 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.

If you wish to inquire about this ruling, please contact , I.D. # , at .
Please address all correspondence to SE:T:EP:RA:T .

Sincerely yours,

Frances V. Sloan

, Manager
Employee Plans Technical Group

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