Significant Index Nos. **419.14-00 and 9300.01-00**

*****

Release Number: **201017076**
Release Date: 4/30/10

In re:

Sponsor =

ABC =

XYZ =

Date 1 =

Date 2 =

Date 3 =

Note: In accordance with 26 C.F.R. § 301.6110-3(b), substitutions have been made in this document with respect to certain information deleted pursuant to I.R.C. § 6110(c).

Dear

The letter is in response to your request of *****, for rulings with regard to the Plan. In particular, you have requested the following rulings:

(1) The Plan is a 10 or more employer plan described in section 419A(f)(6) of the Code and

(2) The Plan is not a reportable transaction within the meaning of section 1.6011-4(b)(1) of the regulations because it is not the same as, or substantially similar to, arrangements described in Notice 95-34 and identified in Notice 2004-67 as listed transactions under section 1.6011-4(b)(2) of the regulations.

Facts

The Plan states that it provides welfare benefits to employees of participating employers[1]. Benefits are provided to participants both during their employment and

[1] For purposes of this ruling, we are assuming that the Plan is a welfare benefit plan within the meaning of section 419(e) but we are not addressing issues inherent in that assumption, including whether the Plan is a plan of deferred compensation to which the deduction rules of section 404 would apply and whether the Plan provides constructive dividends to employees/owners. Nor are we addressing whether the Plan is a split-dollar life insurance arrangement. Finally, this ruling

through their retirement. The Plan provides death benefits ("Death Benefits"), as well as medical expense reimbursement benefits, disability benefits and involuntary severance benefits (collectively, "Other Benefits"). The Plan provides that if a participant's employer voluntarily withdraws from the Plan or the Plan is terminated, the Other Benefit and any accompanying Death Benefit attributable to the participant may be transferred to another welfare benefit plan under Code sections 419 or 419A[2].

The Plan funds 100% of the Death and Other Benefits through the purchase of cash value life insurance policies covering the lives of plan participants[3]. In particular, the Plan purchases a life insurance policy on the life of each participant with a face amount equal to the participant's Death Benefit and generally pays Other Benefits by accessing the cash values of such policies. The form of the life insurance policies may be universal life, variable life, or traditional life.

The Plan groups all participants into subgroups ("Groups") *****. According to Plan documents, the Groups are to be organized such that no employer normally contributes more than 10% of the total contributions paid towards the insurance policies covering the lives of the members of a Group who are employees of the employer. Generally, the policies purchased on each of the lives of the members of a Group will be of the same insurance form. If the insurance form is traditional life, the required premium paying period will be the same number of years for each of the policies. If the insurance form is flexible premium universal life or variable life, the planned premium paying period will be the same for each of the policies.

The Other Benefit of a participant, for any year, is generally determined in steps. In Step One the total of the projected (to the end of the policy year) cash values of the insurance policies covering the lives of the members of the participant's Group is multiplied by a fraction, the numerator of which is the participant's Death Benefit, and the denominator of which is the total of the Death Benefits of all the members of the Group. In Step Two, the result from Step One is multiplied by a factor (*****) chosen by the Plan actuary to leave a margin for expenses, inexact projections, and benefit claims early in the policy year.

For example, Participant P has a Death Benefit of $1 million and is a member of Group R. The total of the projected cash values of the insurance policies owned by the Plan on the lives of the members of R, for a year, is $500,000 and the total Death Benefits of the members of R is $20 million. Thus, the result of the first step in the calculation of P's Other Benefit is $25,000 ($500,000 multiplied by $1 million divided by $20 million). Accordingly, if the Plan actuary chooses a factor of 90

---

does not reach the issues of whether the Plan is a single plan rather than an aggregation of individual plans and whether the Plan satisfies the Compliance Information requirements of section 1.419A(f)(6)-1(a)(2) of the regulations, even though the ruling you requested implicitly requests such determinations.

[2] See section ***** of the Plan and *****

[3] See section ***** of the Plan and *****

percent, the Other Benefit of P for the year is $22,500. This is the case regardless of the actual projected cash value of the policy owned by the Plan on the life of P.

Employers must select (as a check off line in the Plan adoption agreement) either an Other Benefit plan or a Death Benefit plan. In general, the cash values of the insurance policies covering the lives of the members of a Group whose employers have selected an Other Benefit plan will build up faster than the cash values of the insurance policies covering the lives of the members of a Group whose employers have selected a Death Benefit plan.

Each year a participating employer is required to contribute an amount dictated by the Group assignments of the various eligible employees who are intended to be participants in the Plan. In particular, the amount that a participating employer is required to contribute with respect to each Group is generally determined as a level amount equal to the sum of the premiums required under each of the life insurance policies on the lives of the members of the Group multiplied by a fraction, the numerator of which is the total of the Death Benefits of the members of the Group who are in his employ, and the denominator of which is the total of the Death Benefits of all the members of the Group. In situations in which the policy form of a Group provides for flexible premiums, the Plan actuary determines a premium for each of the policies in the group such that the policies all become fully funded at the end of the planned premium payment period chosen for the Group.

For example, Participant Q, an employee of Employer E, has a Death Benefit of $2 million and is member of Group S. Participant Q is the only employee of E who is a member of S. The total of the Death Benefits of the members of S is $100 million. The insurance policies purchased on the lives of the members of S are all of the (flexible premium) universal life form. The Plan actuary has determined that the total of the required premiums of the policies owned by the Plan on the lives of the members of S for a year is $3 million. Accordingly, the required contribution from E for the year with respect to Q is $60,000 ($3 million multiplied by $2 million divided by $100 million). This is the case regardless of the actual premium determined by the actuary for the policy on the life of Q.

A Group is generally open to plan participants over a one-year time period[4].

Employees are assigned to Groups based on the following factors:

- Employees are placed in Groups consisting of members with similar life insurance risk profiles (e.g. age, gender, and general health)[5].

[4] See ***** of the *****, included in the original submission, (hereinafter, "Report #1") which states *****.

[5] See *****, included in the original submission (hereinafter, "Report #2") which states*****. See also ***** of Report #2 which states*****.

- Employees are placed into Groups with employees of other employers who intend to contribute to the Plan for the same number of years as the employee's employer[6].

- Employees are placed into Groups with employees of other employers who intend to contribute similar amounts (per $1 million of coverage) to the Plan as the employee's employer[7].

- Employees are placed into Groups with employees of other employers for whom the same mix of welfare benefits (i.e. Other Benefit or Death Benefit) was chosen.

- Employees are placed into Groups with employees of other employers who have similar investment risk tolerances as the employee's employer. For example, certain employers might prefer the minimal risk that is found in insurance products where the investment return is based on the performance of the Insurer's General Account. Other employers might prefer the risk that is found in insurance products where the investment return is tied to an outside index. Still other employers might prefer the risk that is found in insurance products where the assets are invested in a separate account, as in a variable life insurance contract[8].

Additional Material Submitted Pursuant to Section 11.10 of Rev. Proc. 2006-4

On Date 1, your authorized representative was informed of our tentative adverse position with respect to your request. On Date 2, a Conference of Right was held with respect to our tentative adverse position. On Date 3, a date which was after the Conference of Right, your authorized representative submitted additional material including projections based on a group which the authorized representative for the Plan stated existed as of ***** (the "Projections Report"), and a document entitled ABC Employer Welfare Benefit Plan Rules *****[9], dated Date 3 (the "Rules").

The Projections Report, which was prepared by the actuary for the Plan, shows the results of testing the expected contributions against the expected benefits for *****

---

[6] See ***** of Report #2 which states***** and which states*****.

[7] See **ABC Plan Description** of Report #2 which states *****.

[8] See, in particular, ***** of the Report #2 which states that ***** (Emphasis added).

- Assets invested in a separate account as in a variable life insurance contract
- Assets invested in the general account of the life insurance company with the credited interest rate tied to an outside index as in an equity indexed life insurance contract, or
- Assets invested in the general account of the insurance company without the credited interest rate tied to an outside index"

[9] Section ***** of the Plan provides that ***** means the committee as defined by the Plan, *****.

Plan participants in one of the groups. The actuary's conclusion with regard to such testing was that there is not a direct relationship between contributions and benefits for any specific participant", and that "there is a variation in the "returns" achieved, defined as Expected Other Benefits less Expected Contributions."

The Rules generally provide that the committee's interpretations of the Plan's provisions must weigh in favor of maintaining the Plan's compliance with section 419A(f)(6) of the Code, section 1.419A(f)(6)-1 of the regulations, and applicable federal tax authorities promulgated thereunder (collectively, the "Applicable Law"). Furthermore, the rules provide that matters which, in the view of the committee are not clearly decided by the Applicable Law should be submitted to the Plan's counsel for written advice, and that values distributed from the Plan must, in the opinion of the Plan actuary maintain the Plan's status as an employee welfare benefit plan that does not maintain an experience rated arrangement as to any single employer within the means of section 419A(f)(6) of the Code.

The Rules include guidelines regarding the transfer of Plan assets by employers to *bona fide* single or multiple employer welfare benefit plans. Such transfers are permitted, but only where:

- The single employer or multiple employer welfare benefit plan, in the opinion of Plan counsel, satisfies the applicable requirements of sections 419 and 419A of the Code.

- The transfer of assets, in the opinion of Plan counsel and the Plan actuary, does not cause the Plan to maintain an experience rating arrangement as to any Covered Employer or its employee/participants under section 419A(f)(6) and the regulations thereunder.

- The transfer of assets, in the opinion of the Plan counsel and the Plan actuary, does not cause the Plan to become a deferred compensation arrangement.

- The transferee plan does not permit distributions of cash or value, except upon the occurrence of a "standard welfare benefit trigger" as defined under section 419A(f)(6) of the Code and the regulations thereunder, and may not be amended to do so.

- The transferee plan is an employee welfare benefit plan under ERISA and holds plan assets in a taxable trust only to be paid in the form of welfare benefits to participants of the transferee plan. The transferee plan's language permits transfers or rollovers of Plan assets from plans such as the Plan. The transferee plan is in existence at the time the transfer is made and trustees of both the Plan and the transferee plan have agreed to the transfer. The affected participant's benefits do not increase or diminish as a result of the transfer. The Covered Employer's governing body has resolved, in

writing, that the transfer is in the best interest of the participants of the Covered Employer. The transfer does not result in a reversion of Plan Assets to the Covered Employer or in a distribution of benefits to the affected participants. The participants, individually, voluntarily elect and agree to the transfer of Plan Assets.

Example of Plan Operation

Based on the materials submitted with the request and numerous conversations with the authorized representatives of the Sponsor, it is our understanding that it is intended that the Plan (once it becomes fully operational) will operate in a manner consistent with the operation illustrated in the following example:

Participating Employer F intends to make contributions to the Plan for 10 years and selects an Other Benefit plan. Thus, the employees of F are placed in Groups with employees of other employers who intend to make contributions to the Plan for 10 years and have selected Other Benefit plans. In addition, the employees of F are placed in Groups with employees of other employers who have similar life insurance risk profiles.

One employee of Employer F, G, is a 47 year old male non-smoker who is first covered in 2005. Employee G is assigned to a Group, K, consisting of 45 to 50 year old male non-smoker employees of other employers who are first covered in 2005 and whose employers intend to contribute to the Plan for 10 years and who have selected Other Benefit plans[10].

The Plan purchases life insurance policies of the same form on the lives of each of the members of Group K. The Plan actuary then determines, for each policy, a premium amount such that it is likely that the policy will be fully funded after the payment of 10 premiums. Because each of the members of K are of the same gender, in the same age range, and have the same smoking status, the premiums, per $1 million of coverage, for the policies purchased on the lives of the members of K will generally be similar. This is true regardless of whether the policies are purchased from different insurers.

Similarly, the cash values of the policies, per $1 million of coverage, on the lives of the members of Group K will generally, at any point in time, be similar. This is because the cash value of a life insurance policy, per $1 million of overage, is, in general, a function of the policy's duration (which will be the same for each policy in the Group because each policy will be issued in 2005), the premium paying period, the policy form, and the insured's age, gender, and smoking status.

Thus, if the total of the premiums required under the policies on the lives of the members of Group K was $2 million, and the total of the Death Benefits of the

[10] Although Report #1 uses as an example a Group consisting of a mixture of male and female smokers and nonsmokers aged 45 to 55, Report #2 makes clear that "tighter" Groups are intended. *****.

members of the K was $50 million, and Employee G's Death Benefit was $4 million, the contribution required from Employer F with respect to G would be $160,000 (determined as $2 million multiplied by $4 million divided by $50 million). This amount would be required from F regardless of the actual premium required under the policy purchased on the life of G (the "G Policy").

Similarly, if the total of the Other Benefits on the policies on the lives of the members of Group K in future year 200X was $8 million, the Other Benefit in year 200X with respect to Employee G would be $640,000 (determined as $8 million multiplied by $4 million divided by $50 million). This $640,000 would be the amount of the Other Benefit of G regardless of the actual cash value of the G Policy.

In the event that Employer F were to terminate his participation in the Plan in year 200X, the Other Benefits of Employee G could be transferred to another welfare benefit plan under Code sections 419 or 419A[11]. Because the Other Benefit of G would not, in all likelihood in year 200X be exactly the same as the cash value of the G Policy, an adjustment to the cash value would have to be made at the time of the transfer before the policy itself could be transferred.

If the adjustment to the cash value of the G Policy in year 200X was negative (as would be the case if the cash value of the G Policy was greater than his Other Benefit of $640,000), the cash value of the G Policy would be reduced by the excess of the cash value of the G Policy over his Other Benefit. This excess would be transferred to the remaining policies within Group K.

Similarly, if the adjustment to the cash value of the G Policy in year 200X was positive (as would be the case if the cash value of Death Benefit of the G Policy was less than his Other Benefit of $640,000), the difference between G's Other Benefit and the cash value of the G Policy would be made up through transfers of cash values from the remaining policies within Group K.

Law

Section 419A(f)(6)(A) of the Code provides that sections 419 and 419A shall not apply in the case of any welfare benefit fund which is part of a 10 or more employer plan. The preceding sentence shall not apply to any plan which maintains experience-rating arrangements with respect to individual employers.
Section 419A(f)(6)(B) of the Code provides that for purposes of subparagraph(A), the term "10 or more employer plan" means a plan -----

(i) to which more than 1 employer contributes, and

(ii) to which no employer normally contributes more than 10 percent of the total contributions contributed under the plan by all employers.

[11] See section ***** of the Plan.

Section 1.419A(f)(6)-1(a)(1)(iii) of the regulations provides that a plan is a 10 or more employer plan described in section 419A(f)(6) only if it is a single plan that does not maintain an experience-rating arrangement with respect to any individual employer.

Section 1.419A(f)(6)-1(b)(1) of the regulations provides that a plan maintains an experience-rated arrangement with respect to an individual employer and thus does not satisfy the requirements of paragraph (a)(1)(iii) of that section if, with respect to that employer, there is any period for which the relationship of contributions under the plan to the benefits or other amounts payable under the plan (the cost of coverage) is or can be expected to be based, in whole or in part, on the benefits experience or overall experience (or a proxy for either type of experience) of that employer or one or more employees of that employer. For purposes of that paragraph (b)(1), an employer's contributions include all contributions made by or on behalf of the employer's employees.

Section 1.419A(f)(6)-1(b)(4)(iii) of the regulations provides that a plan will not be treated as maintaining an experience-rating arrangement with respect to an individual employer merely because the cost of coverage under the plan with respect to the employer is based, in whole or in part, on the benefits experience or the overall experience (or a proxy for either type of experience) of a rating group, provided no employer normally contributes more than 10 percent of all contributions with respect to that rating group. For that purpose, a rating group means a group of participating employers that includes the employer or a group of employees covered under the plan that includes one or more employees of the employer.

Section 1.419A(f)(6)-1(c)(1) of the regulations provides that the presence any of the characteristics described in paragraphs (c)(2) through (c)(6) of that section generally indicates that the plan is not a 10 or more employer plan described in section 419A(f)(6). Accordingly, unless established to the satisfaction of the Commissioner that the plan satisfies the requirements of section 419A(f)(6) and that section, a plan having any of the following characteristics is not a 10 or more employer plan described in section 419A(f)(6). A plan's lack of all the following characteristics does not create any inference that the plan is a 10 or more employer plan described in section 419A(f)(6). The characteristics are:

Allocation of plan assets. Assets of the plan or fund are allocated to a specific employer or employers through separate accounting of contributions and expenditures for individual employers, or otherwise. Section 1.419A(f)(6)-1(c)(2).

Differential pricing. The amount charged under the plan is not the same for all the participating employers, and those differences are not merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers (such as current age, gender, geographic locale, number of covered dependents, and benefit terms) for the particular benefit or benefits being provided. Section 1.419A(f)(6)-1(c)(3).

No fixed welfare benefit package. The plan does not provide fixed welfare benefits for a fixed coverage period for a fixed cost, within the meaning of paragraph (d)(5) of that section. Section 1.419A(f)(6)-1(c)(4)

Unreasonably high cost. The plan provides for fixed welfare benefits for a fixed coverage period for a fixed cost, but that cost is unreasonably high for the covered risk for the plan as a whole. Section 1.419A(f)(6)-1(c)(5)

Nonstandard benefit triggers. Benefits or other amounts payable can be paid, distributed, transferred, or otherwise provided from a fund that is part of the plan by reason of any event other than the illness, personal injury, or death of an employee or family member, or the employee's involuntary separation from employment. Thus, for example, a plan exhibits this characteristic if the plan provides for the payment of benefits or the distribution of an insurance contract to an employer's employees on the occasion of the employer's withdrawal from the plan. A plan will not be treated as having the characteristic described in this paragraph merely because, upon cessation of participation in the plan, an employee is provided with the right to convert coverage under a group life insurance contract to coverage under an individual life insurance contract without demonstrating evidence of insurability, but only if there is no additional economic value associated with the conversion right. Section 1.419A(f)(6)-1(c)(6)

Section 1.419A(f)(6)-1(d)(1) of the regulations provides that the term benefits or other amounts payable includes all amounts that are payable or distributable (or that will otherwise be provided) directly or indirectly to employers, to employees or their beneficiaries, or to another fund as a result of a spinoff or transfer, and without regard to whether payable or distributable as welfare benefits, cash, dividends, credits, rebates of contributions, property, promises to pay, or otherwise.

Section 1.419A(f)(6)-1(d)(2) of the regulations provides that the benefits experience of an employer (or of an employee or group of employers or employees) means the benefits and other amounts incurred, paid, or distributed (or otherwise provided) directly or indirectly, including to another fund as a result of a spinoff or transfer, with respect to the employer (or employee or group of employers or employees), and without regard to whether provided as welfare benefits, cash, dividends, credits, rebates of contributions, property, promises to pay, or otherwise.

Section 1.419A(f)(6)-1(d)(3)(i) of the regulations provides that the term overall experience means, with respect to an employer (or group of employers), the balance that would have accumulated in a welfare benefit fund if that employer (or those employers) were the only employer (or employers) providing welfare benefits under the plan. Thus, the overall experience is credited with the sum of the contributions under the plan with respect to that employer (or group of employers), less the benefits and other amounts paid or distributed (or otherwise provided) with respect to that employer (or group of employers) or the employees of that employer (or group of employers), and adjusted for gain or loss from insurance contracts (as

described in paragraph (b)(4)(i) of that section), investment return and expenses. Overall experience as of any date may be a positive or a negative number.

Section 1.419A(f)(6)-1(d)(3)(ii) of the regulations provides that the term overall experience means, with respect to an employee (or group of employees whether or not employed by the same employer), the balance that would have accumulated in a welfare benefit fund if that employee (or those employees) were the only employee (or employees) being provided welfare benefits under the plan. Thus, the overall experience is credited with the sum of the contributions under the plan with respect to that employee (or group of employees), less the benefits and other amounts paid or distributed (or otherwise provided) with respect to that employee (or group of employees), and adjusted for gain or loss from insurance contracts (as described in paragraph (b)(4)(i) of that section), investment return and expenses. Overall experience as of any date may be a positive or a negative number.

Section 1.419A(f)(6)-1(d)(5)(i) of the regulations provides that a plan provides for fixed welfare benefits for a fixed coverage period for a fixed cost, if it ---

(A) Defines one or more welfare benefits, each of which has a fixed amount that does not depend on the amount or type of assets held by the fund.

(B) Specifies fixed contributions to provide for those welfare benefits; and

(C) Specifies a coverage period during which the plan agrees to provide specified welfare benefits, subject to the payment of the specified contributions by the employer.

Section 1.419A(f)(6)-1(d)(5)(ii) of the regulations provides that a plan will not be treated as failing to provide for fixed welfare benefits for a fixed coverage period for a fixed cost merely because the plan does not pay the promised benefits (or require all participating employers to make proportionate additional contributions based on the fund's shortfall) when there are insufficient assets under the plan to pay the promised benefits. Similarly, a plan will not be treated as failing to provide for fixed welfare benefits for a fixed coverage period for a fixed cost merely because the plan provides a period of extended coverage after the end of the coverage period with respect to employees of all participating employers at no cost to the employers (or provides a proportionate refund of contributions to all participating employers) because of the plan-wide favorable actuarial experience during the coverage period.

Section 1.419A(f)(6)-1(f) of the regulations illustrates the provisions related to experience-rating arrangements with a number of examples. Five of these examples, Example 2 and Examples 9-12, involve the rule described in section 1.419A(f)(6)-1(b)(4)(iii) for rating groups.

Under the facts in Example 2, the amount charged to an employer under a 10 or more employer plan each year is equal to the claims and other expenses expected

with respect to that employer for the year multiplied by the ratio of actual claims for the previous year (determined on a plan wide basis, i.e., based on the actual claims for the employees of all employers) over the expected claims for the previous year (determined on a plan wide basis). The regulations note that under these facts an employer's cost of coverage is based, in part, on the benefits experience of the employer (as well as of all other participating employers). However, pursuant to section 1.419A(f)(6)-1(b)(4)(iii), the arrangement will not be treated as maintaining experience-rating arrangements with respect to the individual employers merely because the employers' cost of coverage is based on the benefits experience of a rating group. (In Example 2, the rating group includes all the employees of all the participating employers). The regulations conclude that, absent other facts, the arrangement will not be treated as maintaining experience-rating arrangements with respect to individual employers.

Under the facts in Example 10, the amount charged for the coverage of an employee in the rating group is initially determined from a rate-setting manual based on the benefit package and then adjusted to reflect the claims experience of the employers in that classification as a whole. The regulations state that, under the facts in Example 10, an employer participating in the plan should be able to establish that the plan does not maintain experience-rating arrangements with respect to individual employers even though the differential pricing characteristic is present.

Under the facts in Example 12, the experience of each employer in the rating group for the prior year is reviewed and then the employer is assigned to one of the three classifications (low cost, intermediate cost, or high cost) based on the ratio of actual claims with respect to that employer. The regulations state that the special rule for ratings groups can prevent a plan from being treated as maintaining experience-rating arrangements with respect to individual employers if the mere use of the rating group is the only reason the plan would be so treated. Under the arrangement described in Example 12, however, an employer's cost for each year is based on the employer's benefit experience in two ways: the employer's benefit experience is part of the benefits experience of the rating group that is otherwise permitted under the special rule for rating groups, and the employer's benefit experience is considered annually in redetermining the rating group to which the employer is assigned. Accordingly, the plan in Example 12 maintains experience-rating arrangements with respect to individual employers.

Section 1.6011-4(a) of the regulations provides that, in general, every taxpayer that has participated in a reportable transaction and who is required to file a tax return must attach a disclosure statement to its return for the taxable year.

Section 1.6011-4(b)(1) of the regulations provides that a reportable transaction is a transaction described in any of the paragraphs (b)(2) through (7) of that section. The term transaction includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as part of a plan. There are six categories of reportable transactions: listed transactions, confidential transactions, transactions with

contractual protection, loss transactions, transactions with a significant book-tax difference, and transactions involving a brief asset holding period.

Section 1.6011-4(b)(2) of the regulations provides that a listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

Section 1.6011-4(c)(4) of the regulations provides that the term substantially similar includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term substantially similar must be broadly construed in favor of disclosure.

Notice 95-34, 1995-1 C.B. 309, alerts Taxpayers and their representatives to some of the significant tax problems that may be raised by certain arrangements purporting to qualify as multiple employer welfare benefit funds excepted from the limits of section 419 and 419A of the Code. The arrangements described in Notice 95-34 claim to satisfy the requirements for the 10-or-more employer plan exception under section 419A(f)(6) of the Code. Section 419A(f)(6) provides an exception from the strict limits under sections 419 and 419A that otherwise apply to deductions for contributions to a welfare benefit fund. The arrangements described in Notice 95-34 attempt to use the exception provided by section 419A(f)(6) of the Code in order to avoid being subject to the otherwise applicable deduction limits of sections 419 and 419A even though, pursuant to formal or informal arrangements or practices, a particular employer's contributions or its employees' benefits may be determined in a way that insulates the employer to a significant extent from the experience of other subscribing employers. The Service identified transactions described in Notice 95-34 as "listed transactions" for purposes of sections 1.6011-4(b)(2), 301.6111-2(b)(2), and 301.6112-1(b)(2). Notice 2004-67, 2004-2 C.B. 600.

Analysis of First Ruling Request

Section 1.419A(f)(6)-1(c)(1) of the regulations provides that a plan having any of the characteristics in paragraphs (c)(2) through (c)(6) of that section is not a 10 or more employer plan described in section 419A(f)(6) unless it is established to the satisfaction of the Commissioner that the plan satisfies the requirements of section 419A(f)(6) and that section of the regulations. In the instant case, the Plan exhibits four of the characteristics listed under section 1.419A(f)(6)-1(c)(2) through (c)(6).

First, assets of the Plan are effectively allocated to specific employers. This is the case even though there is a small amount of asset sharing among employers within the Groups. Because of the high degree of participant homogeneity within a Group, any such asset sharing is not likely to be significant. In other words, because all of

the members of any particular group will be of similar or identical age, gender, and general health, and because the policies purchased on their lives will be of the same form and have been purchased within the same time period, the values inherent in such policies will generally be similar. Thus, to a significant extent, employers are effectively purchasing policies on the lives of their own employees. Each employer has access to a separate accounting of its proportionate share of the aggregate assets associated with the policies on the lives of the Group members. Accordingly, the Plan exhibits the characteristic of *Allocation of plan assets* within the meaning of section 1.419A(f)(6)-1(c)(2) of the regulations.

Second, the amounts charged under the Plan are not the same for all participating employers and these differences are not merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers. For example, two employers who chose Death Benefit plans would be charged different amounts for the same benefits depending upon whether they chose to fund the benefits over 10 years or 20 years. Although, insurers generally take into account the length of the premium paying period in setting manual rates, premium paying period is generally not considered a current risk or rating factor, but merely the number of years selected by the insurance contract owner over which the owner agrees to, in effect, fund an amount, determined by the insurer, equal to the present value of the sum of the benefits provided by the contract plus the insurer's costs of operation (including profit) allocable to the contract. In addition, for those participating employers choosing to provide Other Benefits, the differences in contribution amounts are not reflective of the risk or rating factors commonly taken into account in manual rates used by insurers for the Other Benefits provided under the Plan. Thus, the Plan exhibits the characteristic of *Differential Pricing* within the meaning of section 1.419A(f)(6)-1(c)(3) of the regulations.

Third, the Plan does not provide for fixed welfare benefits for a fixed coverage period for a fixed cost. For example, an employer who chose a Death Benefit plan (i.e. one in which the Other Benefits are not significant) would be charged a varying amount depending on the number of years the employer chose to make contributions to the Plan. Similarly, employers who placed their employees in Groups that were funded with universal life or variable life policies would not have fixed Other Benefits (because the Other Benefits are based on the cash values of the policies of the Group which in turn are based on unknown future investment returns). In addition, in all situations, the actual cash values of the policies of a Group and the safety margin between such cash values and the Other Benefits of the Group determined by the Plan actuary are also not fixed. Thus, the Plan exhibits the characteristic of *No fixed welfare benefit package* within the meaning of section 1.419A(f)(6)-1(c)(4) of the regulations.

Fourth, benefits can be transferred from the Plan by reason of an event other than the illness, personal injury, or death of an employee or family member, or the employee's involuntary separation from the employer. In particular, benefits can be transferred to another welfare benefit plan under Code sections 419 or 419A if a participant's employer withdraws from the Plan or the Plan is terminated. Thus, the

Plan exhibits the characteristic of *Nonstandard benefit triggers* within the meaning of section 1.419A(f)(6)-1(c)(6) of the regulations.

Because the Plan exhibits at least one of the characteristics listed under section 1.419A(f)(6)-1(c) of the regulations, the Plan must establish to the satisfaction of the Commissioner that the Plan satisfies the requirements of section 419A(f)(6) and section 1.419A(f)(6)-1 of the regulations. The Plan cannot do so.

In particular, the Plan maintains experience–rating arrangements with respect to individual employers because the cost of coverage of an employer is based on a proxy for the overall experience of that employer. An employer's contributions for the benefits or other amounts payable to its employees under the Plan are based, in whole or in part, on the sum of amounts determined with respect to each of the employer's covered employees. For each such employee, that amount is a specified portion of the aggregate cash value of all of the policies covering employees (whether employed by that employer or another) in the Group to which that employee is assigned. That specified portion is a proxy for the cash value of the policy on the life of that particular employee. The sum of these individual amounts, in turn, is a proxy for the employer's overall experience. (For illustrations of this concept, see Examples 4, 6, and 13 in section 1.419A(f)(6)-1(f) of the regulations.) An employer's overall experience is the balance that would have accumulated in the trust if that employer were the only employer providing welfare benefits under the plan: the sum of the employer's contributions, less the benefits or other amounts paid or distributed with respect to the employer, adjusted for gains and losses, investment return, and expenses. In this case, if an employer had been the Plan's only employer, so that each year's contributions were used to pay premiums for cash value life insurance policies on the lives of its employees, the balance of assets accumulated in the trust would essentially equal the aggregate cash value of the life insurance policies. Thus, a participating employer's cost of coverage under the Plan is based on a proxy for that employer's overall experience. Accordingly, the Plan maintains experience-rating arrangements with respect to an individual employer. Furthermore, the special rule in section 1.419A(f)(6)-1(b)(4)(iii) for experience rating by group of employers or group of employees (rating groups) does not change that result[12].

For purposes of determining whether a plan maintains an experience-rating arrangement with respect to an individual employer, the definitions of benefit experience and overall experience both refer to an employer "or a group of employers." Under the special rule for rating groups (provided that no employer in the group normally contributes more than 10% of all contributions with respect to the group) a plan will not be treated as maintaining an experience-rating arrangement with respect to an individual employer *merely* because the cost of coverage under the plan is based, in whole or in part, on the benefits experience or the overall

---

[12] Although we have not determined that the Groups are rating groups within the meaning of section 1.419A(f)(6)-1(B)(4)(iii) of the regulations, we are assuming that they are for purposes of this ruling. Additionally, you have represented that no employer normally contributes more than 10 percent of all contributions with respect to each Group.

experience (or a proxy for either type of experience) of a particular group of employers referred to in the regulations as a rating group. *One* of the reasons the arrangements maintained by the Plan come within the meaning of "maintaining experience-rating arrangements with respect to individual employers" (as defined in section 1.419A(f)(6)-1(b)(1)) is that the cost of coverage is based, in whole or in part, on the experience of a group of employers (group). However, that is not the only reason. As described more fully below, the experience-rating arrangements maintained under the plan in this case are not *merely* with respect to one or more groups. The Plan also maintains experience-rating arrangements with respect to each individual employer.

The assignment process ensures that each member of a Group has very similar experience, and that overall costs to a particular employer will reflect the expected experience of that particular employer's workforce. This effect is achieved by assigning participants who enter the Plan within the same 1-year time period to groups based upon the same or similar risk or rating factors that are commonly taken into account in manual rates used by insurers for the benefits being provided,. Thus, an insurance policy on the life of one member of a Group will, at all times, require essentially similar premiums per $1 million of Death Benefit coverage, and have essentially similar values per $1 million of coverage as insurance policies on the lives of other members of the same Group. Accordingly, regardless of the actual experience of any particular employee, the employer of any other member of a Group can expect that its cost of coverage will not be affected to a significant degree by that experience.

For example, if a member of a Group dies, the Plan will receive funds from the insurer in sufficient amounts to pay the member's beneficiary (because the Plan purchased a policy with a face amount equal to the member's Death Benefit), and the required premiums of the policies on the lives of the other members of the Group will generally be affected only to the extent that the premium for the deceased participant differed from the average premium within the Group. Thus, if the average premium per $1 million of coverage was $20,000 (i.e. the contribution amount per $1 million required of each employer of a member of the Group) for a Group consisting of twenty members, and the premium on the policy on the life of the deceased participant was $19,750 per $1 million of coverage, the average premium per $1 million of coverage of the Group might merely increase to $20,013 per $1 million of coverage in the following year.

Similarly, if a member of a Group incurs a relatively small Other Benefit, the Other Benefits of other members of the Group would not be affected to a significant degree. For example, if the Other Benefit per $1 million of Death Benefit coverage for a Group consisting of twenty members, is $100,000, and a member incurs an Other Benefit of $5,000, the Other Benefit for the Group might otherwise (i.e. absent the affect of increases due to additional employer contributions) merely decrease to $99,750 per $1 million of coverage in the following year of coverage.

If a member of a Group consistently incurs large Other Benefits, the Other Benefits of the other members of the Group could possibly be affected to a significant degree in the following years if the employers of such other members were to continue their participation in the Plan. For example, if the Other Benefit per $1 million of Death Benefit coverage for a Group consisting of twenty members, is $100,000, and a member ("Y") incurs the maximum Other Benefit of $100,000, the Other Benefits for the Group might otherwise (i.e. absent the effect of increases due to additional employer contributions) decrease to $95,000 per $1 million of coverage in the following year of coverage. If, in that following year, Y again incurs the maximum Other Benefit (now $95,000), the Other Benefits for the Group might further decrease to $90,250 in the second following year. However, under the terms of the Plan, the employers of the other members of the Group can, at any time, terminate their participation, and so avoid an adjustment in the second following year.

Thus, in the example in the preceding paragraph, after Y incurred the maximum Other Benefit in the first year, each of the employers could have terminated their participation in the Plan and have the ($100,000 per $1 million of coverage) Other Benefits on their own employees who are members of the Group transferred to another welfare benefit plan to avoid the risk of having their employees' Other Benefits reduced by continuing large Other Benefit claims by Y (as might be the case if, for example, Y developed a chronic non life-threatening disease or sustained a severe injury).

Under the Plan, the Other Benefits of an employer's employees are directly related to the cash value of the policies purchased on the lives of the employees. Section 1.419A(f)(6)-1(b)(4)(iii) does not except plans that have rating groups from being treated as maintaining an experience-rating arrangement with respect to an individual employer. Rather, it provides that the fact that the cost of coverage under a plan with respect to an employer is based, in whole or in part, on the benefits experience or the overall experience (or a proxy for either type of experience) of a rating group, does not, in and of itself, mean that the plan is maintaining an experience-rating arrangement with respect to that employer.

As explained above, under the Plan, the cost of coverage to an employer is based on a proxy for the overall experience of that particular employer, not merely the benefits experience or overall experience of a group. Thus, the Plan maintains experience-rating arrangements with respect to individual participating employers as described in section 1.419A(f)(6)-1(b)(1) of the regulations and so fails to satisfy the requirements of section 1.419A(f)(6)-1(a)(iii) of the regulations. Accordingly, the Plan is not a 10 or more employer plan described in section 419A(f)(6) of the Code.

Comments Regarding Additional Material Submitted Pursuant to Rev. Proc. 2006-4

Although the actuary for the Plan concluded, with regard to one group, that there was not a direct relationship between contributions and benefits for any specific participant, the structure of the group tested in the Projections Report bears little relationship to the ultimate intended structure of the Groups as described in the

Taxpayer's original submission. In particular, it is stated in the original submission that "A Group is generally open to plan participants over a one-year time period." (See footnote 4 in the Facts section). The Group tested in the Projections Report included participants with policy issue dates that range from 1999 to 2004. Furthermore, it is stated in the original submission that the assignment of a participant to a Group "is made according to their risk characteristics such as issue age and class". (See footnote 5 in the Facts section). The group tested in the Projections Report includes participants whose years of birth range from 1941 to 1969. Accordingly, the fact that the actuary for the Plan believes that there is not a direct relationship between contributions and benefits for any specific participant for one purported group as it existed as of *****, is not determinative with respect to the issues of whether the Plan maintains experience-rating arrangements with respect to individual employers within the meaning of section 419A(f)(6) of the Code.

The Rules, in effect, provide that the committee will administer the Plan in accordance with the provisions of section 419A(f)(6) *as interpreted by the Plan counsel and Plan actuary*. However, a mere statement that the Plan will be administered in accordance with the law does not accord the Plan the status of meeting the requirements of section 419(A)(f)(6) of the Code. Accordingly, the provisions of the Rules are similarly not determinative with respect to the issues of whether the Plan maintains experience- rating arrangements with respect to individual employers within the meaning of section 419A(f)(6) of the Code.

Analysis of Second Ruling Request

In determining whether a transaction (arrangement) is "substantially similar" to a listed transaction, the following definition is set forth in section 1.6011-4(c)(4) of the regulations: "The term substantially similar includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. . . . Further, the term substantially similar must be broadly construed in favor of disclosure. "

The intended tax consequences of this arrangement and the arrangements described in Notice 95-34 are the same or of similar type – the avoidance of the strict limits of sections 419 and 419A on the amount of tax-deductible contributions to a welfare benefit fund. Moreover, the arrangement is both factually similar to and based on the same or similar tax strategy as the arrangements described in Notice 95-34.

The tax strategy employed by the arrangements described in Notice 95-34 is to deduct the employer's contributions in the year paid based on the exception from the sections 419 and 419A deduction limits that is provided by section 419A(f)(6) of the Code for 10 or more employer plans that do not maintain experience-rating arrangements with respect to individual employers, while structuring the arrangements, so that an employer's contributions or its employees' benefits are determined in a way that insulates the employer to a significant extent from the experience of other subscribing employers.

In the instant case, the Sponsor and the Plan claim that contributions to the Plan are deductible when paid because the Plan is a 10 or more employer plan described in section 419A(f)(6) of the Code while, in reality, the Plan is structured so that most participants will receive benefits in amounts related to the contributions made on their behalf by their employer. More specifically, as is described above in the Analysis of First Ruling Request section describing why the plan maintains experience-rating arrangements with respect to individual employers, the Group assignment process effectively ensures that each employee/member of a Group will have substantially the same overall experience and, accordingly, will not be significantly affected by the experience of any other employee. Thus, the Plan is structured to insulate an employer to a significant extent from the experience of the other participating employers. Therefore, under section 1.6011-4(c)(4), the Plan is based on the same or similar tax strategy as the arrangement described in Notice 95-34.

Some of the factual elements described in Notice 95-34 include the existence of a trust providing benefits such as life insurance, disability, and severance pay benefits that invests in cash value life insurance contracts on the lives of the covered employees; large employer contributions relative to the cost of the amount of term insurance that would be required to provide the death benefits under the arrangement; the use of the cash values within the insurance contracts owned by the trust to pay benefits other than death benefits; separate accounting of the assets attributable to the contributions made by each subscribing employer; determination of an employer's contributions or its employees' benefits in a way that insulates the employer to a significant extent from the experience of other subscribing employers; and the provision of benefits to most participants whether or not there has been an occurrence of an unanticipated future event.

The Plan is factually similar to the arrangements described in Notice 95-34 in that there is a trust providing benefits such as life insurance, disability, and severance pay benefits that invests in cash value life insurance contracts on the lives of the covered employees. The Plan requires large employer contributions relative to the cost of the amount of term insurance that would be required to provide the death benefits under the Plan. The Plan intends to use the cash within the insurance contracts owned by the trust to pay other than death benefits. Through the Group process, the Plan separately accounts for the assets attributable to the contributions made by each subscribing employer and generally bases benefits and other amounts that are provided to the subscribing employer's employees on such accounts, thereby insulating the experience of each employer from that of every other employer. Consequently, under section 1.6011-4(c)(4), the Plan is factually similar to the arrangements described in Notice 95-34.

Based on the facts submitted, representations made, and considering all the facts and circumstances of this transaction, we conclude that, under section 1.6011-4(c)(4), the arrangement of which the Plan is a part is the same as, or substantially similar to, the listed transaction described in Notice 95-34.

Conclusions

(1) The Plan is not a 10 or more employer plan described in section 419A(f)(6) of the Code because it maintains experience-rating arrangements with respect to individual employers, and

(2) The Plan is a reportable transaction within the meaning of section 1.6011-4(b)(1) of the regulations because it is the same as, or substantially similar to, arrangements described in Notice 95-34 and identified in Notice 2004-67 as listed transactions under section 1.6011-4(b)(2) of the regulations.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Internal Revenue Code provides that it may not be used or cited by others as precedent. Except as specifically ruled above, no opinion is expressed as to the federal tax consequences of the transaction described under any provision of the Code[13].

A copy of this letter is being furnished to your authorized representative pursuant to a power of attorney (Form 2848) on file.

If you have any questions on this ruling letter, please contact *****.

Sincerely,

James E. Holland, Jr., Manager
Employee Plans Technical

[13] Among others, we also do not herein address issues referred to in footnote 1.