



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

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

201238031

JUN 27 2012

UIL No. 401.00-00

**LEGEND**

Company A:

Plan X:

Dear

This is in response to a request for a private letter ruling, dated July 21, 2010, which was submitted by your authorized representative. Your authorized representative supplemented this request with correspondence dated February 21, 2012, which was restated and superseded by a letter dated June 25, 2012, and April 13, 2012. Your request involves the applicability of section 401(a)(35)(G)(v) of the Internal Revenue Code ("Code") to certain preferred stock. Your authorized representative has submitted the following facts and representations in support of this request.

Company A maintains Plan X, a defined contribution plan which your authorized representative represents is qualified under section 401(a) of the Code. Plan X uses the calendar year as its plan year. Plan X is not an employee stock ownership plan ("ESOP") within the meaning of section 4975(e)(7). Plan X includes a cash or deferred arrangement as described in section 401(k) and provides for a discretionary employer matching contribution, which may be made in the form of employer securities. Pursuant to this provision of Plan X, common stock has been contributed to Plan X. Your authorized representative has represented that Company A has one class of preferred stock which was traded on the Over-the-Counter Bulletin Board ("OTCBB") until July 13, 2007, and anticipates that this class of preferred stock ("Stock") will be traded again on the OTCBB by the end of the 2013 calendar year.

Your authorized representative has also represented that Company A has issued several other classes of preferred stock, and that none of these classes of preferred stock or the common stock issued by Company A (or any member of the Company A controlled group) are or have been since January 1, 2007, "readily tradable on an established securities market" within the meaning of section 1.401(a)(35)-1(f)(5)(ii) of the final regulations.

Your authorized representative has requested a ruling that the shares of Company A's Stock did not qualify as "publicly traded employer securities" under Code section 401(a)(35)(G)(v) when they were traded on the OTCBB until July 13, 2007, and will not qualify as such securities when they are traded by the end of the 2013 calendar year.

Code section 401(a) sets forth requirements that must be met for a trust forming part of a stock bonus, pension, or profit-sharing plan to be qualified under section 401(a).

The Pension Protection Act of 2006 added Code section 401(a)(35), generally effective for plan years beginning after December 31, 2006. Section 401(a)(35) provides, in general, that a trust which is part of an "applicable defined contribution plan" shall not be treated as a qualified trust unless the plan meets certain diversification requirements.

Code section 401(a)(35)(E) states in general that the term "applicable defined contribution plan" means any defined contribution plan which holds any publicly traded employer securities, with exceptions for certain ESOPs and one-participant plans.

Code section 401(a)(35)(F) states in general that a plan holding employer securities which are not publicly traded employer securities shall be treated as holding publicly traded employer securities if any employer corporation, or any member of a controlled group of corporations which includes such employer corporation, has issued a class of stock which is a publicly traded employer security.

Code section 401(a)(35)(G)(v) states that the term "publicly traded employer securities" means employer securities which are readily tradable on an established securities market.

The final regulations under Code section 401(a)(35) are effective and applicable for plan years beginning on or after January 2, 2011. The regulations provide that for the period after the statutory effective date and before the regulatory effective date, a plan must comply with Code section 401(a)(35). During this period, a plan is permitted to rely on Notice 2006-107, 2006-2 C.B. 1114; the proposed regulations; or the final regulations for purposes of satisfying the requirements of section 401(a)(35).

Section 1.401(a)(35)-1(f)(5)(i) of the final regulations states that a security is publicly traded if it is readily tradable on an established securities market.

Section 1.401(a)(35)-1(f)(5)(ii) of the final regulations provides that a security is readily tradable on an established securities market if: (A) the security is traded on a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934 or (B) the security is traded on a foreign national securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority and is deemed by the Securities and Exchange Commission (SEC) as having a "ready market" under SEC Rule 15c3-1.

If a security is not traded on a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934, then the security would not be publicly traded for purposes of Code section 401(a)(35), unless it is traded on a foreign securities exchange and has a "ready market" as deemed by the SEC under SEC Rule 15c3-1. The OTCBB is not, and has not been since 2007, one of the exchanges registered under section 6(a) of the Securities Exchange Act of 1934. Therefore, a security which is traded only on the OTCBB is not publicly traded for purposes of Code section 401(a)(35).

Your authorized representative has represented that, in addition to the Stock, Company A has issued a class of common stock and several classes of preferred stock, and that none of these other classes of stock issued by Company A (or any member of the Company A controlled group) are or have been since January 1, 2007, "readily tradable on an established securities market" within the meaning of section 1.401(a)(35)-1(f)(5)(ii) of the final regulations.

Accordingly, we conclude with respect to your requested ruling that the shares of Company A's Stock did not qualify as "publicly traded employer securities" under Code section 401(a)(35)(G)(v) when they were traded on the OTCBB until July 13, 2007, and will not qualify as such securities when they are traded on the OTCBB by the end of the 2013 calendar year. Therefore, the Stock will not cause Plan X, which holds common stock that is not publicly traded, to be treated as holding publicly traded employer securities under Code section 401(a)(35)(F).

This ruling is based on the assumption that Plan X will meet the requirements of section 401(a) of the Code at all times relevant to the transactions described herein.

This ruling is also based on the assumption that the Stock is not a security described in section 1.401(a)(35)-1(f)(5)(ii)(B) of the final regulations.

This ruling is also based on the assumption that, in 2013, the OTCBB will not be a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934.

This ruling is directed only to the taxpayer requesting 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 this office, a copy of this ruling letter is being sent to your authorized representatives. If you wish to inquire about this ruling, please contact  
Please address all  
correspondence to SE:T:EP:RA:G1.

Sincerely yours,



William B. Hulteng, Manager  
Employee Plans Technical

Enclosures:

Deleted copy of letter ruling  
Notice of Intention to Disclose

Cc: