



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

MAR 26 2012

201224046

Uniform Issue List: 402.00-00

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Legend:

Taxpayer A =

Company B =

Plan C =

Financial Institution D =

Amount 1 =

Amount 2 =

Amount 3 =

Dear :

This letter is in response to a request for a letter ruling dated May 27, 2011, as modified and supplemented by additional correspondence dated September 26, October 31, and November 3, 2011, from your authorized representative, in which you request a waiver of the 60-day rollover requirement contained in section 402(c)(3)(B) of the Internal Revenue Code ("Code"), regarding the distribution of Amount 2 from Plan C.

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

Taxpayer A, age at the time of distribution of Amount 2 from Plan C, asserts that his failure to accomplish a rollover within the 60-day period prescribed by section 402(c)(3) of the Code was due to his reliance on misleading statements

by the Plan Administrator causing Taxpayer A to believe that his unpaid loan balance was not in default.

Taxpayer A participated in Plan C, a cash or deferred arrangement under sections 401(a) and 401(k) of the Code, maintained by Company B. Funds in Plan C were held by Financial Institution D serving as Trustee and Plan Administrator of Plan C. Taxpayer A represents that on September 23, , he borrowed Amount 1 from Plan C. The loan was evidenced by a promissory note which provided that if the payee should terminate employment and does not pay his/her loan in full within 90 days, the outstanding balance will be declared in default, offset against the payee's Plan account balance, and considered a distribution subject to applicable taxes and penalties, unless the payee chooses to continue to have regularly scheduled loan payments automatically withdrawn from his/her bank account.

On March 23, , Taxpayer A terminated employment with Company B. Regarding actual default, the promissory note stated that the loan is in default if the full amount of any payment is not paid by the end of the calendar quarter immediately following the quarter in which payment was due. The loan default provision applies to any payment which must include the payment in full within 90 days of termination. Therefore, Taxpayer A understood default could not occur before September 30, 2009. Taxpayer A represents that the Plan Administrator had assured him payments could be reinstated by that date.

Taxpayer A intended to continue to repay the loan via automatic withdrawal from his bank account and had sufficient funds to pay off the loan in full. The Plan Administrator attempted three times to mail Taxpayer A information about repaying the loan but none of the mailings were ever received. In August of 2009, Taxpayer A contacted the Plan Administrator. Taxpayer A was informed that because he did not receive by mail the information about loan repayment terms, the 90-day period for setting up loan payments would be restarted. The restart date was not expressly stated. Taxpayer A presumed the restart date was the day of their conversation. By applying the loan terms regarding default to the restart date, Taxpayer A understood his new default date was March 31, 2010.

Taxpayer A attempted to make the first loan payment, but the transaction failed because of a missing account suffix number. He received no additional instructions regarding how to proceed. Taxpayer A made another call to the Plan Administrator and was told he still had six weeks to set up automatic monthly payments between his checking account and the Plan. Beginning on October 15, 2009, automatic monthly withdrawals of Amount 3 from Taxpayer A's checking account began to be sent to the Administrator of Plan C as loan repayments. Taxpayer A understood the loan terms had been modified and that future monthly payments would continue. However, in 2010, when Taxpayer A began to prepare his 2009 federal income tax return, he noticed he had received a Form 1099-R for tax year 2009 showing a taxable distribution of Amount 2.

Taxpayer A immediately contacted the Plan Administrator but was told his 401(k) Program had disallowed his loan repayment arrangement. In fact, Taxpayer A was first advised by letter dated March 2, 2011, that on November 11, 2009, his loan had been declared in default and distributed. A rollover of the loan payoff balance (Amount 2) could have been made to an eligible retirement plan within 60 days of the date when the plan loan offset occurred. However, due to the Plan Administrator's misleading statements, Taxpayer A was unaware until March of 2011, that a plan loan offset had already occurred in his case in November of 2009, and that the 60-day period to roll over a plan loan offset amount had expired.

Based on the above facts and representations, you request that the Internal Revenue Service ("Service") waive the 60-day rollover requirement contained in section 402(c)(3)(B) of the Code with respect to the distribution of Amount 2.

Section 402(c) of the Code provides that if any portion of the balance to the credit of an employee in a qualified trust is paid to the employee in an eligible rollover distribution, and the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, and in the case of a distribution of property other than money, the amount so transferred consists of the property distributed, then such distribution (to the extent transferred) shall not be includible in gross income for the taxable year in which paid. Section 402(c)(3)(A) of the Code states that such rollover must be accomplished within 60 days following the day on which the distributee received the property. An individual retirement account (IRA) constitutes one form of eligible retirement plan.

Section 402(c)(3)(B) of the Code provides, in relevant part, that the Secretary may waive the 60-day requirement under section 402(c) 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 1.402(c)-2, Question and Answer (Q&A)-9(a), of the Income Tax Regulations ("Regulations"), provides that a distribution of a plan loan offset amount, as defined in paragraph (b) of this Q&A, is an eligible rollover distribution if it satisfies Q&A-3 of this section. Thus, an amount equal to the plan loan offset amount can be rolled over by the employee (or spousal distributee) to an eligible retirement plan within the 60-day period under section 402(c)(3), unless the plan loan offset amount fails to be an eligible rollover distribution for another reason. See section 1.401(a)(31)-1, Q&A-16 for guidance concerning the offering of a direct rollover of a plan loan offset amount. See section 31.3405(c)-1, Q&A-11 of this chapter for guidance concerning special withholding rules with respect to plan loan offset amount.

Q&A-9(b) of Regulation section 1.402(c)-2 provides that, for purposes of section 402(c), a distribution of a plan loan offset amount is a distribution that occurs when, under the plan terms governing a plan loan, the participant's accrued benefit is reduced (offset) in order to repay the loan (including the enforcement of the plan's security interest in a participant's accrued benefit). A distribution of a plan loan offset amount can occur in a variety of circumstances, e.g., where the terms governing a plan loan require that, in the event of the employee's termination of employment or request for a distribution, the loan be repaid immediately or treated as in default. A distribution of a plan loan offset amount also occurs when, under the terms governing the plan loan, the loan is cancelled, accelerated, or treated as if it were in default (e.g., where the plan treats a loan as in default upon an employee's termination of employment or within a specified period thereafter). A distribution of a plan loan offset amount is an actual distribution, not a deemed distribution under section 72(p).

Section 401(a)(31) of the Code provides the rules for governing "direct transfers of eligible rollover distributions".

Section 1.401(a)(31) of the Regulations, Question and Answer-15, provides, in relevant part, that an eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover is a distribution and rollover, and not a transfer of assets and liabilities.

Rev. Proc. 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 sections 408(d)(3)(I) and 402(c)(3)(B) of the Code, 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.

The information presented and the documentation submitted by Taxpayer A is consistent with his assertion that his failure to accomplish a timely rollover of Amount 2 was due to being misled by statements made by the Plan Administrator that he would have an additional 90 days to reinstate his loan repayments and thereby avoid having the Plan Administrator declare the unpaid balance of his loan (Amount 2) to be in default, which triggered the exercise of the plan loan offset provision with respect to Taxpayer A's account balance in Plan C.

Therefore, pursuant to section 402(c)(3)(B) of the Code, the Service hereby waives the 60-day rollover requirement with respect to the distribution of Amount 2 from Plan C. Taxpayer A is granted a period of 60 days from the issuance of this letter ruling to contribute not more than Amount 2 into an eligible retirement plan or rollover IRA. Provided all other requirements of section

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402(c)(3) of the Code, except the 60-day requirement, are met with respect to such contribution, the contribution will be considered a rollover contribution within the meaning of section 402(c)(3) of the Code.

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.

A copy of this letter ruling has been sent to your authorized representative pursuant to a power of attorney on file in this office. If you wish to inquire about this ruling, please contact (I.D. #), , at () .

Sincerely yours,

Carlton A. Watkins

Manager
Employee Plans Technical Group 1

Enclosures:

Deleted Copy of this Letter
Notice of Intention to Disclose, Notice 437

cc: