



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

201434029

TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

MAY 29 2014

Uniform Issue List: 402.00-00

SE: T: EP: RA: T1

Legend

Taxpayer A =

Plan B =

IRA C =

Employer D =

Financial Institution E =

Amount 1 =

Amount 2 =

Amount 3 =

Amount 4 =

Amount 5 =

Amount 6 =

Amount 7 =

Amount 8 =

Amount 9 =

Date 1 =  
Date 2 =  
Date 3 =  
Date 4 =  
Date 5 =  
Date 6 =  
Date 7 =  
Date 8 =  
Year 1 =  
Year 2 =  
Year 3 =

Dear :

This is in response to your request dated September 30, 2013, as supplemented by correspondence dated April 28, 2014, in which you request, through your authorized representative, a waiver of the 60-day rollover requirement contained in section 402(c)(3)(A) of the Internal Revenue Code (the "Code").

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

Taxpayer A represents that he received a distribution from Plan B totaling Amount 1. Taxpayer A asserts that his failure to accomplish a direct rollover of a portion of Amount 1 equal to Amount 9 from Plan B to IRA C, an individual retirement arrangement ("IRA") described under section 408(a) of the Code, within the 60-day period prescribed by section 402(c)(3), was due to the failure of Financial Institution E to correctly process Taxpayer A's rollover request. Taxpayer A further represents that Amount 9 has not been used for any other purpose.

Taxpayer A participated in Plan B, an employee stock ownership plan ("ESOP"), maintained by Employer D for its employees. Employer D is an S corporation. Taxpayer A represents that Plan B is qualified under sections 401(a) and 4975(e)(7) of the Code.

On Date 1, Taxpayer A's ESOP account sold shares of stock to Employer D in exchange for cash and a promissory note ("Note 1") with an initial balance equal to Amount 4. Note 1 was payable to Plan B for the benefit of Taxpayer A, and principal and interest were payable in four equal annual installments. The final payment under Note 1 was payable on Date 6 in Amount 5. Note 1 was retained in Taxpayer A's Plan B account and Taxpayer A received a copy of Note 1.

On Date 2, Taxpayer A separated from service with Employer D. On Date 3, Taxpayer A completed a "Participant Payment Election Form" and a "Direct Rollover Form." On these forms, Taxpayer A requested that his entire vested account balance under Plan B be directly rolled over to IRA C. The form provided three options for payment to the receiving IRA: a check mailed to the receiving institution, a check payable to the IRA and mailed to the taxpayer, or a wire transfer from Plan B to the receiving institution.

On Date 3, Taxpayer A completed the Direct Rollover Form and elected the last option for the method of distribution, substituting "wire" for "journal" transfer. Accompanying the Direct Rollover Form was a Notice to Participant of Distribution Election. It provided a 'put option' with respect to any part of the distribution made in stock. It further stated that the distribution may be made in cash or a combination of cash and note, rather than in employer stock. On Date 3, Taxpayer A's Plan B account balance consisted of shares of stock, cash and the remaining balance due on Note 1.

Taxpayer A was informed that the Employer D stock in Taxpayer A's ESOP account would be transferred and simultaneously purchased by Employer D. Specifically, Employer D would purchase the stock through a cash payment equal to 20 percent of its value, with the balance payable by Employer D to IRA C pursuant to the terms of a Promissory Note executed by Taxpayer A and Employer D ("Note 2") on Date 4. Note 2 identified IRA C as the payee and provided that Employer D would pay IRA C principal and interest equal to Amount 6 in four equal annual installments. Taxpayer A was given a copy of Note 2.

Because Financial Institution E maintained both Taxpayer A's IRA C and the accounts under Plan B, it processed both sides of the direct rollover, which it did on Date 5 in Year 1. On Date 5, the cash in Taxpayer A's account under Plan B, equal to Amount 2, was directly rolled over to IRA C.

On the day before Date 5, Taxpayer A had contacted Financial Institution E to ask whether it would assume custody of Note 2. A week later, Financial Institution E informed Taxpayer A that it would not take custody of Note 2. Taxpayer A contacted an official of Employer D, who stated that Employer D would ask Financial Institution E to take custody of both Note 1 and Note 2. Ultimately, Note 1 and Note 2 were not transferred to IRA C; rather, Employer D retained possession of the notes. Taxpayer A did not realize that Financial Institution E's failure to take custody of Note 1 and Note 2 meant that the amounts due under Notes 1 and 2 were not rolled over because Taxpayer A had requested a direct

rollover of his entire Plan B account balance via a "journal" transfer (e.g., account receivable), no withholding tax was taken from the amounts due under Note 1 and Note 2, and Financial Institution E was involved in both sides of the transaction.

On Date 6 of Year 2, after the 60-day rollover period, the final installment payment under Note 1 in an amount equal to Amount 5 was paid by Employer D by wire directly to IRA C. On Date 7 of Year 2, a date after Date 6, an installment payment under Note 2 in an amount equal to Amount 7 was wired directly to IRA C.

In April of Year 2, Taxpayer A received a Form 1099-R for the distribution from Plan B in Year 1. The Year 1 Form 1099-R reflected a total distribution equal to Amount 1, an amount equal to Taxpayer A's entire vested account balance under Plan B (i.e., the cash and the value of Notes 1 and 2). The Form 1099-R indicated Distribution Code "G" (Direct Rollover). Taxpayer A's professional tax preparer prepared his federal Income Tax Return for Year 1 ("Year 1 Return"), in which the distribution of his entire account in Plan B was reported as a direct rollover to IRA C. After Taxpayer A filed his Year 1 Return, Taxpayer A also received a Form 5498 from Financial Institution E reflecting a rollover contribution to IRA C equal to Amount 2, an amount less than Amount 1. Taxpayer A did not attempt to reconcile the amounts on the Forms 1099-R and 5498 because he believed his entire account in Plan B had been rolled over and his Year 1 Return had already been filed.

In May of Year 3, Taxpayer A received a Form 5498 from Financial Institution E which reported a contribution to IRA C equal to Amount 3, the sum of Amount 5 and Amount 7, the installment payments made on Date 6 on Note 1 and Date 7 on Note 2, respectively. Taxpayer A became concerned when he noticed that the installment payments were reported as regular IRA contributions rather than as rollover contributions and immediately contacted Financial Institution E. Financial Institution E sent a corrected Form 5498 that identified the two payments as rollover contributions. Taxpayer A's tax preparer, however, informed Taxpayer A that a Form 5498 should not be issued if the entire Plan B account had been directly rolled over. Discussions with Employer D resulted in Employer D pre-paying the balance due under Note 2 equal to Amount 8 in the form of check payable to Taxpayer A's IRA C on Date 8.

Amount 5, Amount 7, and Amount 8 total Amount 9, i.e., the portion of Amount 1 that was not directly rolled from Plan B to IRA C.

Based on the facts and representations, you request that the Service waive the 60-day rollover requirement with respect to:

1. Amount 5, the final installment payment due under Note 1 that was contributed by Employer D to IRA C on Date 6;

2. Amount 7, the installment payment due under Note 2 that was contributed by Employer D to IRA C on Date 7; and
3. Amount 8, the remaining balance due under Note 2 that was contributed by Employer D to IRA C on Date 8.

With respect to your ruling requests, section 401(a) of the Code provides the qualification rules applicable to retirement plans set up by employers exclusively to benefit their employees and their beneficiaries.

Section 4975(e)(7) of the Code provides that an "employee stock ownership plan" (ESOP) is a defined contribution plan -- (A) which is a stock bonus plan which is qualified, or a stock bonus plan and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and (B) which is otherwise defined in regulations prescribed by the Secretary.

Section 402(a)(1) 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) of the Code 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, in the manner provided under section 72 (relating to annuities).

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

Section 402(c)(1) of the Code provides, generally, that if any portion of an eligible rollover distribution from a qualified employees trust is paid to the employee in an eligible rollover distribution and the employee 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, such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

Section 402(c)(2) of the Code provides that the maximum amount of an eligible rollover distribution to which paragraph (1) applies shall not exceed the portion of such distribution which is includible in gross income (determined without regard to paragraph (1)).

Section 402(c)(3)(A) of the Code provides, generally, that section 402(c)(1) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.

Section 402(c)(3)(B) of the Code provides that the Secretary may waive the 60-day requirement under subparagraph (A) 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 occur after December 31, 2001, are eligible for the waiver under section 402(c)(3)(B).

Section 402(c)(4) of the Code defines "eligible rollover distribution" as any distribution to an employee of all or a portion of the balance to the credit of an 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 --

(i) 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

(ii) for a specified period of 10 years or more,

(B) any distribution to the extent the distribution is required under section 401(a)(9), and

(C) any distribution which is made upon hardship of the employee.

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

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

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

Section 402(c)(8) of the Code defines eligible retirement plan as (i) an individual retirement account described in section 408(a); (ii) an individual retirement annuity described in section 408(b) (other than 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) maintained by an eligible employer as described in section 457(e)(1)(A); and (vi) an annuity contract described in section 403(b).

Section 402(f) of the Code provides for a written explanation to recipients of distributions eligible for rollover treatment. Section 402(f)(1) provides, in pertinent part, that the plan administrator of any plan shall, within a reasonable period of time before making an eligible rollover distribution, provide a written explanation to the recipient of the provisions under which the recipient may have the distribution directly transferred to an eligible retirement plan and of the provisions under which the distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution.

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

Section 1.401(a)(31)-1 of the federal Income Tax Regulations ("Regulations"), Question & Answer -3, provides, generally, that a direct rollover that satisfies section 401(a)(31) of the Code is an eligible rollover distribution that is paid directly to an eligible retirement plan for the benefit of the distributee. A direct rollover may be accomplished by any reasonable means of direct payment to an eligible retirement plan. Reasonable means of direct payment include, for example, a wire transfer or the mailing of a check to the eligible retirement plan.

Section 1.401(a)(31)-1 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.

Revenue Procedure 2003-16, 2003-4 I.R.B. 359, provides that in determining whether to grant a waiver of the 60-day rollover requirement pursuant to section 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.

Regarding ruling requests (1), (2) and (3), Taxpayer A formally requested a direct rollover of his entire account balance under Plan B to IRA C. Employer D could have repurchased all of the stock in cash in connection with the simultaneous transfer and purchase of the stock in order to effectuate Taxpayer A's request to have his entire account balance in Plan B directly rolled over to an IRA. While both Taxpayer A and Employer D intended to directly roll over Taxpayer A's entire account balance, Financial Institution E failed to identify the balances due under Note 1 and Note 2 in IRA C as accounts receivable or accept custody of Notes 1 and 2. Taxpayer A never had possession of Note 1 or Note 2 or any amounts payable under the terms of the Notes, and the amounts due under the Notes were paid directly to IRA C. Although Note 1 was payable to Taxpayer A's Plan B account and not to IRA C, Taxpayer A had requested a direct rollover of his account in Plan B and the payment was made by Employer D directly to IRA 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 5, Amount 7, and Amount 8, the sum total of which equals Amount 9, from Plan B. Provided all other requirements of section 402(c)(3), except the 60-day requirement, were met with respect to the contributions of Amount 5, Amount 7 and Amount 8 to IRA C, such contributions will be considered rollover contributions within the meaning of section 402(c)(3).

This letter ruling is based on the assumption that Plan B is a plan qualified within the meaning of section 401(a) of the Code, and an ESOP as defined in 4975(e)(7).

This ruling does not authorize the rollover of amounts that are required to be distributed by section 401(a)(9) 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.

Pursuant to a power of attorney on file with this office, a copy of this letter ruling is being sent to your authorized representative.

If you wish to inquire about this ruling, please contact \_\_\_\_\_ at \_\_\_\_\_  
Please address all correspondence to SE:T:EP:RA:T1.

Sincerely yours,



Carlton A. Watkins, Manager  
Employee Plans Technical Group 1

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

cc: