

Internal Revenue Service

Department of the Treasury

Uniform Issue List: 401.00-00

Washington, DC 20224

199903050

Person to Contact:

Telephone Number:

Refer Reply to:

OP:E:EP:T:3

Date:

OCT 28 1998

Legend:

- . Individual A =
- Trust M =
- State P =
- Plan X =

Dear

This is in response to your request for a ruling dated July 22, 1994, and supplemented by letters dated December 1, 1994, February 8, 1995, March 22, 1996, June 5, 1996, and March 31, 1998, submitted by your authorized representative concerning distributions to you, pursuant to section 401(a)(9) of the Internal Revenue Code. Your representative has submitted the following facts and representations.

Individual A was a participant in Plan X, a profit-sharing plan which has been represented to be qualified under section 401(a) of the Internal Revenue Code. Distributions under Plan X had not commenced to Individual A prior to her death. Trust M is the primary beneficiary designated by Individual A.

- . Trust M provides that upon the death of a Trustor, the Trustee shall divide the trust estate into three trusts designated as Trust A, Trust B, and Trust C. Your authorized representative has stated that the Trustee is required to allocate your separate property and your share of community property (including pension benefits earned during marriage) to Trust A. Your authorized representative has also stated that Trust C holds that part of decedent's estate which is

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exempt from estate tax under the unified credit. The trust document requires interests in qualified plans to be allocated to Trust B, unless other assets are insufficient to fully fund Trust C.

In this case, there were sufficient assets allocable to Trust C from the remaining assets that no portion of the interest in Plan X was allocated to Trust C. As a result, all of Plan X assets were required to be allocated to Trust A and Trust B.

Trust M provides that during the lifetime of the surviving Trustor, the Trustee shall pay the entire net income of Trust A to the surviving Trustor, not less frequently than annually, and any part or all of the principal of Trust A as the surviving Trustor may direct in writing from time to time. The surviving Trustor has a general testamentary power of appointment and, if this power is not exercised, the remainder passes to Trust C.

Trust M also provides that the Trustee shall pay to the surviving Trustor the entire net income of Trust B, not less frequently than annually, and such portions of the principal of Trust B, from time to time, as may be needed by the surviving Trustor in order to provide for the surviving Trustor's health, education, support and maintenance, if Trust A is exhausted and the Trustor has no other sources of income or principal available. Upon the death of the surviving Trustor, the Trustee shall distribute the remaining portion of the trust estate of Trust B to and among the issue of the Trustors in such proportions as the surviving Trustor may designate and appoint in and by his or her last will. Any residue shall be added to Trust C.

Trust C provides, in part, that after the death of the surviving Trustor, remaining trust income and principal will go to the children or their issue, under the terms set forth in Trust M.

Section 8.5(D) of Plan X requires that all distributions conform to the requirements of section 401(a)(9) of the Code and the regulations issued thereunder. Section 8.5(D) of Plan X also states that in any instance in which the default provisions of the regulations may be overridden by an election of the Participant (or beneficiary) the Participant (or beneficiary) shall have the right to elect among all permissible optional methods of calculating or distributing benefits.

Based on the above representations, your authorized representative has requested the following rulings:

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(1) That you are the designated beneficiary, as defined in section 401(a)(9) of the Code, of Individual A's account under Plan X.

(2) That your life expectancy at the required beginning date is to be used for determining required distributions under section 401(a)(9) of the Code.

(3) That your life expectancy may be recalculated annually at your election, with such election to be made prior to the required beginning date.

Pursuant to discussions with your authorized representative, your other ruling requests will not be addressed pursuant to section 8.01 of Revenue Procedure 98-4, 1998-1 I.R.B. 113, which states that the Service will not issue letter rulings in certain areas because of the factual nature of the issues involved.

Section 401(a)(9)(B)(ii) of the Code provides, in part, that where an employee dies before distribution of the employee's interest has begun in accordance with 401(a)(9)(A)(ii), the entire interest of the employee will be distributed within five years after the date of the death of such employee.

Section 1.401(a)(9)-1 Q&A C-2 of the Proposed Income Tax Regulations states, in part, that in order to satisfy the five year rule of section 401(a)(9)(B)(ii), the employee's interest must be distributed by December 31 of the calendar year which contains the fifth anniversary of the date of the employee's death.

Section 401(a)(9)(B)(iii) of the Code provides an exception to the five-year rule if certain amounts are payable over the life of the beneficiary. The exception applies if (I) any portion of the employee's interest is payable to (or for the benefit of a designated beneficiary), (II) such portion will be distributed (in accordance with the regulations) over the life of such designated beneficiary (or over a period not extending beyond the life expectancy of such beneficiary), and (III) such distributions begin not later than one year after the date of the employee's death or such later date as the Secretary may prescribe by regulations.

Section 401(a)(9)(B)(iv) of the Code provides that, if the designated beneficiary is the surviving spouse of the employee, the date on which the distributions are required to begin under section 401(a)(9)(B)(iii)(III) shall not be any earlier than the date on which the employee would have attained age 70½, and if the surviving spouse dies before the

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distributions to such spouse begin, section 401(a)(9)(B) shall be applied as if the surviving spouse were the employee.

Section 401(a)(9)(D) of the Code states that, for purposes of section 401(a)(9), the life expectancy of an employee and the employee's spouse (other than in the case of a life annuity) may be redetermined but not more frequently than annually.

Section 401(a)(9)(E) of the Code defines the term "designated beneficiary" as any individual designated as a beneficiary by the employee.

Section 1.401(a)(9)-1 Q&A D-2A(a) of the proposed regulations states, in part, that only individuals may be designated beneficiaries for purposes of section 401(a)(9) of the Code.

Pursuant to section 1.401(a)(9)-1 Q&A D-5 of the proposed regulations, in the case in which a trust is named as beneficiary of an employee, all beneficiaries of the trust with respect to the trust's interest in the employee's benefit are treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under section 401(a)(9)(A)(ii) of the Code if, as of the later of the date on which the trust is named as beneficiary, or the employee's required beginning date the applicable requirements with respect to the trust under section 1.401(a)(9)-1, Q&A D-5 of the proposed regulations are met.

Section 1.401(a)(9)-1 Q&A D-6 of the proposed regulations further states, in part, that in the case in which a trust is named as beneficiary of an employee, all beneficiaries of the trust with respect to the trust's interest in the employee's benefit are treated as designated beneficiaries of the employee under the plan for purposes of determining the distribution period under section 401(a)(9)(B)(iii) and (iv) of the Code if the requirements of section 1.401(a)(9)-1 Q&A D-5 and other applicable requirements are satisfied as of the specified date. If the requirements are satisfied, distributions to the trust for purposes of section 401(a)(9) will be treated as being paid to the appropriate beneficiary of the trust with respect to the trust's interest in the employee's benefit. However, if a trust is named as a beneficiary of an employee and if, the requirements referenced in D-6 are not satisfied, the employee will be treated as not having a designated beneficiary under the plan.

Section 1.401(a)(9)-1 Q&A E-5(a) of the proposed regulations states, in part, that except as otherwise provided in paragraph (f), if more than one individual is designated as a beneficiary with respect to an employee as of the applicable date for determining the designated beneficiary, the designated beneficiary with the shortest life expectancy will be the designated beneficiary for purposes of determining the distribution period.

Section 1.401(a)(9)-1 Q&A E-5(d) of the proposed regulations states, in part, that for purposes of determining the distribution period in accordance with E-5(a), if any designated beneficiary involved is the employee's spouse and the life expectancy of the spouse is being recalculated, the life expectancy of the spouse as recalculated will be compared in each calendar year to the remaining life expectancy of the other applicable designated beneficiary or beneficiaries, not recalculated, and the shortest life expectancy will be used for determining the minimum distribution required for that calendar year.

Section 1.401(a)(9)-1 Q&A E-5(b) of the proposed regulations states that, except as provided in paragraph (e)(1), if a beneficiary's entitlement to an employee's benefit is contingent on an event other than the employee's death (e.g. death of another beneficiary), such contingent beneficiary is considered to be a designated beneficiary for purposes of determining which designated beneficiary has the shortest life expectancy under paragraph (a).

Section 1.401(a)(9)-1 Q&A E-5(e)(1) of the proposed regulations states, if a beneficiary's entitlement to an employee's benefit is contingent on the death of a prior beneficiary, such contingent beneficiary will not be considered a beneficiary for purposes of determining who is the designated beneficiary with the shortest life expectancy under paragraph (a) or whether a beneficiary who is not an individual is a beneficiary. This rule does not apply if the death occurs prior to the applicable date for determining the designated beneficiary. Q&A E-5(e)(3) provides an example illustrating that a death contingency is a provision in which the availability of the benefits is dependent on another beneficiary's death.

Section 1.401(a)(9)-1 Q&A E-7(c) of the proposed regulations states that the plan may adopt a provision that permits the employee (or spouse, in the case of distributions described section 401(a)(9)(B)(iii) and (iv)) of the Code to

elect the applicability or inapplicability of section 401(a)(9)(D). If such election is permitted, the employee (or spouse) must elect whether or not life expectancy will be recalculated no later than the time of the first required distribution under section 401(a)(9). As of the date of the first required distribution under section 401(a)(9), a method (either recalculation of the life expectancy, or no recalculation of the life expectancy) which is in effect with respect to an employee (or spouse) and must apply to all subsequent years. The plan may specify, pursuant to section 1.401(a)(9)-1 Q&A E-7(b), whether or not life expectancy will be recalculated in the event that the employee (or spouse) fails to make the election. Absent such a plan provision, the life expectancy of the employee (and the spouse) must be recalculated annually pursuant to section 1.401(a)(9)-1 Q&A E-7(a) in the event that the employee fails to make the election.

Section 1.401(a)(9)-1 Q&A E-7(a) of the proposed regulations states that if the plan does not adopt an optional provision specifying whether life expectancies will be determined with or without regard to the permissive recalculation rule of section 401(a)(9)(D) of the Code and the employee or spouse has not made an election pursuant to paragraph (c), the life expectancy of the employee or spouse (or the joint life and last survivor expectancy of the employee and spouse) must be recalculated annually as provided in section 401(a)(9)(D) for purposes of determining all distributions required under section 401(a)(9).

Section 1.401(a)(9)-1 Q&A E-2(a) of the proposed regulations provides, in part, that in the case of any distribution under section 401(a)(9)(B)(iii) and (iv) of the Code, the life expectancy of any designated beneficiary is calculated based on the beneficiary's attained age as of the beneficiary's birthday in the calendar year in which distributions are required to commence to such beneficiary in order to satisfy section 401(a)(9)(B)(iii) and (iv). If the life expectancy of the surviving spouse will be recalculated in accordance with section 1.401(a)(9)-1 Q&A E-6 through E-8, the life expectancy of the surviving spouse will be recalculated using the spouse's attained age as of the surviving spouse's birthday in each succeeding calendar year in which recalculation is provided, for purposes of calculating the minimum distribution for that distribution calendar year.

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Section 1.401(a)(9)-1 Q&A H-2(a) of the proposed regulations states, in part, that, generally, if an employee's benefit under a plan is divided into separate accounts (or segregated in the case of a defined benefit plan) the separate accounts will be aggregated for purposes of satisfying the rules in section 401(a)(9) of the Code.

Section 1.401(a)(9)-1 Q&A H-2(b) of the proposed regulations states that if, as of an employee's required beginning date or, in the case of distributions under section 401(a)(9)(B)(ii) or (iii) and (iv) of the Code, as of the employee's (or spouse's where applicable) date of death, the beneficiaries with respect to a separate account (or segregated share in the case of a defined benefit plan) differ from the beneficiaries with respect to the other separate accounts (or segregated shares) of the employee, such separate account (or segregated shares) need not be aggregated with other separate accounts (or segregated shares) in order to determine whether the distributions from such separate account (or segregated account) satisfy section 401(a)(9). Instead, the rules in section 401(a)(9) may separately apply to such separate account (or segregated share).

With respect to the first ruling request, only Trust M was named as beneficiary of all Plan X assets in the beneficiary form, executed by you and Individual A, that was in effect on Individual A's death. Trusts A, B, and C were created under the terms of Trust M. In order to satisfy the separate account rule under the regulations, plan benefits must be divided into separate accounts in the governing beneficiary instruments. Because the separation of plan benefits among Trusts A, B, and C occurred under the terms of Trust M rather than under the beneficiary designation form, the determination of Individual A's designated beneficiary can not be done on a separate account basis. Therefore, there were no separate accounts as of Individual A's death. Thus, all beneficiaries of the trusts created under Trust M must be considered in determining the applicable distribution period, because the general rule under Q&A H-2(a) applies.

You are the beneficiary of Trust A because the terms of Trust A provide that you may invade principal in your absolute discretion. Thus, the beneficiaries' entitlement to benefits after your death is essentially contingent upon your death within the meaning of section 1.401(a)(9)-1, E-5(e)(1) of the proposed regulations and they are not considered.

Under Trusts B and C, however, your ability to receive the principal is subject to a standard. With respect to income from Trust C, your issue may receive income during your lifetime in the discretion of the Trustee, and they are counted as beneficiaries. Although you are entitled to receive all of the income from Trust B, you are not required to receive any required minimum distribution amount under section 401(a)(9) of the Code that has been distributed from Plan X to Trust B, if greater than annual income. Thus, amounts of income and principal that are distributed from Plan X to Trust B could remain in the trusts while you are alive. Although access to these amounts may be delayed, after your death, the issue may receive benefits. Your death affects the timing rather than the availability of the benefits to the issue. Thus, pursuant to section 1.401(a)(9)-1 Q&A E-5(b) of the proposed regulations, the beneficiaries' entitlement to benefits is not considered to be contingent upon your death under section 1.401(a)(9)-1, E-5(e)(1), and they are counted as beneficiaries. Under Trusts A, B, and C aggregated, you and your issue are beneficiaries. Accordingly we conclude, with respect to your first ruling request, that you and your issue are designated beneficiaries of Plan X, under section 401(a)(9)(E) of the Code.

With respect to your second and third ruling requests, the designated beneficiary with the shortest life expectancy will be used for determining the required distribution. Pursuant to section 1.401(a)(9)-1 Q&A E-7 of the proposed regulations, your life expectancy will be recalculated under E-5(d) to determine who has the shortest life expectancy, unless you have made an appropriate election not to recalculate in accordance with the terms of Plan X, and section 1.401(a)(9)-1 of the proposed regulations.

This ruling is based on the assumption that Plan X at all times met the requirements of section 401(a) of the Code.

You have not requested, and we express no opinion in this ruling about the timing and amount of required distributions under the terms of the trusts, or the status of the trusts for purposes of other provisions of the Internal Revenue Code, including, but not limited to any federal estate tax law.

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A copy of this ruling has been sent to your authorized representative in accordance with a valid power of attorney on file in this office.

Sincerely yours,

Frances V Sloan

Frances V. Sloan
Chief, Employee Plans
Technical Branch 3

Enclosures:

Deleted Copy of Letter

Notice of Intention to Disclose

Copy of Letter to Authorized Representative

CC: