



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

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Uniform Issue List Nos. 401.06-00, 401.08-00, 417.00-00

Legend:

Company A =

Company B =

State X =

Dear:

This is in response to a letter dated August 12, 2005, submitted on your behalf by your authorized representatives, in which you request a letter ruling concerning the effect under sections 401(a)(9), 401(a)(11), and 417 of the Internal Revenue Code (the "Code"), arising in connection with a proposed transaction in which variable annuity contracts will be issued to, and distributed from, defined contribution plans described in section 401(a) of the Code.

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

Company A is a stock life insurance company organized and operated under the laws of State X. Company A is a wholly owned subsidiary of Company B. Company A represents that it is a life insurance company as defined by section 816(a) of the Code, and it joins with Company B in the filing of a consolidated Federal income tax return.

Company A proposes to issue two types of non-qualified variable annuity contracts, a group variable annuity contract (the "Group Annuity") and an individual variable annuity contract (the "Individual Annuity"). Company A intends to issue the Group Annuity to defined contribution plans that are intended to satisfy the requirements of section 401(a) of the Code. In each transaction, the plan will be named as the owner of the Group Annuity. The Group Annuity will be used to offer plan participants an annuity form of distribution (the "Annuity Distribution Option") among other optional forms of distributions. A participant who elects the Annuity Distribution Option will then allocate amounts among a fixed account option (the "Fixed Account") and variable investment options available under the Group Annuity. Company A will hold amounts allocated to the Fixed Account in its general account, and such amounts will earn

interest at a rate declared by Company A from time to time, subject to a guarantee of principal and a minimum guaranteed interest rate. Company A will hold amounts allocated to a variable investment option in an account that, pursuant to state law or regulation, is segregated from Company A's general asset accounts (the "Separate Account").

The Separate Account will be divided into Variable Sub-Accounts. The Variable Sub-Accounts available under each Group Annuity will correspond to the mutual funds otherwise available as investment options under the plan. Distributions from the Group Annuity will be paid to the plan as the owner of the Group Annuity. The plan in turn will make distributions to the participants who have elected the Annuity Distribution Option. Distributions will commence after the participant's allocation of the amounts to the Annuity Distribution Option, and will be calculated based upon the allocations that the participant made under the Group Annuity.

The Group Annuity generally provides a stream of income payments to be made over the lifetime of an individual or the joint lifetimes of an individual and a designated beneficiary (the "Periodic Income Payments") through two phases, the Phase I period and the Phase II period.

The Phase I period begins on the valuation date on which the first Periodic Income Payment (the "Initial Periodic Income Payment") is calculated, and ends on the date that the Phase II period begins. The duration of the Phase I period is selected by the participant at the time the Annuity Distribution Option is elected, and can be as short as 5 years or as long as the Company A-determined maximum period. During the Phase I period the participant may (1) direct Company A to start or stop Periodic Income Payments at any time, (2) pay additional premiums for the Group Annuity by allocating additional portions of his or her account balance under the plan to the Group Annuity, (3) request a partial lump-sum withdrawal from the Group Annuity, (4) surrender the Group Annuity for its surrender value, or (5) change the joint annuitant, the Assumed Interest Rate ("AIR"), or the annuity distribution option. Once the Phase I period ends, the participant no longer has the ability to direct Company A to start or stop the Periodic Income Payments, make additional contributions to the Group Annuity or access the surrender value via partial withdrawal or full surrender.

The participant may alter the length of the Phase I period effective as of the next periodic income commencement date anniversary (the date on which the first periodic income payment under the Group Annuity is calculated). Any such change must be made prior to the expiration of the Phase I period and may not cause the Phase I period to be extended beyond the Company A-determined maximum period. Following a change, the periodic income payments will be adjusted accordingly by decreasing payments if the Phase I period is lengthened and increasing payments if the Phase I period is shortened.

The Initial Periodic Income Payment is the product of the Contract's Account Value and an annuity factor. The Account Value during the Phase I period is the sum of

the values of the Variable Sub-Accounts and of the Fixed Account attributable to the Contract. In determining the Account Value on any Valuation Date, the Account Value on the preceding date is increased (or decreased) by the net investment gains (or losses) of the Variable Sub-Accounts and by the interest credited to the Fixed Account. It also is reduced by any Periodic Income Payments made after the preceding date, and adjusted as appropriate to reflect an exercise of the participant's rights during the Phase I period.

The annuity factor is based upon the age and sex of the participant (or ages and sexes of the participant and joint annuitant, if any) as well as the participant selection of (1) an AIR used to determine the amount of the Periodic Income Payments, (2) the frequency at which such payments will be made, and (3) the length of Phase I period. Each subsequent Periodic Income Payment generally is calculated in the same manner as the initial periodic payment. The initial AIR is selected by the participant at the time the Annuity Distribution Option is elected, and may range from 3 percent to 6 percent. The AIR may be changed by the participant prior to the start of the Phase II period.

The Group Annuity generally provides for a payment upon the death of the participant during the Phase I period equal to the Account Value of the Group Annuity. The beneficiary has the right to elect to receive the Account Value in the form of a single sum distribution or in the form of a variety of life annuities, provided that any such annuity must satisfy the requirements of section 401(a)(9) of the Code.

Following the conclusion of the Phase I period, Periodic Income Payments continue throughout the Phase II period. Periodic Income Payments during the Phase II period are life contingent annuity payments (in contrast to Periodic Income Payments during the Phase I period, which are generally treated as withdrawals against the Account Value) and the participant no longer has any of the rights outlined above during the Phase I period.

During the Phase II period, Periodic Income Payments that are based upon the Variable Sub-Accounts are calculated using an "annuity unit" methodology and those that are based upon the Fixed Account are calculated using an actuarially equivalent methodology. Both types of payments reflect the actual net investment returns and actual interest crediting rates in relation to the AIR. The amount of each Periodic Income Payment may be increased or decreased based on investment return, but payments cannot exhaust the value of the Group Annuity and will continue for the life of the participant or the joint lives of the participant and a designated beneficiary.

The portion of the Periodic Income Payments during the Phase II period that is based upon the Variable Account, and the portion that is based upon the Fixed Account are determined using the account value allocated to the Variable Sub-Accounts and Fixed Account respectively, as of the last Valuation Date of the Phase I period. With regard to payments based upon the Variable Account, the number of annuity units per payment per Variable Sub-Account is determined by dividing the portion of the Group Annuity's Account Value attributable to each Variable Sub-Account as of the last

Valuation Date of the Phase I period by a revised annuity factor, with that result being divided by the annuity unit value for the respective Variable Sub-Account as of the last Valuation Date of the Phase I period.

The Group Annuity provides for continued payment in the form elected by the participant upon the death of the participant during the Phase II period, provided such payments satisfy the minimum distribution requirements of section 401(a)(9) of the Code. Additionally, the Group Annuity includes death benefit options that may be elected by the participant, subject to the limitations of section 401(a)(9) of the Code and the incidental benefit requirement.

Company A expects that the Group Annuity may be used by some plans to pay a qualified joint and survivor annuity during the Phase II period. Because the Group Annuity is a variable annuity contract during the Phase II period, the Group Annuity provides that payments to the surviving spouse are based on a specified percentage of the "annuity units" used to calculate payments during the joint lives of the participant and the spouse rather than a specified percentage of the dollar amount that was payable during that period.

With respect to the Individual Annuities, Company A intends to issue the Individual Annuities in situations where a plan that has been the owner of a Group Annuity ceases to offer the Group Annuity as an investment and distribution option and the plan wants or needs to preserve the investment or benefit option for participants. In such cases, the participant will select the Annuity Distribution Option under the plan. Company A will then issue an Individual Annuity to the plan, and the plan will distribute the Individual Annuity to the participant who is then listed as the owner of the Individual Annuity. The Individual Annuity will operate in much the same manner as the Group Annuity providing a fixed investment option and a number of variable investment options that correspond to the investment options that were available under the plan to which the Group Annuity was issued.

Company A represents: (a) that each of the Group Annuity and the Individual Annuity constitutes an annuity contract under the law of each state or other jurisdiction in which it will be issued; (b) that the Group Annuity and the Individual Annuity will each be regulated by the states as a deferred annuity contract during the Phase I period and as an "annuitized" or payout annuity during the Phase II period; (c) that the Group Annuity and the Individual Annuity constitute variable contracts within the meaning of section 817(d) of the Code; (d) that each Group Annuity will be purchased under a plan that satisfies the requirements of section 401(a); (e) that each Individual Annuity will be purchased by a plan that satisfies the requirements of section 401(a) and will then be distributed to a participant in such plan; (f) that each Individual Annuity will satisfy the requirements of sections 404(a)(2), including the requirements of sections 401(a)(9), 401(a)(11), 411(d)(6) and 401(a)(31) of the Code, and (g) that no additional federal tax

liability would have been incurred if a plan that purchases an Individual Annuity to distribute to a participant instead paid amounts into a custodial account in an arrangement that satisfied the requirements of section 403(b)(7)(A).

Based on these facts and representations, the following rulings are requested:

1. That required minimum distributions from the Group Annuity and from the Individual Annuity will be determined under section 1.401(a)(9)-5 of the Treasury Regulations (the "Regulations") (i.e., under the individual account plan rules) during the Phase I period and under section 1.401(a)(9)-6 of the Regulations (i.e., the defined benefit plan rules) during the Phase II period;
2. That a participant's election to begin receiving Periodic Income Payments during the Phase II period is an election of a life annuity for purposes of section 401(a)(11). An election to receive Periodic Income Payments during the Phase I period is not an election of a life annuity for purposes of section 401(a)(11); and
3. That the fact that annuity payments during the Phase II period vary with investment performance does not preclude such annuity payments from being considered payments under a qualified joint and survivor annuity described in section 417 of the Code, provided that the payments would otherwise be considered made under a qualified joint and survivor annuity.

You also requested rulings under sections 818(a) and 817(h) of the Code and with regard to the application of Revenue Ruling 81-225, 1981-2 C.B. 12. These rulings are being issued in a separate letter.

With respect to your first ruling request, section 401(a)(9) of the Code, in general, sets forth the rules governing minimum required distributions from retirement plans qualified within the meaning of Code section 401(a).

Section 401(a)(9)(A) of the Code provides, in general, that a trust will not constitute a qualified trust unless the plan provides that the entire interest of each employee (i) will be distributed to such employee not later than the required beginning date, or (ii) will be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of such employee or over the lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary).

Section 1.401(a)(9)-5, Q&A-1(a) of the Regulations sets forth the general rule that if an employee's accrued benefit is in the form of an individual account under a defined contribution plan, the minimum amount required to be distributed for each distribution calendar year is equal to the quotient obtained by dividing the account by the applicable distribution period. However, the required minimum distribution amount will never exceed entire account balance on the date of distribution.

Section 1.401(a)(9)-5, Q&A-1(e) of the Regulations provides that a defined contribution plan may satisfy the minimum distribution requirement by the purchase of an annuity contract from an insurance company in accordance with the section 1.401(a)(9)-6, Q&A-4 with the employee's entire individual account.

Section 1.401(a)(9)-6, Q&A-4 of the Regulations provides that a plan will not fail to satisfy Code section 401(a)(9) merely because distributions are made from an annuity contract which is purchased with the employee's benefit by the plan from an insurance company, as long as the payments satisfy the requirements of section 1.401(a)(9)-6.

Section 1.401(a)(9)-6, Q&A-12(a) of the Regulations provides, in relevant part, that prior to the date that an annuity contract under an individual account plan is annuitized, the interest of an employee or beneficiary under the contract is treated as an individual account for purposes of section 401(a)(9). Thus the required minimum distribution for any year with respect to that interest is determined under section 1.401(a)(9)-5 rather than section 1.401(a)(9)-6.

Section 72(a) provides that gross income includes any amount received as an annuity under an annuity, endowment or life insurance contract.

Section 72(e) provides rules for any amount received under an annuity contract that is not received as an annuity.

Section 1.72-2(b)(2) of the Regulations provides that amounts generally are considered "amounts received as an annuity" if (i) they are received on or after the "annuity starting date"; (ii) they are payable in periodic installments at regular intervals over a period of more than one full year from the annuity starting date; and (iii) the total of the amounts payable are determinable at the annuity starting date either directly from the terms of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such term and in accordance with sound actuarial theory.

Section 1.72-2(b)(3) of the Regulations provides in pertinent part that if amounts are to be received for a definite or determinable time (whether for a period certain or for a life or lives) under a contract which provides that the amount of the periodic payments may vary in accordance with investment experience (as in certain profit-sharing plans), cost of living indices, or similar fluctuating criteria, each such payment received shall be considered as an amount received as an annuity only to the extent that it does not exceed the amount computed by dividing the investment in the contract, as adjusted for any refund feature, by the number of periodic payments anticipated during the time that the periodic payments are to be made.

Section 1.72-4(b) of the Regulations defines the term "annuity starting date" as the first day of the first period for which an amount is received as an annuity, which is generally the later of the date upon which the obligations under the contract become

fixed or that first day of the period (e.g. month, if payments are to be made monthly) which ends on the date of the first annuity payment.

Under the Regulations, the manner in which benefits paid under an annuity contract must satisfy section 401(a)(9) of the Code depends upon whether the annuity contract has been annuitized. Prior to the date that an annuity contract under an individual account plan is annuitized, the contract is treated as an individual account plan for purposes of section 401(a)(9) and must satisfy the rules of section 1.401(a)(9)-5 of the Regulations. After the annuity contract is annuitized, the contract must satisfy the rules of section 1.401(a)(9)-6 of the Regulations.

You have described the characteristics of the Group Annuity and the Individual Annuity during both the Phase I period and the Phase II Period. According to your description, the amount and timing of payments during the Phase I period remain within the control of the participant and therefore do not fit the definition of amounts received as an annuity set forth in section 1.72-2(b)(2). However, during the Phase II period, the timing and amounts of the distributions are fixed and satisfy the definition of amounts received as an annuity.

In addition, you have represented that the Group Annuity and the Individual Annuity will each be regulated by the states as a deferred annuity contract during the Phase I period and as an "annuitized" or payout annuity during the Phase II period. These descriptions and representations suggest that the distributions from either the Group Annuity or the Individual Annuity should be considered "annuitized" at the commencement of the Phase II period. Accordingly we conclude that for purposes of satisfying the required minimum distribution requirements of section 401(a)(9) of the Code, the required minimum distributions from the Group Annuity and from the Individual Annuity will be determined under section 1.401(a)(9)-5 of the Regulations during the Phase I period and under section 1.401(a)(9)-6 of the Regulations during the Phase II period.

With respect to your second ruling request, section 401(a)(11)(A) of the Code provides that, in the case of a plan listed in subparagraph (B), except as provided in section 417, a trust forming part of such plan shall not constitute a qualified trust under this section unless – (i) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant is provided in the form of a qualified joint and survivor annuity, and (ii) in the case of a vested participant who dies before the annuity starting date, and who has a surviving spouse, a qualified preretirement survivor annuity is provided to the surviving spouse of such participant.

Section 401(a)(11)(B) provides that paragraph (11) shall apply to –

- (i) any defined benefit plan,
- (ii) any defined contribution plan which is subject to the funding standards of section 412, and

- (iii) any participant under any other defined contribution plan unless: (I) such plan provides that the participant's nonforfeitable accrued benefit is payable in full on the death of the participant, to the participant's surviving spouse, (II) such participant does not elect a payment of benefits in the form of a life annuity, and (III) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in clause (i) or (ii) or to which this clause applied with respect to the participant.

Section 417(a)(1) of the Code provides that, a plan meets the requirements of section 401(a)(11) only if under the plan, each participant may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both). It also provides that a participant may revoke any such election at any time during the applicable election period. In addition, for plan years beginning after December 31, 2007, a participant who elects a waiver may elect a qualified optional survivor annuity at any time during the applicable election period. A plan also must meet the spousal consent requirements of paragraphs (2) and (4), and the written notice requirement of paragraph (3).

Section 417(a)(6) provides that the applicable election period for purposes of section 417(a) is the 180-day period ending on the annuity starting date with respect to a qualified joint and survivor annuity, and the period beginning on the first day of the plan year in which the participant attains age 35 and ending on the participant's date of death with respect to a qualified preretirement survivor annuity.

Section 417(f) of the Code provides that for purposes of sections 401(a)(11) and 417, the term "annuity starting date" means (i) the first day of the first period for which an amount is payable as an annuity, or (ii) in the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred which entitle the participant to such benefit.

You have represented that Company A intends to issue each Group Annuity and each Individual Annuity in connection with defined contribution plans that permit participants to direct the investment of their account balances among a menu of diversified investment options. Section 401(a)(11) of the Code generally does not apply to these plans except if the participant elects payment of benefits in the form of a life annuity. You have represented that when a participant elects the Annuity Distribution Option there is an initial period known as the Phase I period during which the participant has the right to (1) direct Company A to start or stop Periodic Income Payments at any time, (2) pay additional premiums for the Group Annuity by allocating additional portions of his or her account balance under the plan to the Group Annuity, (3) request a partial lump-sum withdrawal from the Group Annuity, (4) surrender the Group Annuity for its surrender value, or (5) change the joint annuitant, the AIR, or the annuity distribution option. Once the Phase I period ends, the participant no longer has the ability to direct Company A to start or stop the Periodic Income Payments, make additional

contributions to the Group Annuity or access the surrender value via partial withdrawal or full surrender. These rights are generally inconsistent with the election of a life annuity.

In addition, you have represented that following the conclusion of the Phase I period, Periodic Income Payments continue throughout the Phase II period. Periodic Income Payments during the Phase II period are life contingent annuity payments in contrast to Periodic Income Payments during the Phase I period, which are generally treated as withdrawals against the Account Value. These characteristics are consistent with the election of a life annuity.

As described above, a participant elects the Annuity Distribution Option prior to the start of the Phase I period and does not necessarily make a subsequent election prior to the beginning of the Phase II period. Under this scenario, the initial election of the Annuity Distribution Option is an election to receive a future benefit in the form of a life annuity, preceded by a distribution of a benefit not in the form of a life annuity. Accordingly, we conclude that for purposes of determining when section 401(a)(11) of the Code applies to a participant, the election of the Annuity Distribution Option, rather than the election to receive Periodic Income Payments during either the Phase I period or the Phase II period, constitutes the election of payments in the form of a life annuity. Thus, neither the participant's election to begin receiving Periodic Income Payments during the Phase II period nor the election to receive Periodic Income Payments during the Phase I period alone is the election of a life annuity for purposes of section 401(a)(11) of the Code.

With respect to your third ruling request, section 417 of the Code sets forth certain notice and spousal consent requirements which must be met in connection with the minimum survivor annuity and spousal benefit requirements.

Section 417(b) defines the term "qualified joint and survivor annuity" as an annuity (1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and (2) which is the actuarial equivalent of a single annuity for the life of the participant. Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

Section 1.401(a)-11(b)(2) of the Regulations provides that the term "qualified joint and survivor annuity" means an annuity for the life of the participant with a survivor annuity for the life of his spouse which is neither (i) less than one-half of, nor (ii) greater than, the amount of the annuity payable during the joint lives of the participant and his spouse. For purposes of the preceding sentence, amounts not normally taken into account in determining the normal retirement benefit or the early retirement benefit may be disregarded. The Regulations further provide that a qualified joint and survivor annuity must be at least the actuarial equivalent of the normal form of life annuity or, if

greater, of any optional form of life annuity offered under the plan. Equivalence may be determined, on the basis of consistently applied reasonable actuarial factors, for each participant or for all participants or reasonable groupings of participants, if such determination does not result in discrimination in favor of employees who are officers, shareholders, or highly compensated.

You have represented that when the Group Annuity is used by a plan to pay a qualified joint and survivor annuity during the Phase II period, the payments to the surviving spouse will be based on a specified percentage of the "annuity units" used to calculate payments during the joint lives of the participant and the spouse rather than a specified percentage of the dollar amount that was payable during that period. You represent that this may result in payment to the surviving spouse of a dollar amount that is either less than one-half of, or greater than, the dollar amount of the annuity payable during the joint lives of the participant and the spouse. However, you also represent that the payment to the surviving spouse will be based on not less than one-half of, nor more than the amount of annuity units that would be used to calculate the annuity payable during the joint lives of the participant and the spouse. We agree that this results in an annuity that has the effect of an annuity described in section 417(b) of the Code. Accordingly, we conclude that the fact that annuity payments during the Phase II period vary with investment performance does not preclude such annuity payments from being considered payments under a qualified joint and survivor annuity described in section 417 of the Code, provided that the payments would otherwise be considered made under a qualified joint and survivor annuity.

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.

Copies of this letter are being sent to your authorized representatives in accordance with a power of attorney on file in this office.

If you wish to inquire about this ruling, please contact ***, I.D. No. ***, at (202) ***. Please address all correspondence to SE:T:EP:RA:T4.

Sincerely yours,


Donzell H. Littlejohn, Manager
Employee Plans, Technical Group 4

Enclosures:
Deleted Copy of Ruling Letter
Notice of Intention to Disclose