Significant Index Nos. 401.08.00 and 417.00.00

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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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Plan =

State X =

Company =

ABC Option =

X =

Date 1 =

Dear

This letter is in response to your request dated December 17, 2008, as modified by letters dated December 17, 2008, January 29, 2010, February 17, 2010, and May 7, 2010, in which you request a letter ruling concerning the effects under section 401(a)(11) and 401(a)(17) arising in connection with a proposed new investment option under the Plan. In particular, you have requested rulings that:

(1) Guaranteed withdrawals under the ABC Option constitute a "life annuity" for purposes of the qualified joint and survivor rules under sections 401(a)(11) and 417.

(2) The applicable "annuity starting date" for QJSA purposes is the date when guaranteed withdrawals commence under the ABC Option.

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

The Company is a limited partnership whose principal place of business is located in State X.

The Plan is a profit-sharing plan qualified under Code section 401(a) and includes a cash or deferred arrangement described in Code section 401(k). The Plan last received a determination letter by letter dated Date 1.

The Plan intends to offer the ABC Option as a new investment option to Plan participants. A participant can choose the ABC Option for all or part of the funds in the participant's individual account in the Plan.

The ABC Option is a target-date fund designed to seek high returns when retirement is many years off, to gradually moderate risk over time, and to automatically secure annual lifetime retirement income as retirement age approaches through an insurance guarantee.

From an operational perspective, as retirement age approaches a portion of a participant's investments under the ABC Option would automatically be directed into group flexible premium variable deferred annuity contracts issued by insurance companies, funded by a separate account of each insurance company that would be invested in a balanced mix of equities and fixed income instruments.

The portion of a participant's funds under the ABC Option that would be directed towards variable annuity contracts would be gradually phased in beginning around the time the participant reaches age 50, with a complete phase-in (i.e., all funds under the ABC Option would be invested in Variable Annuity Contracts) by age 60. Unlike traditional target-date funds, as participants reach retirement age, the mix of equity to fixed income instruments is not adjusted downwards; rather, since the participant has secured lifetime income (as described below), the participants' investment in the equity markets is maintained at a meaningful level.

In addition to standard investment management and operational fees, a participant's investment in the ABC Option is subject to additional attained-age insurance fees. The additional insurance fee is expected to be fixed at X basis points.

Starting on or after age 62, and after termination of employment, a participant can elect (the "GLW Election") to receive guaranteed lifetime annual withdrawals ("Guaranteed Withdrawals") determined as the product of a specified percentage ("Guaranteed Percentage") and a participant's Base Amount.

The Guaranteed Percentage will be determined as the average of percentages specified by each of the insurance companies underwriting the ABC Option.

A participant's Base Amount will be initially determined as the amount of the funds in the participant's account under the ABC Option coincident with the participant's attainment of age 60. However, at each subsequent birthday, the Base Amount will be redetermined as the greater of the prior year's Base Amount and the account balance coincident with each such subsequent birthday. Thus, the Base Amount may ratchet up, but it generally can not decrease.

A participant who takes no action subsequent to his or her GLW Election will receive payments for the remainder of his or her lifetime in amounts equal to or greater than the initial Guaranteed Withdrawal amount. This is the case regardless of the amount of funds, if any[1], in his or her account at the time of the payment.

Alternatively, a participant may elect, at any time, to withdraw all or part of the remaining funds in his or her account. In such cases, his Base Amount will be reduced proportionately (consequently decreasing future Guaranteed Withdrawal amounts)[2].

A participant also has the option of skipping a Guaranteed Withdrawal entirely or withdrawing an amount less than the amount of his or her Guaranteed Withdrawal. The effect of either option would generally be to increase his or her Base Amount[3] (consequently increasing his or her future Guaranteed Withdrawal amounts).

Subsequent to the GLW Election, a participant may transfer funds that were in his or her account but were not originally under the ABC Option, to the ABC Option[4]. A

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[1] A participant's account balance is determined as the net of contributions plus investment earnings less expense charges less withdrawals. If postretirement investment experience is poor, or if a participant experiences extraordinary longevity, cumulative withdrawals and expense charges may eventually exceed cumulative investment earnings on the initial account balance (i.e., the account balance at the time of the GLW Election). In such cases, the account balance of the participant will become $0, although Guaranteed Withdrawals will continue for the lifetime of the participant.

[2] If a participant withdraws all of the funds in his or her account, Guaranteed Withdrawals will cease.

[3] In situations in which no, or reduced, withdrawals are taken during a year, the succeeding year's account balance will generally be greater than the prior year's account balance because the net of the prior year's investment earnings less expense charges less withdrawals (i.e., the increase in a participant's account balance) would most likely be a positive amount. In other words, a participant's account balance will increase whenever the prior year's investment earnings exceed the sum of the expense charges and whatever withdrawals are taken. Whenever the new account balance is greater than the prior year's Base Amount, the new account balance will become the new Base Amount.

[4] It is also possible that new funds may be placed under the ABC Option as a result of additional accruals earned by participants who, subsequent to their retirements, return to employment.

participant may also roll over funds from another plan to be invested under the ABC Option. In either case, the addition of the new funds immediately increases the participant's Base Amount on a dollar for dollar basis[5]. However, in determining the participant's additional future Guaranteed Withdrawal amounts, a different Guaranteed Percentage may apply to the transferred or rolled over funds.

A participant who never chooses to make the GLW Election may withdraw funds from his or her account on an ad hoc basis. In such cases, once all funds have been withdrawn from the participant's account, the participant is entitled to no further benefits.

Regardless of when or if a participant chooses to make the GLW Election, in the event of a participant's death the participant's remaining account balance, if any, is paid to the participant's lawfully married spouse[6].

Law

Section 401(a)(11)(A) of the Code provides that in the case of any plan to which that paragraph applies, except as provided in section 417, a trust forming part of such plan shall not constitute a qualified trust under that 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) of the Code 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:

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[5]For example, if a participant's account balance was $80,000 and his Base Amount was $100,000, and the participant rolls over $50,000 from another plan (or transfers $50,000 from another investment option under the Plan), his or her Base Amount would immediately increase to $150,000.

[6]If there is no lawfully married spouse (Eligible Spouse) or the Eligible Spouse consents to a beneficiary other than the Eligible, the remaining account balance is paid to the non-spouse beneficiary.

(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)(A)(i) 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).

Section 417(a)(2)(A) of the Code provides that each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless ----

(A)

(i) the spouse of the participant consents in writing to such election,

(ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and

(iii) the spouse's consent acknowledges the effect of such election, and is witnessed by a plan representative or a notary public, or

(B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because such other circumstances as the Secretary may by regulations prescribe.

Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

Section 417(a)(6) of the Code provides that for purposes of that subsection, the term "applicable election period" means ----

(A) in the case of an election to waive the qualified joint and survivor form of benefit, the 180-day period ending on the annuity starting date, or

(B) in the case of an election to waive the qualified preretirement survivor annuity, the period which begins on the first day of the plan year in which the participant attains age 35 and ends on the date of the participant's death.

In the case of a participant who is separated from service, the applicable election period under subparagraph (B) with respect to benefits accrued before the date of such separation from service shall not begin later than such date.

Section 417(b) provides that for purposes of that section and section 401(a)(11), the term "qualified joint and survivor annuity" means 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 spouse, and

(2) which is the actuarial equivalent of a single annuity for the life of the participant.

Section 417(c)(2) of the Code provides that in the case of any defined contribution plan, or participant described in clause (ii) or (iii) of section 401(a)(11)(B), the term "qualified preretirement survivor annuity" means an amount for the life of the surviving spouse the actuarial equivalent of which is not less than 50 percent of the portion of the account balance of the participant (as of the date of the death) to which the participant had a nonforfeitable right (within the meaning of section 411(a)).

Section 417(f)(2)(A) of the Code provides that, in general, for purposes of that section and section 401(a)(11) 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.

Section 1.401(a)-11(b)(1) of the regulations provides that as used in that section

(i) the term "life annuity" means an annuity that provides retirement payments and requires the survival of the participant or his or her spouse as one of the conditions for any payment or possible payment under the annuity. For example, annuities that make payments for 10 years or until death, whichever occurs first or whichever occurs last, are life annuities.

(ii) However, the term "life annuity" does not include an annuity, or that portion of an annuity, that provides those benefits which under section 411(a)(9), would not be taken into account in the determination of the normal retirement benefit or early retirement benefit. For example, "social security supplements", described in the third sentence of 411(a)(9) are not considered to be life annuities for the purposes of this section, whether or not an early retirement benefit is provided under the plan.

Q & A – 4 of section 1.401(a)(20) provides that if a participant elects at any time (irrespective of the election period defined in section 417(a)(6)) a life annuity option under a defined contribution plan not subject to section 412, the survivor annuity requirements of sections 401(a)(11) and 417 will always thereafter apply to all of the participant's benefits under such plan unless there is separate accounting of the account balance subject to the election. A plan may allow a participant to elect an annuity option prior to the applicable election period described in section 417(a)(6). If a participant elects an annuity option, the plan must satisfy the applicable written explanation, consent, election, and withdrawal rules of section 417, including waiver of the QJSA within 90 days of the annuity starting date. If a participant selecting such an option dies, the surviving spouse must be able to receive the QPSA benefit described in section 417(c)(2) which is a life annuity, the actuarial equivalent of which is not less than 50 percent of the nonforfeitable account balance (adjusted for loans as described in Q & A 24(d) of that section. The remaining account balance may be paid to a designated nonspouse beneficiary.

Q & A -10(b)(1) of section 1.401(a)(20) of the regulations provides that for purposes of sections 401(a)(11), 411(a)(11) and 417, the annuity starting date is the first day of the first period for which an amount is paid as an annuity or any other form.

Q & A -10(b)(2) of section 1.401(a)(20) of the regulations provides, in part, that in case of a deferred annuity, the annuity starting date is the date for which the annuity payments are to commence, not the date that the deferred annuity is elected or the date the deferred annuity contract is distributed.

Q & A -10(d) of section 1.401(a)(20) of the regulations provides that

(1) If benefit payments are suspended after the annuity starting date pursuant to a suspension of benefits described in section 411(a)(3)(B) after an employee separates from service, the recommencement of benefit payments after the suspension is not treated as a new annuity starting date unless the plan provides otherwise. In such case, the plan administrator is not required to provide new waivers for the recommended distributions if the form of distribution is the same as the form that was appropriately selected prior to the suspension. If benefits are suspended for an employee who continues in service without a separation and who never receives payments, the commencement of payments after the period of suspension is treated as the annuity starting date unless the plan provides otherwise.

(2) In the case of an annuity starting date that occurs on or after normal retirement age, such date applies to any additional accruals after the annuity starting date, unless the plan provides otherwise. In the case of an annuity starting date that occurs prior to normal retirement age, such date does not apply to additional accruals after such date.

Analysis

The ABC Option is an investment option under the Plan. A participant may choose to place all or part of his or her funds in the Plan under the ABC Option.

Upon retirement (but no earlier than age 62) a participant may elect to receive lifetime payments in amounts determined as a percentage (Guaranteed Percentage) of the asset value of the portion of the participant's individual account under the ABC Option (GLW Election). If a participant so elects, the initial payment (Guaranteed Withdrawal) amount is generally determined as the product of the Guaranteed Percentage and the asset value of the portion of the participant's account that is invested under the ABC Option. Alternatively, a participant may choose to never make a GLW Election, and withdraw funds on an ad hoc basis until all funds have been withdrawn from his or her account.

If a participant makes a GLW Election, the participant, absent any further action, will receive Guaranteed Withdrawals for the remainder of his or her lifetime in amounts equal to or greater than the initial Guaranteed Withdrawal amount. Although for purposes of determining a participant's account balance, Guaranteed Withdrawals are treated as withdrawals from the participant's account, Guaranteed Withdrawals are paid regardless of the amount of funds, if any, remaining in the participant's account.

Section 1.401(a)-11(b)(1)(i) of the regulations provides that the term "life annuity " means an annuity that provides retirement payments and requires the survival of the participant as one of the conditions for any payment or possible payment under the annuity. Section 1.401(a)-11(b)(1)(ii) of the regulations provides that the term "life

annuity" does not include an annuity, or that portion of an annuity, that provides those benefits which under section 411(a)(9) would not be taken into account in the determination of the normal retirement benefit or early retirement benefit.

In the instant case, a GLW Election by a participant to commence Guaranteed Withdrawals is an election by the participant of an annuity that provides retirement payments and requires the survival of the participant as one of the conditions for possible payments under the annuity. The benefits provided subsequent to a GLW Election are benefits which under section 411(a)(9) would be taken into account in the determination of a normal retirement benefit or early retirement benefit. Accordingly, a GLW Election is an election to receive benefits in the form of a life annuity.

Section 401(a)(11)(A) of the Code provides, in the case of plans to which that paragraph applies, except as provided in section 417, that qualified trusts under that section must provide qualified joint and survivor annuities (QJSA) in the case of vested participants who do not die before the annuity starting date and qualified preretirement survivor annuities (QPSA) in the case of vested participants who do die before the annuity starting date and who have a surviving spouse. Section 401(a)(11)(B) provides, in relevant part, that paragraph (11) applies to any participant under a defined contribution plan unless the participant does not elect a payment in the form of a life annuity.

Prior to the time a participant makes a GLW Election, the participant is a participant who has not elected a payment of benefits in the form of a life annuity. Accordingly, prior to the GLW Election section 401(a)(11) does not apply to the participant.

However, if a participant makes a GLW Election, the participant becomes a participant who has elected a life annuity and therefore the provisions of section 401(a)(11) apply to the participant. Accordingly, the Plan, at the time of the GLW Election by a participant, except as provided in section 417, must provide that any accrued benefits payable to the participant are paid in the form of a QJSA.

Section 417(f)(2)(A) of the Code provides that for purposes of that section and section 401(a)(11), the term "annuity starting date" means the first day of the first period for which an amount is payable as an annuity, or 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.

In the instant case, the date of the GLW Election is the annuity starting date with respect to the funds under the ABC Option at the time of the GLW Election. If subsequent to a GLW Election, a participant elects to skip one or more Guaranteed Withdrawals, the subsequent restart of Guaranteed Withdrawals does not constitute an additional, or new, annuity starting date with respect to the funds subject to the GLW Election. Such is also the case with respect to such funds, if, subsequent to the GLW

Election, the participant elects to take additional ad hoc withdrawals or elects to withdraw all of the remaining funds in his or her account.

However, if subsequent to the GLW Election additional funds are invested under the ABC Option either through an internal transfer or an external rollover, the increase in the Guaranteed Withdrawal amount resulting from such additional funds is a new annuity starting date with respect to such funds. Thus, for example, if one year subsequent to the GLW Election, a participant transfers funds from another investment option under the Plan to the ABC Option, and two years subsequent to the GLW Election the participant rolls over funds from another plan to the ABC Option, three separate annuity starting dates will be applicable with respect to amounts payable as Guaranteed Withdrawals[7].

Conclusions

(1) Guaranteed Withdrawals under the ABC Option constitute a "life annuity" for purposes of the qualified joint and survivor rules under sections 401(a)(11) and 417.

(2) The applicable "annuity starting date(s)" for QJSA purposes is the date of the GLW Election and the dates, if any, that an increase in the Guaranteed Withdrawal amount occurs as a result of an internal transfer or an external rollover.

This ruling does not address the tax treatment of the ABC Option under any other Code provisions, including sections, 72(t), 401(a)(9), 402(c), and 3405, and assumes that at all relevant times the Plan is a qualified plan.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Internal Revenue Code provides that it may not be used or cited by others as precedent.

A copy of this letter is being furnished to your authorized representative pursuant to a power of attorney (Form 2848) on file.

[7] i.e., the date of the GLW Election, the date of the internal transfer, and the date of the external rollover.

If you have any questions on this ruling letter, please contact

Sincerely,

David M. Ziegler, Manager
Employee Plans Actuarial Group 2