Internal Revenue Service

Department of the Treasury

Washington, DC 20224

199918065

Person to Contact:

Telephone Number:

Refer Reply to: OP:E:EP:T:2

Date: FEB 10 1999

S.I.N.: 408.03-00

Legend:

Individual A:
Individual B:
Individual C:
Individual D:
Company A:
Trust B:

Dear :

This is in response to your ruling request, dated July 21, 1998, as supplemented by a letter dated February 2, 1999, submitted on your behalf by your authorized representative, in which several rulings were requested concerning section 408(d)(3) of the Internal Revenue Code and the minimum distribution requirements with respect to an Individual Retirement Account ("IRA") described in section 408(a) of the Code. Your authorized representative submitted the following facts and representations:

Individual A, whose date of birth was July 4, 1937, died on January 11, 1998. He was survived by his spouse, Individual B, whose date of birth is September 3, 1938. He was also survived by two children of his marriage to Individual B, Individuals C and D. On October 30, 1992, Individual A entered into a Living Trust Agreement to form Trust B. Individual A named himself grantor of Trust B and designated himself and Individual B as trustees. At the time of Individual A's death, Trust B was a valid trust under state law; Trust B became irrevocable upon Individual A's death; and the beneficiaries of Trust B were who were beneficiaries with respect to Trust B's interest in Individual A's IRA were identifiable from Trust B's trust instrument. A copy of Trust B's trust instrument was delivered to the plan administrator on July 15, 1998.

At the time of his death, Individual A was an owner of an IRA, whose custodian was Company A. Pursuant to a beneficiary designation, Individual A designated himself and Individual B, trustees of Trust B, as the primary beneficiaries of the IRA. Individual A had not begun to take any distributions from the IRA as of the date of his death and had not made any election as to the form of distribution from his IRA that could restrict the ability of the trustees of Trust B with respect to their distribution election.

Individual A's will appointed Individual B and Company A as co-personal representatives of his estate. The value of the estate exceeded $620,000, the amount of the applicable credit, $625,000, minus a $5,000 death benefit provided Individuals C and D. Pursuant to section 8.01 of Trust B, Individual B and Company B became Trust B's co-trustees upon Individual A's death.

Section 4.02 of Trust B divides the trust into two shares. Share No. 2 is allocated a percentage of Trust B which is equal to the amount of Individual A's unused applicable credit amount ($620,000). Share No. 1, the balance of the value of Trust B in excess of Individual B's unused applicable credit amount, is payable to a trust, designated in Trust B as "Trust No. 1." Trust 1 qualified for a marital deduction due to Individual B's general power of appointment. Share No. 2 is payable to a trust, designated in Trust B as "Trust No. 2."

Section 4.03(a) of Trust B specifies the uses and purposes of Trust No. 1. In particular, during Individual B's lifetime, section 4.03(a)(i) provides in part that:

> The income from Trust No. 1 shall be paid in current installments, not less frequently than quarter-annually, to my wife, Individual B, during her lifetime. In addition, the Trustees shall pay or deliver to my said wife so much of the principal of Trust No. 1 as she may from time to time request in writing.

Section 4.03(b) of the Trust B specifies the uses and purposes of Trust No. 2. In particular, section 4.03(b)(i) provides as follows:

> The income from Trust No. 2 shall be paid in current installments, not less frequently than quarter-annually, to my wife, Individual B, during her lifetime. In addition, the Trustee other than my said wife shall pay over to, or use and apply for the benefit of, my said wife so much of the principal of Trust No. 2 to provide for the health, support and maintenance of my said wife as such Trustee shall in its sole discretion determine after taking into consideration other resources known by such Trustee to be available to my said wife for the purposes hereinabove set forth.

Section 4.03 of Trust B sets forth the beneficiaries of Trust 1 and Trust 2. Individual B is the lifetime beneficiary of the income of Trust 1 with an unrestricted power of withdrawal and a general testamentary power of appointment over the principal. Section 4.03(a)(iii) of Trust B requires the distribution of the unappointed balance of Trust 1, if any, at Individual B's death to Individuals C and D, subject to a portion of such amounts being held in trust for them until they respectively attain age 35. Individual B is the lifetime beneficiary of the income of Trust 2 with

the power to invade the principal under certain standards. Section 4.03(b)(ii) of Trust B provides that the balance of Trust No. 2 remaining after the death of Individual B shall be paid over to such of Individual A's lineal descendants and in such proportions as Individual B shall designate by her Last Will and Testament. If Individual B does not appoint a lineal descendant for any amount, upon her death , Trust 2 will be distributed to Individuals C and D under the provisions relating to Trust 1.

The Trustees of Trust B intend to fund Trust No. 2 in the amount of $620,000 (the remaining applicable credit amount) with cash and other assets, none of which consist of distributions from the IRA. The co-trustees of Trust B intend to request a distribution from Individual A's IRA of an amount equal to the entire account balance of his IRA in excess of $620,000 ("Rollover Amount") to be distributed to Trust B. Because Section 4.02 of Trust B limits the value of Trust No. 2 to Individual A's unused applicable credit amount, the Trustees must allocate the Rollover Amount to Trust No. 1. Upon receipt by Trust B of this amount from the IRA into Trust No. 1, Individual B intends to withdraw an amount equal to the rollover amount from Trust No. 1 and roll over such funds to an IRA set up and maintained in her name. The rollover will be made no later than 60 days from the date that the distributions from Individual B's IRA are made to Trust B. You represent that Individual B has not rolled over any amounts from a qualified plan or IRA into another qualified plan or IRA within the last year.

The co-trustees do not intend to request a current distribution of the amount of Individual A's IRA equal to his applicable credit amount, $620,000, (the "Base Amount"). The co-trustees intend to allow the Base Amount to remain in Individual A's IRA until Individual A would have attained age 70½, at which time the co-trustees intend to commence distributions from Individual A's IRA over Individual B's life or over a period not extending beyond her life expectancy.

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

1. Individual B may be treated as the payee or distributee of Individual A's IRA with respect to the Rollover Amount.

2. The Rollover Amount portion of Individual A's IRA does not represent an inherited IRA within the meaning of section 408(d)(3)(C) of the Internal Revenue Code with respect to Individual B.

3. Individual B is eligible to roll over the Rollover Amount into an IRA set up and maintained in her own name pursuant to section 408(d)(3) of the Code as long as the rollover of such distribution occurs no later than 60th day after the date the Rollover Amount is received by Trust B.

4. Individual B will not be required to include in gross income for federal income tax purposes for the year in which the roll over of the Rollover Amount is timely made (or any prior year) any portion of the Rollover Amount rolled over from Individual A's IRA to the IRA set up and maintained in Individual B's name.

5. The Base Amount portion of Individual A's IRA may be held in his IRA until the provision of section 401(a)(9) of the Code require distributions to begin.

6. Individual B is treated as the designated beneficiary of the Base Amount portion of Individual A's IRA.

7. Distributions of the Base Amount are not required to be made from Individual A's IRA until December 31 of the calendar year in which Individual A would have attained age 70 ½ and may be paid out over Individual B's life or over a period not extending beyond her life expectancy, as elected by the trustees at the time distributions begin.

8. If Individual B dies before distributions begin, she will be treated as the owner of Individual A's IRA for purposes of computing the minimum distributions pursuant to section 401(a)(9) of the Code.

9. No party will be required to include any portion of the Base Amount in gross income for federal income tax purposes until the calendar year in which section 401(a)(9) of the Code requires distributions from Individual A's IRA to commence, unless any portion of the Base Amount is withdrawn from his IRA prior to such calendar year.

With respect to the first four ruling requests, Section 408(d)(1) of the Code provides, in general, that except as otherwise provided in section 408(d), any amount paid or distributed from an IRA shall be included in gross income by the payee or distributee, as the case may be.

Section 408(d)(3) of the Code provides that section 408(d)(1) does not apply to a rollover contribution if such contribution satisfies the requirements of sections 408(d)(3)(A) and (B).

Section 408(d)(3)(A)(i) of the Code provides that section 408(d)(1) does not apply to any amount paid or distributed out of an IRA to the individual for whose benefit the account is maintained if the entire amount received (including money and any other property) is paid into an IRA (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distributions.

Section 408(d)(3)(B) of the Code provides that section 408(d)(3)(A) does not apply to any amount described in section 408(d)(3)(A)(i) if at any time during the one-year period ending

on the day of such receipt such individual received any other amount described in such subparagraph from an IRA which was not includible in his gross income because of the application of section 408(d)(3)(A).

Section 408(d)(3)(C)(i) of the Code provides, in pertinent part, that, in the case of an inherited IRA, section 408(d)(3) shall not apply to any amount received by an individual from such account (and no amount transferred from such account shall be excluded from income by reason of such transfer), and such inherited account shall not be treated as an IRA for purposes of determining whether any other amount is a rollover contribution.

Section 408(d)(3)(C)(ii) of the Code provides that an IRA shall be treated as inherited if the individual for whose benefit the account is maintained acquired such account by reason of the death of another individual, and such individual was not the surviving spouse of such other individual.

Thus, pursuant to section 408(d)(3)(C)(ii) of the Code, a surviving spouse who acquires IRA proceeds from and by reason of the death of her husband, may elect to treat those IRA proceeds as her own and roll them over into her own IRA.

Generally, if a decedent's IRA proceeds pass through a third party, e.g. a trust, and then are distributed to the decedent's surviving spouse, said spouse will be treated as acquiring them from the third party and not from the decedent. Thus, generally, the surviving spouse will not be eligible to roll over the IRA proceeds into his or her own IRA.

However, if the trustee(s) of a trust which distributes IRA proceeds to a surviving spouse has no discretion with respect to either the allocation of the IRA proceeds to a trust or a subtrust within the trust or to the payment of the IRA proceeds to the surviving spouse, then for purposes of section 408(d)(3) of the Code, the Internal Revenue Service will treat the surviving spouse as having acquired the IRA proceeds from the decedent and not from the trust.

Individual B is the surviving spouse of Individual A. Because the Trustees of Trust B do intend to fund Trust No. 2 with $620,000 of assets not obtained from Individual A's IRA, pursuant to the allocation provisions in section 4.02 of Trust B which limits the amount allocated to Trust No. 2 to $620,000, the Trustees are required to pay the funds distributed from Individual A's IRA to Trust No. 1. The Co-trustee has no discretion with respect to the allocation of the Rollover Amount. Once the Rollover Amount is allocated to Trust No. 1, pursuant to the terms of Trust B, Individual B has the power to demand payment of the Rollover Amount. Thus, the Co-trustee has no discretion with respect to either the allocation of the IRA proceeds to Trust No. 1 or to the payment of the IRA proceeds to Individual B. Therefore, Individual B is treated as having acquired the Rollover Amount from Individual A and not from Trust B. Individual B will

then roll over these IRA amounts into an IRA maintained by her. The rollover will take place within sixty days of the date the distribution was made from Individual A's IRA into Trust No. 1.

Therefore, in regard to ruling requests number one, two, three and four, we concluded as follows:

1. Individual B may be treated as the payee or distributee of Individual's A IRA with respect to the Rollover Amount.

2. The Rollover Amount portion of Individual A's IRA does not represent an inherited IRA within the meaning of section 408(d)(3)(C) of the Code with respect to Individual B.

3. Individual B is eligible to roll over the Rollover Amount into an IRA set up and maintained in her own name pursuant to section 408(d)(3) of the Code as long as the rollover of such distribution occurs no later than 60th day after the date the rollover amount is received by Trust B.

4. Individual B will not be required to include in gross income for federal income tax purposes for the year in which the roll over of the Rollover Amount is timely made (or any prior year) any portion of the Rollover Amount rolled over from Individual A's IRA to the IRA set up and maintained in Individual B's name.

With respect to ruling requests five through nine, section 408 of the Code defines an IRA as a trust which meets the requirements of sections 408(a)(1) through 408(a)(6). Section 408(a)(6) of the Code provides that under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) of the Code and the incidental death benefit requirement of section 401(a) of the Code shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

Sections 401(a)(9)(A)(i) and (ii) of the Code provide generally that a trust will not constitute a qualified trust unless the plan provides that the entire interest of each employee will be distributed beginning not later than the required beginning date 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).

Q&A A-3, section 1.408-8 of the proposed regulations, states that the term "required beginning date" means April 1 of the calendar year following the calendar year in which the individual attains age 70-1/2.

Section 401(a)(9)(B) of the Code provides, in part, that if an employee dies before the distribution of his interest in a qualified plan has begun in accordance with section 401(a)(9)(A)(ii), a participant's interest must be distributed either under the "five year rule" of section 401(a)(9)(B)(ii) or under the exception to the "five year rule" as set forth in section 401(a)(9)(B)(iii). Section 401(a)(9)(A)(ii) requires that the employee's entire interest be distributed within five year after his death.

Section 401(a)(9)(B)(iii) of the Code (concerning an exception to the 5-year rule) provides that if any portion of the employee's interest is payable to (or for the benefit of) a designated beneficiary, such portion will be distributed (in accordance with regulations) over the life of such designated beneficiary, and requires such distributions to begin not later than 1 year after the date of the employee's death or such later date as the Secretary may by regulations prescribe.

If the designated beneficiary is the employee's spouse, section 401(a)(9)(B)(iv) of the Code provides that distributions are not required to begin until the date on which the employee would have attained age 70-1/2, and if the surviving spouse dies before the distribution to such spouse begins, section 401(a)(9) shall be applied as if the surviving spouse were the employee.

Q&A D-6, section 1.401(a)(9)-1 of the proposed regulations, provides that in the case in which a trust is named as a 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 Q&A D-5(a) are satisfied as of the date of the employee's death or in case of documentation described in Q&A D-7 of this section, by the end of the ninth month beginning after the employee's date of death. If the requirements are satisfied, distributions to the trust for purposes of section 401(a)(9) of the Code 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.

The requirements of Q&A D-5, section 1.401(a)(9)-1 of the proposed regulations, are in pertinent part as follows: (1) the trust is valid under state law or would be but for the fact that there is no corpus, (2) the trust is irrevocable or will by it terms become irrevocable upon the death of the employee, (3) the beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's benefit are identifiable from the trust instrument, and (4) the documentation described in Q&A D-7 has been provided to the plan administrator.

Q&A D-7 of section 1.401(a)(9)-7 of the proposed regulations identifies the trust documentation that must be provided to the plan administrator both in the case of required distributions commencing before death and required distributions after death. Under Q&A D-

7(6)(2), relating to distributions after death, the documentation requirement will be satisfied if the plan administrator is provided with a copy of the actual trust document for the trust that is named as beneficiary of the employee under the plan by the ninth month beginning after the death of the employee.

Q&A E-5(a)(1), section 1.401(a)(9)-1 of the proposed regulations, states, in general, that if more than one individual is a designated beneficiary, the designated beneficiary with the shortest life expectancy will be the designated beneficiary for purposes of determining the distribution period.

Your authorized representative asserts that the requirements of Q&A D-5 were satisfied as of the date of Individual A's death. Also, a copy of trust instrument was provided to the plan administrator of Individual A's IRA on July 15, 1998, which is within the nine month period provided under Q&A D-7(b)(2) of section 1.401(a)(9)-1 of the proposed regulations. Individual B is the designated beneficiary for purposes of determining the distribution period because she has the shortest life expectancy. As provided by section 401(a)(9)(B)(iv) of the Code, distributions are not required to begin until the date on which the employee would have attained 70-1/2 if the designated beneficiary is the surviving spouse.

Therefore, in regard to ruling requests five through nine, we conclude as follows:

5. The Base Amount portion of Individual A's IRA may be held in his IRA until the provisions of section 401(a)(9) of the Code require distributions to begin.

6. Individual B is treated as the designated beneficiary of the Base Amount portion of Individual A's IRA.

7. Distributions of the Base Amount are not required to be made from Individual A's IRA until December 31 of the calendar year in which he would have attained age 70 ½ and may be paid out over the spouse's life or over a period not extending beyond her life expectancy, as elected by the trustees at the time distributions begin.

8. If Individual B dies before distributions begin, she will be treated as the owner of Individual A's IRA for purposes of computing the minimum distributions pursuant to section 401(a)(9) of the Code.

9. No party will be required to include any portion of the Base Amount in gross income for federal income tax purposes until the calendar year in which section 401(a)(9) of the Code requires distributions from Individual A's IRA to commence, unless any portion of the Base Amount is withdrawn from his IRA prior to such calendar year.

This ruling letter is based on the assumption that Individual A's IRA and the IRA Individual B will establish satisfy the requirements of section 408(a) of the Code at the time of the transactions described herein are completed.

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

Sincerely yours,

(signed) JOYCE E. FLOYD

Joyce E. Floyd
Chief, Employee Plans
Technical Branch 2

Enclosures:
Deleted copy of letter
Notice of Intention to Disclose