TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

201442073

JUL 21 2014

UIL No.: 9100.00-00

T:EP:RA:T1

Attn.:

Legend:

Company A =

Company B =

Firm C =

Firm D =

Individual E =

Individual F =

Individual G =

Individual H =

Dear :

This is in response to a letter dated January 6, 2014, as supplemented by information received on June 25, 2014, in which you request, through your authorized representative, an extension of time pursuant to section 301.9100-1 of the Procedure and Administration Regulations (the "P&A Regulations") to file the notice of election described in Section 3 of Revenue Procedure 93-40,1993-2 C.B. 535 ("Rev. Proc. 93-40") to be treated as operating qualified separate lines

of business ("QSLOBs") under section 414(r)(2) of the Internal Revenue Code (the "Code").

The following facts and representations have been submitted under penalties of perjury in support of Company A's ruling request. Affidavits supporting these facts and representations were also submitted.

Company A is a holding company with nine wholly-owned subsidiaries. Each of its subsidiaries sponsors a plan described under sections 401(a) and 401(k) of the Code ("401(k) plan"). Company B, a subsidiary of Company A, established its 401(k) plan in 1996. Company A acquired Company B in 2005. Prior to the acquisition, Company B was not part of a controlled group. Following the acquisition in 2005, Company B continued to operate as a separate entity with its own financial and accounting systems, human resources system and procedures, employees, and 401(k) plan. Company A had minimal involvement in the business operations of Company B, which continues to operate independently of Company A and the other entities in Company A's controlled group.

Company A recognized that certain plan qualification requirements apply to the controlled group and retained Firm C, a third-party administrator, to consolidate testing data for Company A. Firm C tested the 401(k) plans maintained by Company A's subsidiaries on an employer-wide basis, including the average deferral percentage ("ADP") test. If excess contributions were found, Company A's policy was to inform the affected subsidiary of the test results and identify the HCEs to whom corrective distributions should be made. Company A did not confirm with each subsidiary that the corrective distributions were actually made. Following the expiration of the transition period for acquisitions contained in section 410(b)(6)(C) of the Code, Firm C began including Company B in consolidated testing beginning in the 2007 plan year.

Company B provided the information requested each year and acknowledged Company A's instructions to make corrective distributions to HCEs; however, Company B failed to make the distributions. Instead, Company B followed the results of testing prepared by its own third-party administrator, Firm D, because it considered itself to be an independent entity with a stand-alone plan.

Individual E, the Vice-President for Human Resources at Company B, has held her position since October of 2009. She had trained for several months with her predecessor, who informed her that Company B was not required to follow Company A's testing results and instructions to make corrective distributions because it performed its own testing. Individual E did not understand the significance of Company B's relationship to Company A, and she received confirmation that Company B could act independently from Company B's Chief Financial Officer ("CFO"), Individual G, whose understanding was also based on advice given by Individual E's predecessor. Individual G had also been informed

by the prior CFO of Company B that Company A had assured Company B it would operate independently after the 2005 acquisition.

In 2011 and 2012, Company B's Benefits Manager, Individual F, completed an annual questionnaire from Firm D, which asked whether Company B was part of a controlled group, whether it was a QSLOB, and whether any changes in ownership had occurred. Individual F followed her predecessor's answers of responding negatively to these questions. While Individual F assisted in gathering the information annually provided to Company A, the request for information and instructions to make corrective distributions were sent to Individual E and not to her.

The prior Director of Human Resources for Company A, Individual H, recalls annual discussions with Company B regarding the testing because Company B did not believe it should be included in group testing. Individual H also recalls particular concerns from other subsidiaries about including Company B in the testing because Company B has a high percentage of HCEs. In 2011, Firm C had some communications with Firm D regarding Company B's controlled group status, but no further action was taken. Prior to the spring of 2013, neither Firm C nor Firm D raised the possibility of making a QSLOB election by filing the Form 5310-A, Notice of Qualified Separate Lines of Business ("Form 5310-A").

In the spring of 2012, Individual E contacted benefits counsel to streamline the communications between Company A and Company B regarding plan testing. At this time, she learned that Company A would be required to file the Form 5310-A in order for Company B to rely on separate testing. However, she did not notify Company A of this issue and became absorbed in Company B's other business priorities. She revisited the issue during the next round of testing in the spring of 2013 and, at that time, notified Company A of the issue.

You represent that, except for the filing of the Form 5310-A, Company B satisfied the requirements for treatment as a QSLOB beginning January 1, 2007.

Based on the above facts and representations, you request an extension of time, pursuant to section 301.9100-3 of the P&A Regulations, to file the Form 5310-A effective for plan years beginning on or after January 1, 2007.

In general, section 414(r) of the Code provides that for purposes of sections 129(d)(8) and 410(b) an employer shall be treated as operating separate lines of business during any year if the employer operates separate lines of business for bona fide business reasons and satisfies certain other conditions under the Code. If the employer is treated as operating qualified separate lines of business for the year, the employer may apply the minimum coverage requirements of section 410(b) (including the nondiscrimination requirements of section 401(a)(4) and the minimum participation requirements of section 401(a)(26)) separately with respect to the employees in each qualified separate business line.

Section 414(r)(2)(B) of the Code requires that an employer notify the Secretary of the Treasury that a line of business is being treated as separate for purposes of sections 129(d)(8) and 410(b).

Section 3 of Rev. Proc. 93-40 sets forth the exclusive rules for satisfying the notice requirement of section 414(r)(2)(B) of the Code. Section 3.03 of Rev. Proc. 93-40 provides that notice must be given by filing Form 5310-A. Section 3.05 of Rev. Proc. 93-40 provides that notice for a testing year must be given on or before the Notification Date for the testing year. The Notification Date for a testing year is the later of October 15 of the year following the testing year or the 15th day of the 10th month after the close of the plan year of the plan of the employer that begins earliest in the testing year. Section 3.06 of Rev. Proc. 93-40 provides that after the Notification Date, notice cannot be modified, withdrawn or revoked, and will be treated as applying to subsequent testing years unless the employer takes timely action to provide a new notice.

Section 301.9100-1(a) of the P&A Regulations states that the regulations under sections 301.9100-1, 301.9100-2 and 301.9100-3 provide the standards the Commissioner of Internal Revenue ("Commissioner") will use to determine whether to grant an extension of time to make a regulatory election. It further provides that the granting of an extension of time is not a determination that the taxpayer is otherwise eligible to make the election.

Section 301.9100-1(b) of the P&A Regulations defines a "regulatory election" to mean an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin. Notice that an employer elects to be treated as operating qualified separate lines of business pursuant to section 414(r) of the Code and Section 3 of Rev. Proc. 93-40 constitutes a regulatory election.

Section 301.9100-1(c) of the P&A Regulations provides that the Commissioner, in the Commissioner's discretion, may grant a reasonable extension of time under the rules of sections 301.9100-2 and 301.9100-3 to make a regulatory election.

Section 301.9100-2 of the P&A Regulations lists certain elections for which automatic extensions of time to file are granted. Section 301.9100-3 generally provides guidance with respect to the granting of relief with respect to those elections not referenced in section 301.9100-2. The relief requested in this case is not referenced in section 301.9100-2.

Section 301.9100-3(a) of the P&A Regulations provides that applications for relief that fall within section 301.9100-3 will be granted when the taxpayer provides sufficient evidence (including affidavits described in section 301.9100-3(e)(2)) to establish that (1) the taxpayer acted reasonably and in good faith, and (2)

granting relief would not prejudice the interests of the Government.

Section 301.9100-3(b)(1) of the P&A Regulations provides that, except as provided in paragraphs (b)(3)(i) through (iii) of this section, a taxpayer will be deemed to have acted reasonably and in good faith if (i) the taxpayer's request for relief under this section is filed before the failure to make a timely election is discovered by the Service; (ii) the taxpayer inadvertently failed to make the election because of intervening events beyond the taxpayer's control; (iii) the taxpayer failed to make the election because, after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election; (iv) the taxpayer reasonably relied upon the written advice of the Service; or (v) the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(3) of the P&A Regulations provides that a taxpayer is deemed to have not acted reasonably or in good faith if (i) the taxpayer seeks to alter a return position for which an accuracy-related penalty has been or could be imposed at the time relief is requested; (ii) the taxpayer was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) the taxpayer requests relief based on hindsight.

Section 301.9100-3(c)(1) of the P&A Regulations provides the standards for determining whether the interests of the Government are prejudiced. Paragraph (c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made. Paragraph (c)(1)(ii) provides that ordinarily the Service will not grant relief when tax years that would have been affected by the election had it been timely made are closed by the statute of limitations before the taxpayer's receipt of a ruling granting relief under this section.

Company A's ruling request contains an explanation describing the circumstances that caused its failure to give the Service timely notice of its QSLOB election for the 2007 testing year. Company B had operated as an independent company prior to its acquisition by Company A in 2005, and testing its 401(k) plan, established in 1996, on a controlled group basis was not required until the plan year beginning January 1, 2007. Company B continued to operate independently from Company A, as it been assured it could do after the 2005 acquisition. The persons involved in the administration of Company B's 401(k) plan, Individuals E, F, and G, and Firm D, were unaware of the election until Individual E learned of the requirement to file Form 5310-A in the spring of 2012 and informed Company A in the spring of 2013. Firm C, hired by Company A in 2005 to test the 401(k) plans annually for compliance, did not raise the possibility of electing QSLOB status until the spring of 2013. Although Firm C and Firm D

had communicated regarding Company B's controlled group status in 2011, no further action was taken. This request for relief under section 301.9100-1 of the P&A Regulations was made on January 6, 2014, before the Service discovered the failure to file the election. Based on these facts, Company A is deemed to have acted reasonably and in good faith because it satisfies clause (i) of section 301.9100-3(b)(1).

Although the interests of the Government are ordinarily prejudiced if the taxable year in which the election would have been made is closed by the statute of limitations, Company A has filed an application under the Voluntary Correction Program to correct the 401(k) plans for failures to satisfy the ADP test. Additionally, Company A does not have a lower tax liability than it would have if it had timely filed the election.

Accordingly, Company A is granted an extension of 60 days from the date of the issuance of this ruling letter to file notification of the QSLOB election on Form 5310-A with the appropriate office of the Service.

No opinion is expressed as to whether the separate lines of business of the taxpayer satisfy the requirements (other than notifying the Secretary) under section 414(r) of the Code.

This ruling does not constitute a determination that a separate line of business satisfies the requirement of administrative scrutiny within the meaning of section 1.414(r)-6 of the federal Income Tax Regulations.

No opinion is expressed as to the tax treatment of the transaction described herein under any other provisions of 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.

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

Should you have any concerns regarding this ruling, please contact

Sincerely yours,

Carlton A. Watkins

Carlton A. Watkins, Manager
Employee Plans Technical Group 1

Enclosures:
Deleted copy of letter ruling
Notice 437

cc: