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Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Date:
August 01, 2017

Legend

Y =

X =

State =
Pooling Arrangement =
Trust =

Fund A =

Fund B =

Fund C =

Fund D =

Fund E =

Fund F =

Year 1 =
Year 2 =
Date 1 =
n1 =
n2 =
n3 =
n4 =

n5 =
n6 =

Dear :

This letter responds to your letter dated January 24, 2017, and subsequent correspondence, submitted on behalf of Pooling Arrangement, Fund A, Fund B, Fund C, Fund D, Fund E, and Fund F (collectively the "Funds"), by their authorized representative requesting permission to revoke an election made pursuant to § 761(a) of the Internal Revenue Code (the Code) that was intended to exclude Pooling Arrangement from subchapter K of chapter 1 of the Code. Additional rulings related to the revocation the election are also requested. Specifically, you requested the following rulings:

1. Permission to revoke the election made pursuant to § 1.761-2(b)(3) to be excluded from the application of subchapter K;
2. The recapitalization of each fund's interest in Pooling Arrangement will not result in gain or loss and will not cause a termination under § 708.
3. Pursuant to Rev. Proc. 2001-36, Pooling Arrangement requests permission to aggregate built-in gains and built-in losses from contributed property for purposes of making § 704(c) and reverse § 704(c) allocations.
4. Neither the revocation of Pooling Arrangement's § 761(a) election nor the recapitalization of Pooling Arrangement is a prohibited act of self-dealing under § 468A; and
5. None of the Funds will be disqualified under § 468A as a result of (i) the revocation the § 761(a) election and subsequent treatment of Pooling Arrangement as a partnership subject to subchapter K or (ii) the recapitalization of Pooling Arrangement.

FACTS

Y, a wholly owned subsidiary of Company X, is engaged in providing electric public utility service to customers in State. Y owns an interest in six electric nuclear generating stations (Units). Y is responsible for a share of the eventual decommissioning costs associated with each Unit.

Y established separate qualified funds (Fund A, Fund B, Fund C, Fund D, Fund E, and Fund F) for the nuclear decommissioning costs of each Unit under a single qualified trust agreement (Trust). Each Fund is a qualified fund subject to the rules of § 468A. Y contributes to each Fund its respective share of each Unit's decommissioning costs that will qualify for a current deduction under § 468A.

Trust permits the trustee to pool together the Funds' assets for investment purposes. Pooling Arrangement was established by Y with respect to the Funds for investment purposes. Currently, Pooling Arrangement allocates investment gains and losses pro-rata based on each Fund's account balance relative to Pooling Arrangement's total Fund account balances. Each Fund's account is separately maintained by the trustee to account for all decommissioning contributions, and all income and other increments to each Fund, and all distributions from each Fund.

In Year 1, Y requested, and the Service issued PLR-9515006 (Dec, 28, 1994) concluding that Pooling Arrangement would be classified as a partnership for federal income tax purposes. Pooling Arrangement's, Form 1065, *Partnership Return of Income*, for the taxable year ended Date 1 included the election under § 761(a) to be excluded from the application of subchapter K.

Y represents that, as required under § 1.468A-4(d)(1), a return on Form 1120-ND is filed each year for each Fund.

In order to continue to more accurately reflect each Fund's income and investment balances and to more effectively meet its investment objectives, the parties want to revoke the prior election under § 761(a) to be excluded from the application of subchapter K.

Upon granting permission to revoke the election made pursuant to § 761(a), Y represents it will treat each Fund as having contributed its securities to Pooling Arrangement in exchange for interests therein in a non-recognition transaction under § 721(a). Further, § 721(b) will not apply to any such contribution because each Fund will contribute a portfolio of assets that was "diversified" within the meaning of § 1.351-1(c)(6)(i).

After formation of the partnership, Y states Pooling Arrangement will undergo a recapitalization. Y states that each Fund will exchange its n1% interest in fixed income investments and n2% interest in equity investments of Pooling Arrangement for, in the case of each of Fund A, Fund B, and Fund C, a n3% of the fixed income investments and n4% of the equity investments of Pooling Arrangement and, in the case of each of Fund D, Fund E, and Fund F a n5% in the fixed income investments and n6% in equity investments in Pooling Arrangement. Y represents that each Fund's proportionate share of Pooling Arrangement will remain the same after the planned recapitalization of the membership interests.

Y represents that each Fund will maintain detailed capital accounts. Each capital account will consist of two sub-account to correspond with each Fund's fixed and equity investment accounts of the asset pools, and will track the asset pool's performance. An interest in a particular asset pool entitles a Fund to an interest in the profits, losses, and capital of the asset pool to which that interest relates. The sub-accounts and the capital account will be maintained in accordance with § 1.704-1(b)(4)(iv). Pooling Arrangement will make special allocations of items of income, gain, loss, deduction or credit to specific Funds in the pool. Each Fund will track the difference between the fair market value and tax basis of the assets contributed to Pooling Arrangement in accordance with § 704(c) and Rev. Proc. 94-75, 1994-2 C.B. 824.

On the recapitalization, each Fund will determine its § 704(c) amounts for the assets contributed to Pooling Arrangement. Y states that Pooling Arrangement will increase the § 704(c) accounts by allocating any gain on the sale of assets to the Fund that receives the cash associated with the sale or, if no cash is being distributed, in accordance with each Funds' capital account. Once that Fund receives an allocation of gain equal to its § 704(c) amount, any remaining gain will be allocated to the other Funds based upon each Fund's relative capital account until all § 704(c) amounts are eliminated. For purposes of tracking, the § 704(c) amount, the § 704(c) amounts will be aggregated.

Y further represents as follows:

1. The assets of Pooling Arrangement constitute a diversified portfolio of stocks and securities within the meaning of § 1.351-1(c)(6)(i);
2. Pooling Arrangement is not an investment company within the meaning of § 351(c) and § 1.351-1(c)(3);
3. After the revocation of its prior election under § 761(a), Pooling Arrangement will qualify as a "securities partnership" as defined in § 1.704-3(e)(3)(iii);
4. Pooling Arrangement will make revaluations at least annually in accordance with § 1.704-3(e)(3)(iii)(B)(2)(ii);
5. The burden of making § 704(c) allocations separately from reverse § 704(c) allocations is substantial; and
6. Pooling Arrangement's contributions, revaluations, and the corresponding allocations of tax items are not made with a view to shifting the tax consequences of built-in gain or loss among the Funds in a manner that would substantially reduce the present value of the Funds' aggregate tax liability.

LAW AND ANALYSIS

Ruling 1: Permission to revoke the election made pursuant to § 1.761-2(b)(3) to be excluded from the application of subchapter K;

Section 761(a) provides that under regulations the Secretary may, at the election of all the members of an unincorporated organization, exclude such organization from the application of all or part of subchapter K, if it is availed of for investment purposes only and not for the active conduct of a business, if the income of the members of the organization may be adequately determined without the computation of partnership taxable income.

Section 1.761-2(a)(1) provides that an unincorporated organization described in § 1.761-2(a)(2) may be excluded from the application of all or a part of the provisions of subchapter K. Such organization must be availed of for investment purposes only and not for the active conduct of a business. The members of such organization must be able to compute their income without the necessity of computing partnership taxable income. Any syndicate, group, pool, or joint venture which is classifiable as an association, or any group operating under an agreement which creates an organization classifiable as an association, does not fall within these provisions.

Section 1.761-2(a)(2) provides that where the participants in the joint purchase, retention, sale, or exchange of investment property--(i) own the property as co-owners, (ii) reserve the right separately to take or dispose of their shares of any property acquired or retained, and (iii) do not actively conduct business or irrevocably authorize some person or persons acting in a representative capacity to purchase, sell, or exchange such investment property, although each separate participant may delegate authority to purchase, sell, or exchange his share of any such investment property for the time being for his account, but not for a period of more than a year, then such group may be excluded from the application of the provisions of subchapter K under the rules set forth in paragraph (b) of this section.

Based on the information provided and the representations made, Pooling Arrangement and the Funds may revoke the election under § 761(a) of the Code by filing a statement to that effect with Pooling Arrangement's Form 1065 for its first taxable year for which the revocation is to be effective.

Ruling 2: The recapitalization of each fund's interest in Pooling Arrangement will not result in gain or loss and will not cause a termination under § 708

Section 741 provides, in part, that when a partnership interest is sold or exchanged, the transferor partner recognizes gain or loss.

Under § 1001, if there is a sale or other disposition of property, the entire amount of the gain or loss realized thereunder will be recognized, unless another section of subtitle A provides for nonrecognition.

Under § 721, no gain or loss is recognized by a partnership or any of its partners upon the contribution of property to the partnership in exchange for an interest therein.

Section 708 provides, in part, that a partnership continues if it is not terminated. A partnership terminates only if (1) no part of any business, financial operation, or venture of the partnership continues to be carried on by any of its partners in a partnership, or (2) within a 12-month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits.

Rev. Rul. 84-52, 1984-1 C.B. 158, addressed the circumstance where a general partnership interest was converted into a limited partnership interest in the same partnership. Each partner's total percent ownership interest in the partnership remained the same after the conversion. Rev. Rul. 84-52 holds, in part, that the partnership was not terminated because the conversion was not a sale or exchange for § 708 purposes.

Based on the facts provided and the representations made, no gain or loss will be recognized by the Funds on the conversion of fixed income investments into equity investments in Pooling Arrangement and vice versa on a one-to-one basis. Further, we determine the recapitalization of the Funds interest in the Pooling Arrangement will not result in a termination of the Pooling Arrangement under § 708.

Ruling 3: Pursuant to Rev. Proc. 2001-36, Pooling Arrangement requests permission to aggregate built-in gains and built-in losses from contributed property for purposes of making § 704(c) and reverse § 704(c) allocations.

The aggregation rule of § 1.704-3(e)(3) applies only to reverse § 704(c) allocations. Therefore, a securities partnership using an aggregate approach must generally account for any built-in gain or loss from contributed property separately. The preamble to § 1.704-3(e)(3) explains that the final regulations do not authorize aggregation of pre-contribution built-in gains and losses with built-in gains and losses from revaluations because this type of aggregation can lead to substantial distortions in the character and timing of income and loss recognized by contributing partners. T.D. 8585, 1995-1 C.B. 120, 123. The preamble, however, also recognizes that there may be instances in which the likelihood of character and timing distortions is minimal and the burden of making § 704(c) allocations separate from reverse § 704(c) allocations is great. Consequently, § 1.704-3(e)(4)(iii) authorizes the Commissioner to permit, by published guidance or private letter ruling, aggregation of qualified financial assets for purposes of making § 704(c) allocations in the same manner as that described in § 1.704-3(e)(3).

In Rev. Proc. 2001-36, 2001-1 C.B. 1326, the Service granted automatic permission for certain securities partnerships to aggregate contributed property for purposes of making § 704(c) allocations. Rev. Proc. 2001-36 also described the information that must be included with the ruling requests for permission to aggregate contributed property for purposes of making § 704(c) allocations submitted by partnerships that do not qualify for automatic permission.

Rev. Proc. 94-75, 1994-52 I.R.B. 29, provides that the Commissioner will not challenge a partnership's reverse § 704(c) allocations if: (1) all of the partners in the partnership are nuclear decommissioning reserve funds that, under the provisions of the Internal Revenue Code, are in the same tax bracket at all times and for all income, (2) all of the partnership's book and tax allocations are made in proportion to the partners' relative book capital accounts, (3) state or federal regulations require that, until substantial completion of nuclear decommissioning of the nuclear powerplant, the assets of the partnership may only be used to pay the partners' statutory decommissioning liabilities and associated administrative costs, and (4) no partner makes a contribution to the pooling arrangement with a principal purpose of substantially reducing the present value of the partners' aggregate federal tax liability.

Pooling Arrangement represents that the burden to it of making § 704(c) allocations separate from reverse § 704(c) allocations is substantial. Pooling Arrangement represents that it will comply with Rev. Rul. 94-75 with respect to its reverse § 704(c) allocations.

Based on the information submitted and representations made, we find that Pooling Arrangement's method of making § 704(c) allocations, including reverse allocations, for the Funds is permissible under § 1.704-3(e)(4)(iii), provided that a contribution or revaluation of the property and the corresponding allocation of tax items with respect to the property are not made with a view to shifting the tax consequences of built-in gain or loss among the partners in a manner that substantially reduces the present value of the Funds' aggregate tax liability.

Ruling 4: Neither the revocation of Pooling Arrangement's § 761(a) election nor the recapitalization of Pooling Arrangement is a prohibited act of self-dealing under § 468A.

Section 468A(a) of the Code provides that a taxpayer may elect to deduct payments made to a nuclear decommissioning reserve fund (hereinafter referred to as the "Fund") that meets the requirements of section 468A.

Section 468A(e)(6) provides that in any case in which the Fund violates any provision of this section or § 4951, the Secretary may disqualify such Fund from the application of this section. Treas. Reg. § 1.468A-1(b)(4) provides that a "qualified nuclear decommissioning fund" is a Fund that satisfies the requirements of § 1.468A-5.

Treas. Reg. § 1.468A-5(c)(1) provides that if at any time during the taxable year a qualified nuclear decommissioning fund does not satisfy a requirement of § 1.468A-5(a), or the fund and a disqualified person engage in an act of self-dealing, the Service may, in its discretion, disqualify all or a portion of the fund as of the date that the fund does not satisfy such requirements.

Section 468A(e)(5) prohibits self-dealing by providing that under regulations prescribed by the Secretary, for purposes of § 4951, a qualified nuclear decommissioning fund shall be treated in the same manner as a trust described in § 501(c)(21). Section 4951(a) imposes a tax on each act of self-dealing between a disqualified person and a trust described in § 501(c)(21).

Treas. Reg. § 1.468A-5(a) sets out the qualification requirements for nuclear decommissioning funds. It provides, in part, that a qualified nuclear decommissioning fund must be established and maintained pursuant to an arrangement that qualifies as a trust under state law.

Treas. Reg. § 1.468A-5(b)(1) provides that, except as otherwise provided in paragraph (b), the excise taxes imposed by § 4951 apply to each act of self-dealing between a disqualified person and a nuclear decommissioning fund. Further, § 1.468A-5(b)(2) provides that (with exceptions not relevant to this analysis), for purposes of paragraph (b), the term self-dealing means any act described in § 4951(d).

Section 4951(d)(1) provides, in relevant part, that the term “self-dealing” means any direct or indirect sale, exchange, or leasing of real or personal property between a trust described in § 501(c)(21) and a disqualified person. Treas. Reg. §1.468A-5(b)(3) provides that, for these purposes, the term “disqualified person” includes each person described in § 4951(e)(4) and Treas. Reg. § 53.4951-1(d).

Section 4951(e)(4) provides that the term “disqualified person” means, with respect to a trust described in § 501(c)(21), a person who is—

(A) a contributor to the trust,
(B) a trustee of the trust,
(C) an owner of more than 10% of--
  (i) the total combined voting power of a corporation,
  (ii) the profits interest of a partnership, or
  (iii) the beneficial interest of a trust or unincorporated enterprise, which is a contributor to the trust,
(D) an officer, director, or employee of a person who is a contributor to the trust,
(E) the spouse, ancestor, lineal descendant, or spouse of a lineal descendant of an individual described in subparagraph (A), (B), (C), or (D),
(F) a corporation of which persons described in subparagraph (A), (B), (C), (D), or (E) own more than 35% of the total combined voting power,
(G) a partnership in which persons described in subparagraph (A), (B), (C), (D), or (E), own more than 35% of the profits interest, or
(H) a trust or estate in which persons described in subparagraph (A), (B), (C), (D), or (E), hold more than 35% of the beneficial interest.

The flush language of § 4951(e)(4), following § 4951(e)(4)(H), provides, in part, that for purposes of § 4951(e)(4)(C)(i) (an owner of more than 10% of the total combined voting power of a corporation that is a contributor to a particular trust) and (F) (a corporation in which specified disqualified persons own more than 35% of the combined voting power), there shall be taken into account indirect stockholdings which would be taken into account under § 267(c).

Further, this flush language also provides that for purposes of §§ 4951(e)(4)(C)(ii) and (iii) (an owner of more than 10% of the profits interest of a partnership or of the beneficial interest of a trust or unincorporated enterprise, which is a contributor to the trust), (G) (a partnership in which disqualified persons own more than 35% of the profits interest), and (H) (a trust or estate in which disqualified persons own more than 35% of the beneficial interest), the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in § 267(c).

Section 267(c)(1) provides that stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries. Section 267(c)(5) provides, in part, that stock constructively owned by a person by reason of § 267(c)(1) shall, for purposes of applying § 267(c)(1), be treated as actually owned by such person.

Treas. Reg. § 53.4946-1(e) contains rules for the attribution of profits and beneficial interests. In particular, Treas. Reg. § 53.4946-1(e)(1) provides that, for purposes of Treas. Reg. § 53.4946-1(a)(1)(iii)(b) (relating to an owner of more than 20% of the profits interests of a partnership and Treas. Reg. § 53.4946-1(a)(1)(iii)(c) (relating to the beneficial interests of a trust), ownership of profits or beneficial interests shall be taken into account as though such ownership related to stockholdings, if such stockholdings would be taken into account under § 267(c) and the regulations thereunder. However, for purposes of Treas. Reg. § 53.4946-1(e), any profits interest or beneficial interest which has been counted once (whether by reason of actual or constructive ownership) in applying § 4946(a)(1)(F) (relating to a partnership in which disqualified persons hold more than 35% of the beneficial interest) or § 4946(a)(1)(G) (relating to a trust or estate in which disqualified persons hold more than 35% of the beneficial interest) shall not be counted a second time.

The revocation of Pooling Arrangement's § 761(a) election and the recapitalization of the Funds are two separate transactions in which self-dealing potentially may occur. Under § 468A(e)(5), a Nuclear Decommissioning Reserve Fund is treated in the same manner as a trust described in § 501(c)(21) for purposes of § 4951. Each Fund is a qualified fund subject to the rules of § 468A. Accordingly, each Fund is treated in the same manner as a trust described in § 501(c)(21) and is subject to the excise tax on self-dealing imposed by § 4951.

Applying the rules under § 4951(e)(4) to the facts as provided, we determined :

1. Y contributes its share of the decommissioning costs to each Fund and therefore is a disqualified person described in § 4951(e)(4)(A) with respect to each Fund;

2. Each Fund is a disqualified person with respect to any other Fund with respect to which a disqualified person described in § 4951(e)(4)(A) holds more than 35% of the beneficial interest; and

3. Pooling Arrangement is not a disqualified person with respect to any of the Funds because the profits interests in Pooling Arrangement held by the Funds are considered as owned proportionately by or for Y.

In order for an act of self-dealing to have occurred, either or both the revocation of the § 761(a) election and the recapitalization of the Funds must be a direct or indirect sale or exchange of real or personal property between the Funds and Y or among the Funds. As represented by Y, the revocation of its § 761(a) election results in a § 721 contribution of the investment assets by each Fund to Pooling Arrangement and not a sale or exchange of real or personal property for purposes of § 4951. Therefore, the revocation the § 761(a) election does not result in an act of self-dealing for purposes of § 468A(e)(5).

Similarly, recapitalization of the Funds results in the deemed exchange of one interest in Pooling Arrangement for another interest that represents a specific mix of assets in the different asset pools. Y represents that the total fair market value of the investments of each Fund will be the same before and after the recapitalization. Because Pooling Arrangement is not a qualified person with respect to the Funds, no act of self-dealing occurs for purposes of § 468A(e)(5).

Ruling 5: None of the Funds will be disqualified under § 468A(e)(6) as a result of the revocation of Pooling Arrangement's § 761(a) election and subsequent treatment of Pooling Arrangement as a partnership subject to subchapter K or the recapitalization of Pooling Arrangement.

Because neither the revocation of Pooling Arrangement's § 761(a) election and subsequent treatment of Pooling Arrangement as a partnership subject to subchapter K nor the recapitalization of Pooling Arrangement result in an act of self-dealing for purposes of §§ 4951(a) and 468A(e)(5), none of the Funds will be disqualified under § 468A(e)(6).

Except as specifically set forth above, no opinion is expressed concerning the federal tax consequences of the facts described above under any other provision of the Internal Revenue Code and the regulations thereunder. Specifically, we express or

imply no opinion regarding whether Pooling Arrangement is a partnership or the tax consequences resulting from the revocation of the § 761(a) election.

This ruling is limited to allocations of gain or loss from the sale or other disposition of qualified financial assets made under §§ 704(b), 704(c)(1)(A), and 1.704-3(a)(6). Specifically, no opinion is expressed concerning allocations of items other than items of gain or loss from the sale or other disposition of qualified financial assets, or the aggregation of built-in gains and losses from qualified financial assets contributed to Pooling Arrangement by any owner other than the Funds described in this ruling. Pooling Arrangement must maintain sufficient records to enable it and its Funds to comply with §§ 704(c)(1)(b) and 737.

Additionally, this ruling applies only to the contributions to Pooling Arrangement by the Funds for whom Pooling Arrangement supplied specific information concerning the contributed assets as described above, and not to any other contributions by the Funds or any other future owner.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. In accordance with the power of attorney on file with this office, copy of this letter is being sent to Y's authorized representatives.

Sincerely,

David R. Haglund
David R. Haglund
Branch Chief, Branch 1
(Passthroughs & Special Industries)

Enclosures (2)
Copy of this Letter
Copy for 6110 purposes

cc: