

## INTERNAL REVENUE SERVICE

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April 1, 2003

Entity E =

Dear :

This responds to your letter of October 28, 2002 and subsequent correspondence, on behalf of Entity E, requesting a ruling concerning the amended and restated deferred compensation plan (the "Plan") which E intends to be an eligible deferred compensation plan under section 457(b) of the Internal Revenue Code of 1986, as amended under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). E is represented to be a tax-exempt organization which is an eligible employer described in section 457(e)(1)(B) of the Code.

Under the Plan an eligible participant, determined as provided thereunder, may elect to defer compensation that would have been received for services rendered to E in any taxable year until death, severance from employment with E, attainment of age 70½, or until the occurrence of an unforeseeable emergency. The Plan also includes a provision for an in-service distribution of \$5,000.00 or less to be paid to a participant from his or her account in certain limited circumstances specified thereunder and in section 457(e)(9)(A). Related tax-exempt affiliates of E may also adopt the Plan as their deferred compensation plan.

Under the Plan, the participant's election to defer compensation not yet paid or made available must be filed prior to the beginning of the month in which his or her salary reduction agreement becomes effective for such amounts. The Plan provides for a maximum amount that may be deferred by a participant in any taxable year and also provides for a catch-up computation for amounts deferred for one or more of the participant's last three taxable years ending before he attains normal retirement age under the Plan. In addition, the Plan also provides for the "one additional" post-severance election described in section 457(e)(9)(B) to further delay commencement of

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distribution. The amounts that may be deferred under the annual maximum limitation and the catch-up provisions are within the limitations of section 457.

With certain limitations, a participant may elect the manner in which his deferred amounts will be distributed. If the participant fails to make a timely election by the dates set in the Plan, including the required minimum distribution date, distribution will commence at the time and in the manner set forth in the Plan. The Plan provides that the manner and time of benefit payout must meet the distribution requirements of sections 401(a)(9) and 457(d)(1) of the Code.

The Plan provides that all amounts deferred under the Plan and all income attributable to such amounts will remain (until made available to the participants or beneficiaries) solely the property and rights of the employer, subject only to the claims of the employer's general creditors. The Plan also provides that a participant or beneficiary has only an unsecured right to benefits thereunder, and no right or claim against the assets of the employer. The rights of any participant or beneficiary to payments pursuant to the Plan are generally non-assignable and not subject to pledge, alienation or encumbrance.

Section 457 of the Code provides rules for the deferral of compensation by an individual participating in an eligible deferred compensation plan described in section 457(b).

Section 457(a)(1)(B) of the Code provides that in the case of a participant in an eligible deferred compensation plan of a tax-exempt employer, any amount of compensation deferred under the plan and any income attributable to the amounts so deferred shall be includible in gross income only for the taxable year in which such compensation or other income is paid or otherwise made available to the participant or beneficiary.

Section 457(b)(5) prescribes that an eligible deferred compensation plan must meet the distribution requirements of section 457(d).

Section 457(b)(6) requires an eligible plan of a tax-exempt employer to provide that i) all amounts of compensation deferred under the plan, ii) all property and rights purchased with such amounts, and iii) all income attributable to such amounts, property, or rights must remain (until made available to the participant or other beneficiary) solely the property and rights of the employer (without being restricted to the provision of benefits under the plan), subject only to the claims of the employer's general creditors.

Section 457(d)(1)(A) provides that for a section 457 plan to be an eligible plan, the plan must have distribution requirements providing that under the plan amounts will not be made available to participants or beneficiaries earlier than i) the calendar year in which the participant attains age 70 ½, ii) when the participant has a severance from

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employment with the employer, or iii) when the participant is faced with an unforeseeable emergency as determined under Treasury regulations.

Based upon the provisions of the Plan summarized above, and the documents presented, we conclude as follows:

1. The amended and restated Plan established by Entity E is an eligible deferred compensation plan as defined in section 457(b) of the Internal Revenue Code of 1986 as amended under the EGTRRA.
2. Amounts of compensation deferred in accordance with the Plan, including any income attributable to the deferred compensation, will be includible under section 457(a)(1)(B) in the recipient's gross income for the taxable year or years in which such amounts are paid or made available to a participant or beneficiary in accordance with the terms of the Plan.

No opinion is expressed concerning the timing of the inclusion in income of amounts deferred under any deferred compensation plan other than E's amended and restated Plan described above. In addition, this ruling applies only to amounts deferred (including the earnings thereon) after the date this ruling is issued. If the Plan is significantly modified, this ruling will not necessarily remain applicable. This ruling is directed only to Entity E and its related tax-exempt affiliates that adopt the Plan. Also, this ruling applies only to the revised Plan submitted on February 18, 2003. Section 6110(k)(3) of the Internal Revenue Code provides that this ruling may not be used or cited as precedent.

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not yet been adopted. Therefore, this ruling may be modified or revoked if the adopted temporary or final regulations are inconsistent with any conclusion in the ruling. See section 12.04 of Rev. Proc. 2003-1, 2002-1 I.R.B. 1, 44. However, when the criteria in section 12.06 of Rev. Proc. 2003-1 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

Sincerely yours,

ROBERT D. PATCHELL  
Chief, Qualified Plans Branch 2  
Office of the Associate Chief Counsel  
(Tax Exempt and Government Entities)

Enclosure: