

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

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Date:

April 23, 2003

**LEGEND:**

X =

Plan =

Agreement =

Agreement=

Y =

EIN:

Dear \_\_\_\_\_ :

This is in response to your letter of August 29, 2002, and subsequent correspondence, requesting a ruling with respect to the Plan, which X intends to be an eligible deferred compensation plan under section 457 of the Internal Revenue Code of 1986. X is represented to be a public, governmental entity created by laws of the state of Y, which is charged with the function of operating the multi-campus state university system of the state of Y.

Those eligible to participate in the Plan are those individuals who render services to X and are characterized as an employee of X for federal income and wage withholding income purposes. The Plan does not extend coverage to independent contractors or to student employees of X. Employees become eligible to participate in the Plan on becoming employees of X. Under the Plan an employee may elect to defer compensation that would have been received for services rendered to X in any taxable year until death, severance from employment with X, or until the occurrence of an unforeseeable emergency. The Plan also includes a provision providing an automatic in-service distribution of \$5,000.00 or less to be paid to a participant from his or her account in certain limited circumstances set forth thereunder and in section 457(e)(9)(A).

An eligible employee becomes a participant by executing an Agreement, authorizing X to reduce the employee's compensation by a specific amount and to contribute such amount to an account established on behalf of the participant under a trust agreement. The Agreement must be entered into prior to the first day of the month in which compensation is paid or made available. 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

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participant's last three taxable years ending before he or she attains normal retirement age under the Plan. In addition, the Plan provides for the age 50 plus catch-up contributions described in section 414(v). The amounts that may be deferred under the annual maximum limitation and the catch-up provisions are within the limitations of section 457.

Participants are permitted to choose among various investment options under the Plan for the investment of amounts in their accounts. If a participant does not elect an investment option, then a participant's account is to be invested in a stable value fund.

With certain limitations, a participant may elect the manner in which his or her deferred amounts will be distributed. If the participant fails to make a timely election by 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)(1)(9) and 457(d) of the Code.

The Plan provides that amounts of compensation deferred thereunder are to be transferred to and invested in a trust described in section 457(g)(1) of the Code for the exclusive benefit of the participants and their beneficiaries. All amounts deferred under the Plan must be transferred to the trust within an administratively reasonable time period. The rights of any participant or beneficiary to payments pursuant to the Plan are generally nonassignable and not subject to pledge, transfer or encumbrance.

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

Section 457(a)(1)(A) of the Code provides that in the case of a participant in an eligible governmental deferred compensation plan, 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) of the Code prescribes that an eligible deferred compensation plan must meet the distribution requirements of section 457(d).

Section 457(d)(1)(A) of the Code 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  $\frac{1}{2}$ , (ii) when the participant has a severance from employment with the employer or (iii) when the participant is faced with an unforeseeable emergency as determined under Treasury regulations.

Section 457(g) of the Code provides that a plan maintained by an eligible governmental employer shall not be treated as an eligible deferred compensation plan

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unless all assets and rights purchased with such deferred compensation amounts and all income attributable to such amounts, property, or rights of the plan are held in trust for the exclusive benefit of participants and their beneficiaries. Section 457(g)(2)(A) provides that a trust described in section 457(g)(1) shall be treated as an organization exempt from tax under section 501(a). Section 457(g)(3) states that custodial accounts and contracts described in section 401(f) shall be treated as trusts under rules similar to the rules under section 401(f).

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

1. The Plan constitutes an eligible state deferred compensation plan as defined in section 457(b) of the Code.
2. Amounts of compensation deferred to the Plan, including any income attributable to the deferred compensation, will be includible in the gross income of the recipient only for the taxable year or years in which such amounts are paid to the participant under the Plan.
3. The Trust Agreement established with respect to the Plan under section 457(b) is treated under section 457(g) as an organization exempt from taxation under section 501(a).
4. The right of the Plan's participants to choose among various investment options under the Plan for the investment in their accounts does not adversely effect the Plan status as an eligible deferred compensation plan described in section 457(b) of the Code.

Except as specifically ruled upon above, no opinion is expressed as to the federal income tax consequences of the Plan under any other provision of the Code. If the Plan is significantly modified, the ruling will not necessarily remain applicable.

This ruling is directed only to X and applies only to the plan and trust submitted on August 29, 2002, as revised by amendments dated March 5, 2003. Section 6110(k)(3) of the Code provides that it 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

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conclusions in the ruling. See section 12.04 of Rev. Proc. 2003-1, 2003-1 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.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,

Robert D. Patchell  
Chief, Qualified Plans Branch 2  
Office of the Division Counsel/  
Associate Chief Counsel  
(Tax Exempt and Government  
Entities)

Enclosure  
Copy of letter  
Copy for section 6110 purposes