

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Person To Contact:  
, ID No.

Telephone Number:

Attention:

Refer Reply To:  
CC:TEGE:EB:QP2  
PLR-112389-04

Date:  
January 28, 2005

Legend

Employer =  
EIN:

Plan =

Trust =

X =

Dear :

This is in response to a letter, dated January 20, 2004, submitted on your behalf by your authorized representative, requesting a ruling that the Sixth Amendment restating the Plan and the First Amendment restating the Trust constitutes an eligible deferred compensation plan as defined in section 457(b) of the Internal Revenue Code. It is represented that Employer is a political subdivision of the state of X and is an employer that is a state or local governmental entity as described in section 457(e)(1)(A).

In a letter dated February 22, 2000, the Internal Revenue Service issued a favorable ruling on the status of the Plan, as amended (the "Prior Ruling"). Employer subsequently amended the Plan, effective May 1, 2000, to change the terms under which participants may change investment options. To comply with the regulations published in the Federal Register on August 27, 2003 (68 FR 51446) Employer adopted a Sixth Amendment to the Plan that amended and restated the Plan effective December 15, 2003.

The Employer established the Plan in 1979 for the benefit of eligible employees. Only executive employees may participate in the Plan. Under the Plan a participant may defer compensation by filing a salary deferral agreement that shall take effect on the first payday of the first calendar month following its filing with the Employer if it is filed on or before the 15<sup>th</sup> calendar day of the preceding month. Otherwise, an agreement filed after the 15<sup>th</sup> day of a calendar month shall be effective on the first regular payday of the second following month; provided, however, that a new eligible participant may defer compensation payable in the calendar month during which he or she first becomes an eligible participant if an agreement is entered into on or before the first day on which the eligible participant performs services for the Employer. The Plan provides for a maximum amount that may be deferred by a participant in any taxable year and for a catch-up computation for amounts deferred for one or more of the participant's last three taxable years ending before normal retirement age under the Plan. The Plan also provides for a catch-up contribution for individuals age 50 or older. The amounts that may be deferred under the annual maximum limitation and the catch-up provisions are within the limitations set out in section 457 of the Code.

The Plan permits payment of plan benefits upon severance of employment, death, or an unforeseeable emergency. Plan benefits will be paid out in annual installments over a period of one to ten years. The participant may designate the period of years for payout of the annual installments. The manner and time of benefits must meet the distribution requirements of section 401(a)(9) and 457(d)(2) of the Code.

The Plan allows segregation of accounts on behalf of and payments to an ex-spouse, or an ex-spouse's beneficiary, pursuant to a court order. The Plan provides that no distribution may be made to an ex-spouse, or an ex-spouse's beneficiary that may violate section 457(d)(1)(A) of the Code.

The Plan, in accordance with section 457(e)(9)(A) of the Code, includes a provision permitting an in-service distribution of \$ 5,000.00 or less from a participant's account provided that 1) the total amount payable to the participant under the Plan does not exceed the dollar limit under section 411(a)(11) (currently \$ 5,000), 2) the participant had not previously received an in-service distribution of the total payable to him or her under the Plan, 3) no amount had been deferred under the Plan for the participant during the two-year period ending on the date of such in-service distribution and 4) the participant has elected to receive the distribution.

The Plan further provides that all amounts of compensation deferred pursuant to the Plan, all property and rights purchased with such amounts and all income attributable to such amounts, property, or rights shall be held in trust for the exclusive benefit of participants and beneficiaries under the Plan. The trust under the Plan was established pursuant to a written agreement that is represented to be a valid trust under the laws of State X.

The rights of any participant, or any other person, to payments pursuant to the Plan are not subject in any manner to anticipation, assignment, pledge or charge in whole or in part, either directly or by operation of law or otherwise, including but without limitation, execution, levy, garnishment, attachment, pledge, bankruptcy, or in any other manner, but excluding devolution by death or mental incompetency or assignment by reason of divorce or legal separation from his or her spouse.

The terms of the Trust make it impossible prior to the satisfaction of all liabilities with respect to participants and their beneficiaries for any part of the assets and income of the trust to be used for, or diverted to, purposes other than the exclusive benefit of participants and their beneficiaries.

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

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

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 70-1/2, 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. However, section 401(a)(9)(C)(i) generally allows plans to postpone the required beginning date until April 1 of the calendar year following the later of the calendar year in which the employee retires or in which he attains age 70-1/2.

A basic requirement prescribed by section 457(b)(5) is that an eligible section 457 plan must meet the section 457(d) distribution requirements described above in order to retain its tax- deferred eligible status. A section 457 plan would violate these provisions of section 457(b)(5) and the regulations thereunder if the participant or anyone else received a distribution earlier than the earliest date established in section 457(d)(1)(A).

Section 457(e)(9)(A) provides that the total amount payable to a participant under

the plan will not be treated as made available merely because the participant may elect to receive such amount (or the plan may distribute such amount without the participant's consent) if (i) such amount does not exceed \$ 5,000, and (ii) such amount may be distributed only if -- (I) no amount has been deferred under the plan with respect to such participant during the 2-year period ending on the date of the distribution, and (II) there has been no prior distribution under the plan to such participant under this option.

Section 1.457-6(c)(2) of the Income Tax Regulations define an unforeseeable emergency as a severe financial hardship of the participant or beneficiary resulting from an illness or accident of the participant or beneficiary, the participant's or beneficiary's spouse, or the participant's or beneficiary's dependent (as defined in section 152(a)); loss of the participant's or beneficiary's property due to casualty (including the need to rebuild a home following damage to a home not otherwise covered by homeowner's insurance, e.g., as a result of a natural disaster); or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant or the beneficiary.

Section 457(g)(1) provides that a plan maintained by an eligible governmental employer shall not be treated as an eligible deferred compensation plan 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) 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)(2)(B) provides that the amounts in the trust are treated as includible in the gross income of participants and beneficiaries only to the extent, and at the time, provided in section 457.

Under the terms of the Plan and Trust, the trustee must hold all of the section 457(b) plan assets for the exclusive benefit of the participants and their beneficiaries, and all amounts deferred under the Plan must be transferred to a trust meeting the requirements of section 457(g) of the Code within an administratively reasonable time period.

Based upon the provisions of the Sixth Amendment that restates the Plan and the Trust summarized above and provided that the Plan is amended as stated in the letter submitted by your authorized representative, dated January 20, 2004, we conclude as follows:

1. The Plan, along with the Trust, constitutes an eligible deferred compensation plan as defined in section 457(b) of the Code;

2. Amounts of compensation previously deferred (or in the future deferred) by a Plan participant in accordance with the Plan, including any income attributable to the deferred compensation, will be includible in gross income for the taxable year or years in which amounts are paid from the Plan's Trust to the Plan participant;

3. The Plan is not an ineligible plan described in section 457(f); and

4. The Trust established under the Plan is treated under section 457(g) as exempt from federal income taxation pursuant to section 501(a), and the trustee is eligible to serve as the trustee of the Trust established under the Plan pursuant to section 457(g).

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

This ruling is directed only to Employer and applies only to the plan and trust submitted on January 20, 2004. 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, a copy of this letter is being sent to your authorized representative.

Sincerely,

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

Enclosure (1):

Copy of this letter for section 6110 purposes

cc: