

## INTERNAL REVENUE SERVICE

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October 23, 2001

X =

Plan =

Dear

This is in response to your letter of April 11, 2001 and subsequent correspondence requesting a ruling with respect to X's Deferred Compensation Plan which X intends to be an eligible deferred compensation plan under section 457 of the Internal Revenue Code of 1986.

Under the Plan, a participant may elect to defer compensation received for services rendered to an employer until separation from service, death, disability or until the occurrence of an unforeseeable emergency. Each employee may become a participant in the Plan following execution of a participation agreement, which establishes the amount of deferral. The Plan allows 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 the participant attains normal retirement age under the Plan. 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.

A participant or his beneficiary may elect the manner in which his deferred amounts will be distributed. The election must be made at least 30 days before the commencement of benefits. Subject to restrictions established by the Administrator, the Plan shall permit payout options in the form of lump sums, periodic payments of a fixed amount or fixed duration or life contingent annuities. Absent such an election, the Account will be paid in a periodic payment. However, if the monthly payment at benefit commencement will be less than \$50 a month, the Administrator shall pay such amount in a lump sum. The manner and time of benefit payout must meet the distribution requirements of sections 457 (d) and 401(a)(9) of the Code.

Membership in the Plan is available to employees of the employer. The term employee means any individual who performs services for an employer for compensation on a regular basis, specifically including any salaried employee or elected or appointed official. The term employee also includes an independent contractor who performs services for an employer. Employer means X or any political subdivision of X that participates in the Plan.

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.

The Plan can accept a transfer of compensation previously deferred under another plan of deferred compensation maintained by another employer as an eligible Code section 457 plan. A participant who is entitled to a distribution and accepts employment with another employer that maintains an eligible 457 plan may elect to transfer his or her compensation deferred under the Plan to that other plan if the other plan can accept such transfers and amounts are transferred to a trust described in section 457 (g). Both transfers to the Plan and from the Plan must be made in cash.

Participants may not sell, assign, transfer or otherwise convey the right to receive any payments under the Plan.

The Plan permits hardship withdrawals of all or any portion of a participant's deferred benefit, limited to an amount reasonably necessary to alleviate the unforeseeable emergency. The Plan also includes a provision permitting a participant to elect an in-service distribution of \$5,000 or less from his or her account in certain limited circumstances set forth thereunder and in accordance with section 457(e)(9)(A).

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) of the Code 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.

Treas. Reg. sec. 1.457-1(b)(2) states that amounts deferred (including amounts previously deferred) under an eligible plan will not be considered made available to the participant solely because the participant is permitted to choose among various investment modes under the plan for the investment of such amounts whether before or after payments have commenced under the plan.

Section 457(g)(1) states that a plan maintained by a State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State shall not be treated as an eligible deferred compensation plan unless all assets and income of the plan are held in trust for the exclusive benefit of participants and their beneficiaries.

Section 457(e)(10) states that a participant shall not be required to include in gross income any portion of the entire amount payable to such participant solely by reason of the transfer of such portion from one eligible deferred compensation plan to another eligible deferred compensation plan.

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, as amended under sections 1447 and 1448 of the Small Business Job Protection Act of 1996.

2. Amounts of compensation deferred pursuant 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 or otherwise made available to the participant under the Plan.

3. The trust 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).

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 April 11, 2001, as revised by amendments submitted on September 25, 2001 and October 19, 2001. 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 conclusions in the ruling. See section 12.04 of Rev. Proc. 2001-1, 2001-1 I.R.B. 1, 46. However, when the criteria in section 12.05 of Rev. Proc. 2001-1 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

Sincerely yours,  
ROBERT D. PATCHELL  
Acting Chief, Qualified Plans  
Branch Two  
Office of the Division Counsel/  
Associate Chief Counsel  
(Tax Exempt and Government  
Entities)

Enclosure

Copy of letter

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