

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200927016**
Release Date: 7/2/2009

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:

Index Number: 457.00-00

, ID No.
Telephone Number:

Refer Reply To:
CC:TEGE:EB:QP2
PLR-141567-08
Date:
March 25, 2009

Legend

Commission =

EIN =

Plan =

State X =

Dear :

This responds to your letter of , requesting a ruling concerning the Plan, which the Commission intends to be an eligible deferred compensation plan under section 457(b) of the Internal Revenue Code of 1986 (the Code).

The Plan is a nonqualified deferred compensation plan and related trust established by the Commission and adopted by State X for the benefit of the employees of State X. It is represented that State X is an eligible employer within the meaning of section 457(e)(1)(A).

Under the Plan, an eligible employee becomes a participant by entering into an agreement to defer compensation into the Plan. The election must be made prior to the beginning of the month in which the employee's compensation is paid or made available.

The Plan provides for a maximum amount that may be deferred by a participant in any taxable year. It also provides for a catch-up contribution for amounts deferred for one or more of the participant's last three taxable years ending before he or she attains normal retirement age under the Plan. In addition, the Plan provides for age fifty-plus catch-up contributions described in section 457(e)(18). The amounts that may be deferred under the annual maximum limitation and the catch-up provisions are within the limitations of section 457(c).

Upon separation from service, participant's account will be paid in accordance with the payment option elected by the participant. Benefits under the plan will commence no later than the latter of: 60 days after the close of the plan year in which the participant attains age 70 $\frac{1}{2}$; or 60 days after the close of the plan year in which the participant has a separation from service. The Plan provides that the manner and time of benefit payout must meet the distribution requirements of sections 457(d) and 401(a)(9) of the Code.

The Plan also provides for a distribution due to an unforeseeable emergency that is a severe financial hardship resulting from extraordinary and unforeseeable circumstances beyond the control of the participant under section 457(d)(2). The plan also provides that a participant may apply for and receive a loan from the participant's account balance.

The Plan provides for acceptance of transfers of a participant's account balance from another eligible deferred compensation plan. The Plan provides for permissive plan to plan transfers or rollovers of all or a portion of a participant's account to another eligible governmental plan if the participant has terminated service and is a participant of the other eligible plan.

The Plan provides that amounts of compensation deferred under the Plan are to be transferred to and invested in a trust as described in section 457(g)(1) 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 that is not longer than fifteen business days following the end of the month in which the amount would otherwise have been paid to the participant. Each participant shall, subject to requirements of any applicable law and any procedures established by the Committee, direct the investment of his or her benefit amount. Benefits payable from the trust may not be subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, or charge.

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 to the participant or beneficiary. Section 457(b) provides that the term "eligible deferred compensation plan" means a plan established and maintained by an eligible employer in which only individuals who perform service for the employer may be participants and which meet the deferral limitations described in section 457(c); which meets the distribution requirements described in section 457(d); which provides for deferral elections described in section 457(b)(4); and, in the case of a governmental plan, which requires the plan assets and income to be held in trust for the exclusive benefit of participants and beneficiaries as described in section 457(g).

Section 457(e)(1) provides that the term "eligible employer" means a State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State, and any other organization (other than a governmental unit) exempt from income tax.

Section 457(b)(4) of the Code provides that compensation will be deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month. An eligible plan may provide that if a participant enters into an agreement providing for deferral by salary reduction under the plan, the agreement will remain in effect until the participant revokes or alters the terms of the agreement.

Section 457(b)(2) of the Code provides the basic limits on the amount of eligible annual deferrals. However, a catch-up amount described in section 457(b)(3) may be added to this amount for participants that are within three years of the normal retirement age or, for participants age 50 or older, a catch-up amount may be added as described in section 457(e)(18). A participant eligible for both catch-up provisions is entitled to use the higher limit of the two. The total annual eligible deferral amount is limited by section 457(c). Coordination of the basic limits and the catch-up limits is described in §1.457-4(c) of the Income Tax Regulation ("regulations").

Section 1.457-4(c)(3)(v)(A) of the regulations provides that a plan may define the normal retirement age for purposes of the last-three-years catch-up provision as any age that is on or after the earlier of age 65 or the age at which participants have the right to retire and receive, under the basic defined benefit pension plan of the State or tax-exempt entity (or a money purchase pension plan in which the participant also participates if the participant is not eligible to participate in a defined benefit plan), immediate retirement benefits without actuarial or similar reduction because of retirement before some later specified age, and that is not later than age seventy and a

half. Alternatively, a plan may provide that a participant is allowed to designate a normal retirement age within these ages. For purposes of the three-year catch-up provision an entity sponsoring more than one eligible plan may not permit a participant to have more than one normal retirement age under the eligible plans it sponsors. Section 1.457-4(c)(3)(v)(B) of the regulations provides a special exception for qualified police and firefighters to retire as early as age forty for purposes of the three-year catch-up provision.

Section 1.457-5 of the regulations provides that the section 457(c) eligible-deferral amount limitation is applied to all eligible plans in which a participant participates in a tax year and is determined on an aggregate basis. If a participant has annual deferrals under more than one eligible plan and the applicable catch-up amount is not the same for each such eligible plan for the taxable year, section 457(c) is applied using the catch-up amount under whichever plan has the largest catch-up amount applicable to the participant. To the extent that the combined annual deferral amount exceeds the maximum deferral limitation, the amount is treated as an excess deferral under §1.457-4(e) of the regulations. For purposes of determining whether there is an excess deferral resulting from a failure of a plan to apply the deferral limitations, all plans under which an individual participates by virtue of his or her relationship with a single employer are treated as a single plan (without regard to any differences in funding).

Section 457(d)(1)(A) of the Code provides that amounts distributed under an eligible plan 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.

Section 1.457-6(c)(2) of the regulations provides the requirements for a unforeseeable emergency distribution. An unforeseeable emergency must be defined in the plan 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; 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. Whether a participant or beneficiary is faced with an unforeseeable emergency is determined based on the relevant facts and circumstances of each case. However, a distribution on account of unforeseeable emergency may not be made to the extent that such emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the participant's assets, to the extent the liquidation of such assets would not itself cause severe financial hardship, or by

cessation of deferrals under the plan. Further, distributions because of an unforeseeable emergency must be limited to the amount reasonably necessary to satisfy the emergency need (which may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution).

Section 457(d)(2) of the Code requires a plan to meet the minimum distribution requirements of section 401(a)(9). These requirements are described in §1.401(a)(9)-1 through 1.401(a)(9)-9 of the regulations.

Section 457(d)(3) of the Code provides that a governmental plan will not fail to meet the distribution requirements if it provides for in-service distributions of a limited-dollar amount which meet the requirements of section 457(e)(9)(A) and §1.457-6(e) of the regulations. Section 1.457-6(e) of the regulations is satisfied if the participant's total amount deferred (the participant's total account balance) which is not attributable to rollover contributions is not in excess of the dollar limit under section 411(a)(11)(A) (i.e., \$5000 adjusted for inflation), no amount has been deferred under the plan by or for the participant during the two-year period ending on the date of the distribution, and there has been no prior distribution under the plan to the participant of this kind.

Section 457(e)(10) of the Code provides 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. Section 1.457-10(b)(1) of the regulations provides that an eligible government plan may transfer amounts to, and receive amounts from, an eligible government plan if certain conditions are met.

With regard to transfers from an eligible governmental plan to another eligible governmental plan of the same employer, §1.457-10(b)(4) of the regulations provides that a transfer from an eligible governmental plan to another eligible governmental plan is permitted if the following conditions are met: (i) the transfer is from an eligible governmental plan to another eligible governmental plan of the same employer; (ii) the transferor plan provides for transfers; (iii) the receiving plan provides for the receipt of transfers; (iv) the participant or beneficiary whose amounts deferred are being transferred will have an amount deferred immediately after the transfer at least equal to the amount deferred with respect to that participant or beneficiary immediately before the transfer; and (v) the participant or beneficiary whose deferred amounts are being transferred is not eligible for additional annual deferrals in the receiving plan unless the participant or beneficiary is performing services for the entity maintaining the receiving plan.

Section 457(e)(16) of the Code provides that, with regard to rollover distributions, for an eligible deferred compensation plan if (i) any portion of the balance to the credit of

an employee in such plan is paid to such employee in an eligible rollover distribution (within the meaning of section 402(c)(4)), (ii) the employee transfers any portion of the property such employee receives in such distribution to an eligible retirement plan described in section 402(c)(8)(B), and (iii) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed, then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid. Under §1.457-10(e) of the regulations, an eligible governmental plan that permits eligible rollover distributions made from another eligible retirement plan to be paid into the eligible governmental plan is required to provide that it will separately account for any eligible rollover distributions it receives. Amounts contributed to an eligible governmental plan as eligible rollover distributions are not taken into account for purposes of the annual limit on annual deferrals by a participant but are otherwise treated in the same manner as amounts deferred under the plan. Section 1.402(c)-2(b) of the regulations provides that a distributee other than the employee or the employee's surviving spouse (or a spouse or former spouse who is an alternate payee under a qualified domestic relations order) is not permitted to roll over distributions.

Consistent with section 414(p)(10) of the Code, §1.457-10(c) of the regulations provides for distributions made pursuant to a qualified domestic relations order. If a distribution or payment is made from an eligible plan to an alternate payee pursuant to a qualified domestic relations order, rules similar to the rules of section 402(e)(1)(A) apply to the distribution. Section 414(p)(8) provides that the term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

Section 457(e)(17) of the Code provides that no amount shall be includible in gross income by reason of a direct trustee-to-trustee transfer to a defined benefit governmental plan (as defined in section 414(d)) if such transfer is for the purchase of permissive service credit (as defined in section 415(n)(3)(A)) under such plan or a repayment to which section 415(k)(3) does not apply.

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 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).

Based upon the information submitted and the representations made, we conclude as follows:

1. The Plan is an eligible deferred compensation plan as defined in section 457(b) of the Code and the regulations.
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)(A) of the Code in the recipient's gross income for the taxable year or years in which amounts are paid to a participant or beneficiary in accordance with the terms of the Plan.
3. Amounts distributed from the Plan in an eligible rollover distribution (within the meaning of section 402(c)(4) of the Code), shall not be includible in gross income for the taxable year in which paid as provided in section 457(e)(16).
4. The trust established as part of the Plan meets the requirements of section 457(g)(1) of the Code and is an organization exempt from tax under section 501(a) of the Code.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter. If the Plan is significantly modified, this ruling will not necessarily remain applicable.

No opinion is expressed concerning the timing of the inclusion in income of amounts deferred under any deferred compensation plan other than the plan described above. In addition, this ruling applies only to deferrals made after the date of this ruling.

No ruling was requested and no opinion expressed concerning the amount included by a participant in gross income as a result of the rollover of an eligible rollover distribution from the Plan into a Roth IRA (as defined in section 408A).

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, a copy of this letter is being sent to your authorized representative.

Sincerely,

/John T. Ricotta/

John T. Ricotta
Branch Chief, Qualified Plans Branch 2
(Employee Benefits)
(Tax Exempt & Government Entities)

Enclosure:

Copy for section 6110 purposes