Internal Revenue Service

Department of the Treasury

200020061

Washington, DC 20224

Uniform Issue List: 414.00-00

Contact Person:

Telephone Number:

In Reference to:

T:EP:RA:T3

Date:

Attention:

FEB 24 2000

Legend:

Employer A =

University B =

Director C =

Association D =

State M =

Statute P =

Plan X =

Plan Y =

Dear

This is in response to your request for a ruling, dated May 17, 1999, submitted by your authorized representative, as to whether Employer A is an agency or instrumentality of State M and that, as a result, Plan X and Plan Y constitute governmental plans within the meaning of section 414(d) of the Internal Revenue Code (the "Code"). Letters dated August 2, 1999 and October 5, 1999, and a telephone discussion on February 11, 2000, supplemented the request.

Employer A maintains Plan X and Plan Y. Plan X and Plan Y are qualified under section 401(a) of the Code. Employer A is a department of University B. Employer A is an

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organization exempt from taxation under section 501(a) as an organization described in section 501(c)(3) of the Code.

University B is established under the constitution of State M, which provides that "the State shall maintain a system of higher education, including [University B], which shall be dedicated to excellence in higher education. The general assembly shall determine the size, number, terms and method of appointment of the governing boards of [University B] and of such constituent units or coordinating bodies in the system as from time to time may be established". Chapter 185b of Statute P deals with the constituent units of State M's system of higher education, including (in Sections 10a-102 *et seq.*) University B.

Employer A was established in 1961 as Association D. Article II of its 1979 constitution describes Employer A as "an association of student operated commissaries occupying University B residences formed to provide central administrative services, programs, guidance and other services for the benefit of its membership."

While described in its constitution as an association, Employer A from its inception has been regarded by University B as an "activity fund" established under Statute P, Sections 4-52 through 4-54. Statute P, Section 4-52 defines an activity fund as "any fund operated in any state educational, welfare or medical institution for the benefit of the employees or students of such institutions... the revenue of which is derived from the operation of canteens, vending machines... membership fees, deposits or any other legal source compatible with the good government of such institutions."

Statute P, Section 4-53 provides that activity funds are established by the administrative head of an institution that may, within the above definition, establish an activity fund. Section 4-53 also authorizes "the use of such state facilities as space, fixtures, heat and light to obtain revenue" for an activity fund.

It has been represented that Employer A has always been under the control of University B, although the extent of that control has increased over the years. Director C is, and always has been, an employee of University B, appointed by the Vice President for Student Affairs. Under Article VI of the 1979 constitution, the board of directors of Employer A was granted authority and responsibility for the formulation of general policy for the operation, management, and affairs of the association to the extent allowed by University B.

On March 13, 1987, the board of trustees of University B approved amendments to the constitution and bylaws of Employer A. The bylaws provided that the business and other affairs of Employer A will be managed by Director C within broad University B guidelines. Previously, under Section 6.1 of the 1979 bylaws, "broad policy guidelines" had been determined by the board of directors of Employer A, not by University B. At the same time, the 1987 bylaws reflect closer financial control by University B over Employer A. Section 7.3 of the 1987 bylaws provided that the records of Employer A would be open to audit by University B.

Previously each member unit of Employer A had set its own dining fees. Section 7.4 of the 1987 bylaws provided: "There shall be one annual board fee for all dining units. This board fee shall be established by the University B board of trustees upon the recommendation of University B's administration." Finally, the 1987 constitution changed the rights of the membership of Employer A, transferring from its members to the board of trustees of University B, the power to amend Employer A's constitution. Similarly, the 1987 bylaws vested in the board of trustees of University B the power to amend Employer A's bylaws.

Most of Employer A's revenues are derived from student board fees which are collected from students by University B and remitted to Employer A. Since 1987, the board of trustees of University B has approved the board fees charged by the dining units serving members of Employer A, so that the board fees charged by all dining units have been uniform. Also, Employer A derives some funds from its catering operation. Revenues derived from the student board fees represent approximately 94 percent of Employer A's total revenues, while the catering operation accounts for approximately 6 percent of total revenues. The catering operation provides catering services principally to University B. These include, for example, catering University B functions such as receptions and banquets.

All the individuals who work for Employer A who have the power to hire and fire employees (Employer A's management employees) are state employees, with one exception.

In addition, the board of trustees of University B approves Employer A's union contracts.

Also, University B owns the buildings in which Employer A operates as well the equipment that Employer A uses to provide food services.

Plan X became effective as of September 1, 1974, and covers all employees of Employer A who complete one year of service. Plan Y became effective as of September 1, 1994, and covers all employees of Employer A who are not also employed by University B.

Based on the foregoing, you request a ruling that Employer A is an agency or instrumentality of State M, and that Plan X and Plan Y are governmental plans within the meaning of section 414(d) of the Code.

Section 414(d) of the Code provides that a "governmental plan" means a plan established and maintained for its employees by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Revenue Ruling 89-49, 1989-1 C.B. 117 provides that a plan will not be considered a governmental plan merely because the sponsoring organization has a relationship with a

governmental unit or some quasi-governmental power. One of the most important factors to be considered in determining whether an organization is an agency or instrumentality of the United States or any state or political subdivision thereof is the degree of control that a governmental entity or entities exercise over the organization's everyday operations. Other factors include: (1) whether there is specific legislation creating the organization, (2) the source of funds for the organization, (3) the manner in which the organization's trustees or operating board are selected, and (4) whether the applicable governmental unit considers the employees of the organization to be employees of the applicable governmental unit. Although all of the above factors are considered in determining whether an organization is an agency or instrumentality of a government, the mere satisfaction of one or all of the factors is not necessarily determinative.

In Revenue Ruling 89-49 the Service ruled that the retirement plan discussed in the ruling was not a governmental plan within the meaning of section 414(d) of the Code because, among other reasons, the degree of control which the municipalities exerted over the entity in its everyday operations was minimal.

In this case, all the individuals who work for Employer A who have the power to hire and fire employees (Employer A's management employees) are state employees, with one exception. Director C is appointed by and under the control of University B. University B establishes the fees charged by Employer A, and University B has the power to amend Employer A's constitution. Also, all union contracts entered into by Employer A must be approved by University B.

Employer A is distinguishable from the entity described in Revenue Ruling 89-49. First, the entity described in Rev. Rul. 89-49 was managed by a board of trustees elected by the employees of the entity. In this case, Director C is chosen and employed by University B. Second, with the exception of catering operation revenues derived from private catering (less than one-half of one percent of Employer A's total revenues), all of Employer A's revenues are derived from University B, whereas the entity in Rev. Rul. 89-49 derived much of its revenue from community donations.

University B treats the employees of Employer A as governmental employees, as evidenced by the fact that employees of Employer A are included in Plan X and Plan Y.

Accordingly we conclude that, for purposes of section 414(d) of the Code, Employer A is an agency or instrumentality of State M, and that Plan X and Plan Y are governmental plans within the meaning of section 414(d) of the Code.

No opinion is expressed as to the federal tax consequences of the transaction described above under any other provisions of the Code.

The above ruling is based on the assumption that Plan X and Plan Y will be otherwise qualified under section 401(a) of the Code, and the related trusts will be tax exempt under section 501(a).

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

A copy of this letter is being sent to your authorized representative in accordance with a power of attorney on file in this office.

Sincerely Yours,

/s/ Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3
Tax Exempt and Government Entities Division

Enclosures:
Notice of Intention to Disclose
Deleted Copy of Ruling

CC: