Internal Revenue Service

Department of the Treasury

200028042

Washington, DC 20224

SIN: 414.03-00

Person to Contact:

Telephone Number:

Refer Reply to: T:EP:RA:T3

Date:

Legend:

Retirement Board B =

State A =

Plan P =

Plan D =

This is in response to a request for a ruling letter submitted on your behalf by your authorized representative on June 10, 1999, as supplemented by letters dated July 29, 1999, September 21, 1999 and December 14, 15 and 16, 1999. This request concerns the consequences under section 401(k)(4)(B) of the Internal Revenue Code of extending Plan P to additional governmental entities in State A.

The following facts and representations have been submitted on your behalf:

On July 1, 1971, the State A Department of Health and Welfare adopted a supplemental retirement plan known as the State A Department of Health and Welfare Supplemental Retirement Plan. On April 1, 1972, the State A Department of Lands, adopted a similar plan known as the State A Department of Lands' Supplemental Retirement Plan. These plans were both supplemental to Plan D, a defined benefit plan maintained by State

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A. These plans were adopted before section 401(k) existed. However, they were both pre-ERISA money purchase plans which provided a pretax contribution feature from their inception. Thus, they became 401(k) plans when section 401(k) became effective.

Plan D is administered by Retirement Board B. The employees of most governmental entities in State A with few exceptions are eligible to participate in Plan D. The covered employees can be categorized as follows: (1) employees of State A, (2) employees of local school districts within State A, (3) employees of political subdivisions of State A, such as cities, counties, and taxing districts, and (4) employees of other State A statutorily created entities that perform governmental functions.

On October 1, 1994, State A adopted Plan P, a 401(k) plan which is the subject of this ruling. At that time, most of the assets of the State A Department of Health and Welfare Supplemental Retirement Plan and the State A Department of Lands' Supplemental Retirement Plan were transferred to Plan P. On March 25, 1995, the Internal Revenue Service issued a favorable determination letter stating that Plan P was a qualified plan, and met the requirements of section 401(k) of the Code. Plan P was subsequently amended and restated on February 1, 1998, effective as of January 1, 1998. On December 8, 1998, the Internal Revenue Service issued a favorable determination letter on this amendment and restatement.

Initially, Plan P was available only to employees of the Department of Health and Welfare and the Department of Lands. On March 14, 1995, State A Code section 59-1308 was approved. This legislation gave Retirement Board B, which also administers Plan P, approval to extend Plan P to the same group of employees as is covered by Plan D. Plan P is supplemental to Plan D and is available only to the employees of employers participating in Plan D.

Although State A Code section 59-1308 gives Retirement Board B the authority to extend Plan P to all employees covered by Plan D, to date, it has extended Plan P only to employees of State A. It now proposes to extend Plan P to other employees covered by Plan D, that is, employees of State A local school districts, political subdivisions, and other statutorily created entities that perform governmental functions. Since the establishment of Plan D, State A has consistently treated all participating employers as a single employer, for purposes of for example, the section 415 limits and the determination of whether an employee has terminated employment for purposes of receiving a distribution. If Plan P is extended as proposed in this ruling, all of the local school districts, political subdivisions and statutorily created entities as well as the state itself will similarly be treated as a single employer.

Based on the foregoing, your authorized representative has requested a ruling on your behalf that the proposed extension of Plan P to cover the employees of State A local school districts, political subdivisions and other statutorily created entities that perform governmental functions will not violate section 401(k)(4)(B) of the Code.

Section 401(k) sets forth the requirements for a qualified cash or deferred arrangement. Section 401(k)(2) provides, in part, that a qualified cash or deferred arrangement is any arrangement which is part of a profit sharing plan which meets the requirements of section 401(a) under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash.

Section 401(k)(4)(B)(ii) of the Code provides that a cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a state or local government or a political subdivision thereof, or any agency or instrumentality thereof (a "governmental unit"). Prior to being amended by the Tax Reform Act of 1986 ("TRA"), section 401(k) permitted such governmental units to maintain a qualified cash or deferred arrangement. Section 1116(f)(2)(B)(i) of TRA provides that section 401(k)(4)(B) does not apply to cash or deferred arrangements adopted by a governmental unit before May 6, 1986.

Section 1.401(k)-1(e)(4)(ii) of the Income Tax Regulations provides that a cash or deferred arrangement maintained by a governmental unit is treated as adopted after May 6, 1986, with respect to all employees of any employer that adopts the arrangement after that date. However, if an employer adopted an arrangement prior to that date, all employees of the employer may participate in the arrangement. In addition, if the governmental unit adopted a cash or deferred arrangement prior to that date, then any cash or deferred arrangement adopted by the unit at any time is treated as adopted before that date.

Section 1.401(k)-1(g)(6) of the regulations provides as a definition of the word "employer" for 401(k) plans, that the term means the employer within the meaning of section 1.410(b)-9 of the regulations.

Section 1.410(b)-9 of the regulations states that the term "employer" means the employer maintaining the plan and those employers required to be aggregated with the employer under sections 414(b), (c), (m), or (o) of the Code.

Since the establishment of Plan D, State A has consistently treated all participating employers as a single employer, for purposes of for example, the section 415 limits and the determination of whether an employee terminated employment. The Plan D participating employers who will be participating in Plan P will likewise be treated as a single employer for purposes of the administration of Plan P. Such treatment represents a reasonable and good faith interpretation of the rules and definitions under sections 414(b), (c), (m) and (o) of the Code. Consequently, it is reasonable here to treat all the Plan D participating employers in Plan P as a single employer for purposes of section 1.401(k)-1(e)(4)(ii) of the Regulations.

Accordingly, since plans described in section 401(k) of the Code were adopted by State A through two of its Departments prior to May 6, 1986, the adoption of Plan P by State A in 1994 and its proposed extension to the Plan D participating employers will not violate section 401(k)(4)(B) of the Code.

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 has been sent to your authorized representative in accordance with a power of attorney submitted with the request.

Sincerely,

Frances V. Sloan

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

Enclosures:
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Notice 437

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