Uniform Issue List: 403.04-04

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MAR 19 2001

Attn: **********

Legend

Employer M = **********
Plan X = **********
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State A = **********

Dear **********

This letter is in response to a request for a ruling request dated September 14, 2000, as supplemented by correspondence dated October 18, 2000, and February 21, 2001, which was submitted on your behalf by your authorized representative, concerning an arrangement described under section 403(b)(1) of the Internal Revenue Code ("Code").

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

Employer M is a nonprofit corporation organized in 1965 under the laws of State A and is a private non-operating foundation under sections 501(c)(3) and 509(a) of the Code. Effective January 1, 1989, Employer M established Plan X for the benefit of its employees. Plan X received favorable 403(b) rulings in 1989, 1993, and in 1996. Employer M now seeks approval of its amended and restated Plan effective January 1, 1997.

Section 1.7 of Plan X requires that funding be exclusively through the purchase of annuity contracts issued by one or more insurance companies. Effective as of January 1, 1992, plan contributions may be invested with such insurers as are approved by the Board of Directors of Plan X.

Section 1.7 of Plan X has been amended to provide that in the event of conflict between the terms of Plan X and the Contract, the terms of Plan X shall prevail.

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Section 2.1 of Plan X provides that in accordance with Article 3 each employee of Employer M, on or after the effective date, is eligible to enter into a Salary Reduction Agreement with Employer M. Under section 2.2 of Plan X, all employees of Employer M and participating employers (except employees who (i) are hired prior to January 1, 1995, and work less than 20 hours per week and (ii) "leased employees," as defined in section 414(n) of the Code) are immediately eligible to enter into a salary reduction agreement. Article 3, section 3.3 of Plan X provides that effective as of January 1, 2000, a participant shall not be permitted to execute or modify more than two salary reduction agreements during a single Plan Year, which shall become effective as of the earlier of : (1) January 1 of the year following the year in which the salary reduction agreement was executed or modified or (2) July 1 of the year in which the salary reduction agreement was executed or modified if such an agreement was executed or modified before such effective date.

Section 3.1 of Plan X , is amended to read as follows: A participant may elect under a salary reduction agreement to make contributions to Plan X for any Plan Year of (i) not less than one percent and not more than twenty percent of his Earnings (as defined herein) or (ii) a specified dollar amount per pay period not in excess of the percentage limitation described in (i) above; provided, however, that the amount of a participant's Elective Deferral Contributions must be at least $5.00 for each payroll period.

Under section 4.1 of Plan X, participating employers are required to contribute on behalf of each participant who has satisfied the applicable participation requirements of Article 2 of Plan X and who is employed by Employer M, an amount equal to fifteen percent of the eligible participant's earnings during the plan year.

For plan years commencing on or after January 1, 1995, participants may choose to invest contributions in such investment products selected in the discretion of the Administrative Committee which constitute qualified investment products for purposes of annuity plans described in section 403(b) of the Code.

Under section 5.1 of Plan X, a participant's assets are distributable only after the participant's termination of employment on account of the participant's (i) retirement , (ii) early retirement, (iii) death, (iv) resignation or dismissal, or (v) disability. Distributions must commence under section 7.4 of Plan X by April 1 of the Calendar year next following the later of the calendar year in which the participant attains age 70 1/2, or the calendar year in which the participant retires. All distributions must be made in accordance with section 401(a)(9) of the Code and regulations thereunder. For plan years commencing on or after January 1, 1995, participants may choose to invest contributions in such investment products selected in the discretion of the Administrative Committee which constitute qualified investment products for purposes of annuity plans described in section 403(b) of the Code.

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Section 6.1 of Plan X, limits an employee's annual additions for any plan year to the lesser of $30,000 or 25 percent of the employee's total compensation as defined under section 415 of the Code. "Annual additions" are defined as the total of a participant's elective deferral contributions and employer contributions to Plan X for a plan year. Section 6.2 of Plan X limits the total benefits a participant may receive from all benefit plans maintained by Employer M and participating employers to the combined fraction limitation contained in section 415(e) of the Code.

Section 6.3 of Plan X, limits contributions made pursuant to salary reduction agreement for each plan year to an amount not to exceed $10,500 (or such other amount as determined by the Secretary of the Treasury for a plan year under section 402(g) of the Code). Salary reduction contributions which exceed the $10,500 limit during a plan year are distributed to the participant according to a procedure set forth in section 6.3 of Plan X.

Under section 6.4 of Plan X, plan contributions are not permitted to exceed the exclusion allowance for each participant as set forth in section 403(b)(2) of the Code. Plan X provides that the exclusion allowance is 20 percent of a participant's "includible compensation," as defined in section 403(b)(3) of the Code, multiplied by the participant's years of service less amounts previously excludable.

Section 7.1 of Plan X provides that plan contributions are nonforfeitable at all times.

Pursuant to section 7.2 of Plan X, the normal form of benefit is a single life annuity for unmarried participants and a qualified joint and survivor annuity for married participants for which no consent to waive this form of payment has been made. Additional forms of benefit having an equal actuarial value, including a single lump sum payment option may be selected by participants in accordance with section 7.2 of Plan X.

Under section 7.7 of Plan X, a participant may withdraw contributions made pursuant to the salary reduction agreement on or after attaining age 59 ½, or on account of a participant's hardship, as defined in Plan X. Effective on or after January 1, 1989, withdrawals on account of a participant's hardship, as defined in Plan X, may be made during the participant's employment.

Section 8.6 of Plan X provides that, rollover amounts may be contributed or transferred directly to Plan X if such amounts are distributed or transferred directly from Plan X if such amounts are distributed or transferred directly from a plan qualified under section 403(b) of the Code or from a conduit individual retirement arrangement under section 408(d)(3)(A)(iii) of the Code and will be credited to an account established in the name of the participant. Any rollover or transferred amounts received by Plan X in accordance with the preceding sentence shall be applied toward the purchase of one or more contracts, and participants making such rollover or transferred amounts may elect the manner in which the amounts are invested among the investment funds offered by the insurer. Effective for distributions under Plan X made on or after January 1, 1993, and

notwithstanding any provision of Plan X to the contrary that would otherwise limit an election under Plan X, a distributee may elect in the manner prescribed by the Administrative Committee to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

Section 9.7 of Plan X provides that, the interests of any participant in Plan X or the related annuity contracts are not subject to voluntary or involuntary sale, transfer, alienation or encumbrance, except as permitted under section 414(p) of the Code regarding qualified domestic relations orders, or as required by the tax withholding provisions of the Code or any State's income tax act.

All amounts held under Plan X or related annuity contracts must be used for the exclusive benefit of Plan X participants and cannot be diverted to Employer M or used for any purpose other than the benefit of employees.

Based on the foregoing facts and representations, you have requested the following rulings:

1. Contributions to Plan X shall be treated under section 403(b) of the Code as amounts contributed by Employer M or participating employers for annuity contracts, and

2. Contributions to Plan X (and earnings thereon) shall not be taxable in the year contributed, to the extent that such contributions satisfy the applicable limits under sections 402(g)(2), 403(b)(2) and 415 of the Code, but instead will be taxable under section 72 of the Code in the year in which such amounts are received by the participant.

Section 403(b)(1) of the Code provides, in part, that if: (A) an annuity contract is purchased for an employee by an employer described in section 501(c)(3) which is exempt from tax under section 501(a); (B) such annuity contract is not subject to section 403(a); (C) the employee's rights under the contract are nonforfeitable, except for failure to pay future premiums; (D) such contract is purchased under a plan which meets the nondiscrimination requirements of paragraph 12, except in the case of a contract purchased by a church; and (E) in the case of a contract purchased under a plan which provides a salary reduction agreement, the contract meets the requirements of section 401(a)(30); then such amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable, shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amounts does not exceed the exclusion allowance for such taxable year.

Section 403(b)(1) of the Code provides further that the employee shall include in his gross income the amounts actually distributed under such contract in the year distributed as provided in section 72 of the Code (relating to annuities).

Section 403(b)(2) of the Code provides that the exclusion allowance equals 20 percent of the employee's includible compensation multiplied by the employee's years of service with the employer less amounts previously excludable.

Section 403(b)(3) of the Code defines includible compensation to mean the amount of compensation received from the employer in the employee's most recent one-year period of service which is includible in the employee's gross income.

Section 415(a)(2) of the Code provides, in relevant part, that an annuity contract described in section 403(b) shall not be considered described in section 403(b) unless it satisfies the section 415 limitations. In the case of an annuity contract described in section 403(b), the preceding sentence applies only to the portion of the annuity contract exceeding the section 415 limitations and the amount of the contribution for such portion shall reduce the exclusion allowance as provided for by section 403(b)(2).

Under section 415(c)(1) of the Code, contributions to a section 403(b) plan for a limitation year are generally limited to the lesser of (A)$37,500 or (B) 25% of compensation.

Section 403(b)(10) of the Code requires that arrangements pursuant to section 403(b) must satisfy requirements similar to those of section 401(a)(9) and similar to the incidental death benefit requirements of section 401(a) with respect to benefits accruing after December 31, 1986, in taxable years ending after such date. In addition, this section requires that, for distributions made after December 31, 1992, the requirements of section 401(a)(31) are met regarding direct rollovers. Section 401(a)(31) of the Code requires that a distributee of an eligible rollover distribution be given the option of having the distribution directly rollover to an eligible retirement plan.

Section 401(a)(9) of the Code, generally, provides for a mandatory benefit commencement date at age 70 1/2 and specifies required minimum distribution rules for the payment of benefits from qualified plans. For taxable years beginning after December 31, 1996, section 1404(a) of SBJPA amended section 401(a)(9) to provide that the term "required beginning date", means April 1 of the calendar year following the later of the calendar year in which the employee attains age 70 1/2, or the calendar year in which the employee retires.

Section 403(b)(1)(E) of the Code provides that, in the case of a contract purchased under a plan which provides a salary reduction agreement, the contract must meet the requirements of section 401(a)(30). Section 401(a)(30) requires a section 403(b) arrangement, which provides for elective deferrals, to limit such deferrals under the arrangement, in combination with any other qualified plans or arrangements (of an employer maintaining such plans or arrangements) providing for elective deferrals, to the limitation in effect under section 402(g)(1) for taxable years beginning in such calendar year.

Sections 402(g)(1) and (g)(5) of the Code provide, generally, that the elective deferrals of any individual for any taxable year shall be included in such individual's gross income to the extent the amount of such deferrals exceeds $7,000, as adjusted for cost of living increases.

Section 402(g)(4) of the Code provides that the limitation under paragraph (1) shall be increased (but not to an amount in excess of $10,500) by the amount of any employer contributions for the taxable year used to purchase an annuity contract under section 403(b) under a salary reduction agreement.

Section 402(g)(3) of the Code provides that the term elective deferrals includes any employer contribution to purchase an annuity contract under section 403(b) under a salary reduction agreement (within the meaning of section 3121(a)(5)(D).

Section 403(b)(11) of the Code provides, generally, that section 403(b) annuity contract distributions attributable to contributions made pursuant to a salary reduction agreement (within the meaning of section 402(g)(3)(C) of the Code) may be paid only when the employee attains age 59 1/2, separates from service, dies, becomes disabled (within the meaning of section 72(m)(7) of the Code), or in the case of hardship. Such contract may not provide for the distribution of any income attributable to such contributions in the case of hardship.

Section 401(g) of the Code requires that the contract be nontransferable.

In this case, you represent that Employer M, an employer described in section 403(b) of the Code, has established Plan X as its section 403(b) program for its employees. A participant's salary reduction contributions and the earnings thereon are fully vested and nonforfeitable at all times. Plan X is not an annuity contract described in section 403(a) of the Code. The annuity contracts are nontransferable as required by section 401(g).

Plan X correctly limits, under section 403(b)(12) of the Code, the distributions made pursuant to the salary reduction agreement to the attainment of age 59 1/2, separation from service or hardship. In addition, Plan X satisfies the section 403(b)(10) and section 402(g)(2) requirements and limits contributions in accordance with sections 403(b)(2) and 415 of the Code. Plan X also provides Participants with an election to make a direct rollover distribution.

Plan X meets the general Code section 403(b) requirements. In addition, Plan X limits elective contributions to the $10,500 limitation set by section 402(g)(4) of the Code.

Therefore, based on the foregoing law and facts, we conclude with respect to ruling request number one that contributions to Plan X shall be treated under section 403(b) of the Code as amounts contributed by Employer M for annuity contracts.

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With respect to ruling request number two, section 403(b)(1) of the Code provides that the amount actually distributed to any distributee under a contract purchased pursuant to this section shall be taxable to the distributee in the year in which so distributed under section 72 and section 403(b)(1) of the Code. Because the limitations of sections 402(g)(2), 403(B)(2) and 415 of the Code are satisfied as enumerated under the provisions of Plan X and as set forth above, we conclude that contributions to Plan X (and earnings thereon) shall not be taxable in the year contributed, to the extent that such contributions satisfy the applicable limits under sections 402(g)(2), 403(b)(2) and 415 of the Code, but instead will be taxable under section 72 of the Code in the year in which such amounts are received by the participant.

This ruling is limited to the form of Plan X, excluding any form defects which may violate the nondiscrimination requirements of section 403(b)(12) of the Code. This ruling does not extend to any operational violations of section 403(b) of the Code by Plan X, now or in the future.

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.

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

Sincerely yours,

(signed) JOYCE E. FLOYD

Joyce E. Floyd, Manager
Employee Plans Technical Group 2
Tax Exempt and Government Entities Division

Enclosures:
Deleted copy of this letter
Notice 437

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