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Department of the Treasury

Washington, DC 20224

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CC:EBEO:BR1 - PLR-118087-98

Date:

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Employer =

Plan =

Custodial Account Agreement =

Custodian =

City X =

Dear

This is in reply to your letter dated September 5, 1998, and subsequent correspondence, on behalf of the above Employer requesting a ruling on the federal tax consequences of Employer's deferred compensation plan (the "Plan") and related Custodial Account under section 457 of the Internal Revenue Code.

Employer, City X, is an eligible employer within the meaning of section 457(e)(1)(A) of the Code. The Plan is intended to be an eligible deferred compensation plan to which section 457(a) applies. Employer previously received a private letter ruling with respect to the Plan on September 27, 1991. The Plan was subsequently amended and employer requests a ruling stating that the Plan is in compliance with section 457 as amended by the Small Business Job Protection Act of 1996.

Under the Plan, an employee ("Participant") may elect to defer compensation received for services to the employer until retirement, death, or separation from service with Employer or until the occurrence of an unforeseeable emergency. The election to defer compensation must be made prior to the month for which the compensation is earned. The Plan provides for a catch-up computation for amounts deferred for one or more of the Participant's last three taxable years ending before he attains normal

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retirement age under the Plan. The amounts that may be deferred under the annual maximum limitation and the catch-up provision 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. These include (1) substantially equivalent monthly, quarterly, semi-annual or annual installments, (2) partial lump-sum payment, the rest to be paid in substantially equivalent monthly, quarterly, semi-annual or annual installments or (3) a lump sum cash payment. The election must be made prior to the month any such amounts become payable to the Participant or the beneficiary. If the Participant or his beneficiary fails to make a timely election concerning distribution of the deferred amounts, benefits shall be paid at the time and in the manner prescribed by the Plan. The manner and time of benefit payout must meet the distribution requirements of sections 457(d) and 401(a)(9) of the code.

Deferrals under the Plan will be held in a custodial account, pursuant to the written Custodial Account Agreement between City X and Custodian, a bank. Amounts deferred under the Plan will be transferred to the Custodian or its agent as promptly as possible, but in no event later than two business days after the applicable payroll date, and will be invested promptly in accordance with the investment directions of the Participant, but in no event later than two business days following receipt of the amounts by the Custodian or its agent.

The Custodial Account Agreement provides that it shall be impossible, prior to the satisfaction of all liabilities with respect to Plan Participants and their beneficiaries, for any part of the funds of the custodial account to be used for, or diverted to, purposes other than for the exclusive benefit of the Participants or their beneficiaries as provided for in the Plan. It further provides that the assets of the custodial account will never inure to the benefit of the employer and will be held for the exclusive purposes of providing benefits to the Participants and their beneficiaries and defraying reasonable expenses of administering the Plan and the custodial account. No amount payable at any time under the Plan will be subject in any manner to alienation by anticipation, sale, transfer, assignment, bankruptcy, pledge, attachment, charge, or encumbrance of any kind.

The Plan provides that no payments to an alternate payee pursuant to a domestic relations order may be made prior to the earliest date as of which payments to the Participant could commence under the Plan. Upon the receipt of a plan certified

domestic relations order, a portion of the Participant's account, as determined under the plan certified domestic relation order, shall be segregated in an account maintained on behalf of the alternate payee.

Section 457 of the Code provides rules for the deferral of compensation by an individual participant 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.

Section 457(b)(5) prescribes that an eligible deferred compensation plan must meet the distribution requirements of section 457(d).

Section 457(d)(1)(A) provides that for a section 457 plan to be an eligible plan, the plan must have distribution requirements providing that under the plan amounts 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 is separated from service with the employer, or iii) when the participant is faced with an unforeseeable emergency as determined under Treasury regulations. However, section 401(a)(9)(C)(i) generally allows plans to postpone the required beginning date until April 1 of the calendar year following the later of the calendar year in which the employee retires or in which he attains age 70 1/2.

Section 1.457-2(h)(4) of the Income Tax Regulations defines an unforeseeable emergency as a severe financial hardship to the participant resulting from a sudden and unexpected illness or accident of the participant or of a dependent, loss of a participant's property due to casualty, or other similar extraordinary an unforeseeable circumstances arising as a result of events beyond the control of the participant.

Section 457(g) 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)(3) provides that for purposes of section 457(g), custodial accounts described in section 401(f) shall be treated as trusts.

A basic requirement prescribed by section 457(b)(5) is that an eligible section 457 plan must meet the section 457(d) distribution requirements described above in order to retain its tax-deferred eligible status. A section 457 plan would violate these provisions of section 457(b)(5) and regulations thereunder if the participant or anyone else received a distribution earlier than the earliest date established in section 457(d)(1)(A). The Plan provides that all distributions will be made in accordance with section 457(d)(2), section 401(a)(9) and the regulations thereunder.

Based upon the provisions of the Plan and the Custodial Account Agreement summarized above, we conclude as follows:

1. The Plan is an eligible deferred compensation plan as defined in section 457 of the Internal Revenue Code of 1986.

2. Amounts of compensation deferred under the Plan, including any income attributable to the deferred compensation, will be includible in gross income for the taxable year or years in which amounts are paid or otherwise made available to the Participant or a Participant's beneficiary in accordance with the terms of the Plan.

3. The custodial account established under the plan will be treated as a trust for purposes of section 457(g).

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 this ruling is issued.

This ruling is directed only to the Employer and its employees. Section 6110(j)(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

conclusion in the ruling. See section 12.04 of Rev. Proc. 98-1, 1998-1 I.R.B. 7, 47. However, when the criteria in section 12.05 of Rev. Proc. 98-1 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

Sincerely yours,

ROBERT D. PATCHELL
Acting Chief, Branch 1
Office of the Associate
Chief Counsel
(Employee Benefits and
Exempt Organizations)

Enclosure:
Copy for section 6110 purposes