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Internal Revenue Service

Employment Index 414.07-00

Department of the Treasury

Washington, DC 20224

********** Person to Contact: ********** ********** ID #********** ********** Telephone Number: (202) 622-**** **********

Refer Reply to: OP:E:EP:T:2

Attn: ********** ********** Date: MAY 4 1999

Legend:

State A = **********
Corporation M = **********
Municipality A = **********
Municipality B = **********
Municipality C = **********
Plan X = ********** **********

Dear M**********

This is in response to a ruling request dated June 18, 1998, as supplemented by correspondence dated August 26, 1998 and March 10, 1999, submitted on your behalf by your authorized representative, requesting a ruling under section 414(d) of the Internal Revenue Code (Code).

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

Corporation M is a non-profit corporation created pursuant to State A's nonprofit corporations act and is a tax-exempt organization under section 501(c)(3) of the Code. Corporation M's primary purpose is to provide fire protection and emergency response services to Municipalities A, B and C. Corporation M was established in 1944 and operates exclusively to combat and prevent fires and to perform other public safety assistance such as rescue work, emergency medical attention and hazardous materials response/investigation. Corporation M also provides police assistance when requested. These services are provided primarily to Municipalities A, B and C, each of which is a municipal corporation and political subdivision of State A.

Section 471.59 of State A's statutes allows the governing bodies of two or more political subdivisions to enter into agreements to jointly and cooperatively exercise any common power. Subdivision 3 of Section 471.59 authorizes political subdivisions entering into these

269

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agreements to provide for disbursements from public funds to carry out the purposes of the agreement. Pursuant to this statute, Municipalities A, B and C entered into a joint powers agreement ("JPA") to facilitate cooperation in providing fire protection services to their residents. The JPA creates an administrative committee, composed of the three chief administrative officers of Municipalities A, B and C. The administrative committee reviews and approves the annual budget of Corporation M and administratively monitors the execution of the approved annual budget. The JPA provides a formula for determining how Municipalities A, B and C each respectively pays its share of the annual cost of fire protection services. This formula is roughly based on the following:

(1) one half on the number of fire calls to each of Municipalities A, B and C for the previous three years as it relates to the total number of fire calls to Municipalities A, B and C collectively for the same period; and,

(2) one half on each of Municipalities A, B and C's total assessed valuation for the preceding fiscal year as it relates to the total assessed valuation of Municipalities A, B and C.

Under this formula, Municipality A's share is roughly seventy percent of the total annual cost, Municipality B's, twenty percent and Municipality C's, ten percent.

Municipalities A, B and C own, and control title to, all fire response vehicles and other fire protection equipment Corporation M uses to provide its fire protection services. Municipalities A, B and C also own all land and buildings used by Corporation M. The JPA provides that the percentage ownership interest of each of Municipality A, B and C is dependent on their contributions, both past and present, to the capital cost of all property and equipment used by Corporation M.

Corporation M is governed by a seven seat Board of Directors. Five seats are reserved for community representative of Municipalities A, B and C and two seats are reserved for duly elected active members (firefighters) of Corporation M. Community representatives, who make up a clear majority of the Board, are defined by Corporation M's by-laws as an individual who resides, or has gainful employment in the community they represent. Corporation M's by-laws require that the community representative seats be allocated among Municipalities A, B and C as follows--

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Municipality A (three directors), Municipality B (one director) and Municipality C (one director). Community representative directors are nominated by slate by a nominating committee consisting of five members--the three city administrators of Municipalities A, B and C and two active members of the fire department--and then elected by a majority vote of the Board of Directors. The two active member directors are elected by the active membership of Corporation M.

Municipalities A, B and C have each individually appointed five members of Corporation M's board to serve as its fire code board of appeals. The Fire Chief, a paid member of Corporation M's staff, is appointed to each of the three appeal boards as an ex-officio member. In this capacity the board determines the suitability of alternate materials and types of construction and interprets provisions of Municipalities A, B and C's fire code.

Substantially all revenues received by Corporation M are from fees for providing fire protection services to political subdivisions of State A and the federal government. Over ninety percent of Corporation M's revenues are fees received from Municipalities A, B and C pursuant to a Fire Protection Services Contract ("Contract"). Under the terms of this Contract, the administrative committee (referred to above) serves as the budget review committee. Each year Corporation M submits a budget request to the budget review committee. It is the budget review committee which sets the annual budget of Corporation M and decides how much Corporation M spends annually.

Municipalities A, B and C have the option of keeping their share of the surplus, using it to buy down their contribution for the following year, or investing it in additional capital projects. If expenditures are in excess of anticipated and budgeted amounts then they are required to approve additional expenditures.

The Contract requires Municipalities A, B and C to make payment to Corporation M pursuant to the formula they agreed to in the JPA. The formula applies to both capital and operating budgets, and only Municipalities A, B and C can make changes to the formula. Corporation M had no role in negotiating the formula by which Municipalities A, B and C make payment for services. Corporation M's approval is not required to change the formula.

Under the terms of the Contract, Corporation M cannot contract to provide fire protection services with other political subdivisions and entities without the express, prior approval of Municipalities A, B and C.

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Corporation M maintains a paid staff of five consisting of, in addition to the fire chief, fire suppression personnel and administrative staff. Corporation M also utilizes volunteer firefighters. Municipalities A, B and C control the level of staffing. All paid full-time and part-time staff positions must be approved by the administrative committee before they are filled. Municipality A's personnel director is part of the candidate selection process. Corporation M's Board, which is controlled by Municipalities A, B and C, makes the final decision on hiring both the fire chief and other paid personnel.

While the paid staff people are not employees of Municipalities A, B and C, the compensation and benefit levels they receive are essentially identical to the benefit levels received by individuals employed by Municipalities A, B and C in similar positions. Most of the personnel policies of Corporation M are modeled on the policies of Municipalities A, B and C. The decisions adopting Corporation M's personnel policies and setting compensation and benefit levels are made by the Board.

The fire chief is required to attend the weekly staff meetings at Municipalities A and B (Municipality C does not have weekly staff meetings). The fire chief takes direction from the Municipality A, B and C managers. The fire chief also supervises the work of two Municipality A city employees and one city employee of Municipality C who perform those municipalities' fire inspection and marshalling duties.

Corporation M's volunteer firefighters receive pension contributions from State A. Chapter 69 of State A statutes sets out a state aid program funding the pensions of State A's volunteer firefighters. The funding mechanism for this program is a tax on the premiums paid by State A's citizens for fire, lightning, sprinkler, leakage, and extended coverage insurance. Under this program, Corporation M's volunteer firefighters receive a yearly pension contribution from State A's Commissioner of Revenue. This contribution is based one-half on Municipalities A, B and C's populations and one-half on their total market value.

Pursuant to Chapter 466 of State A's statutes, Corporation M receives the same protection from tort liability as does any other municipality of State A. Corporation M is defined as a municipality for purposes of this statute.

Based on the foregoing facts and representations, your authorized representative has requested a ruling that

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contributions to Plan X by Corporation M on behalf of its employees are considered contributions by an agency or instrumentality of State A for purposes of section 414(d) of the Code.

Section 414(d) of the Code provides that 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 government 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 the state or federal government has 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 this case, State A exercises a considerable degree of control over Corporation M through the power and control that Municipalities A, B and C, political subdivisions of State A, wield over Corporation M pursuant to the JPA. For instance, the JPA administrative committee, comprised of Municipality A, B and C's chief administrative officers, reviews and approves Corporation M's budget and monitors its execution. Municipalities A, B and C own Corporation M's real property, vehicles and equipment. Further, under the Contract, Corporation M cannot expand to provide fire protection services to other political subdivisions or entities without the express prior approval of Municipalities A, B and C. Municipalities A, B and C have considerable control over Corporation M's staffing, both as to the level of staffing, as well as to hiring, personnel policies and compensation and benefit levels. The Fire Chief, an employee of Corporation M, takes direction from Municipality A, B and C managers.

With respect to factors (1) and (2) of Rev. Rul. 89-49,

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specific enabling State A legislation makes possible the type of agreement entered into by Municipalities A, B and C, i.e., the JPA. Indeed, the same State A statute authorizes the funding vehicle under which the public function and purposes of the JPA are carried out. That is, through the disbursement of public funds from Municipalities A, B and C, which, as political subdivisions of State A, pay Corporation M for fire protection services. Municipalities A, B and C account for ninety percent of Corporation M's funding, and the federal government for ten percent.

As to the third factor in the revenue ruling, the manner in which the organization's trustees or operating board are selected, the seven directors who govern Corporation M are chosen through a representative procedure as outlined above. The five community representative Directors reside in or work in Municipality A, B or C and are nominated for their positions by Municipalities A, B and C city administrators and two members of Corporation M. Thereafter these five are elected by a majority vote of the full Board. The remaining two active member Directors are elected by the Corporation M active membership. In addition, five of the members of the fire code board of appeals are appointed by Municipalities A, B and C.

With respect to the fourth factor, Corporation M does not specifically consider the paid staff employees of Corporation M and the fire chief to be Corporation M employees. However, we note that the entity, "Corporation M" is created by and based upon State A legislation which has been applied to this situation in order to provide fire protection for three political subdivisions of State A in the most cost effective manner, in order to exercise common powers and to deliver a traditional governmental service in a cooperative way. In other words, Corporation M is merely a vehicle by which three political subdivisions can share costs. To make Corporation M's paid staff employees of just one of the three political subdivisions would put the other two political subdivisions in a secondary position or require duplication.

Thus, based upon the degree of control that State A exercises over Corporation M, legislation making possible the existence of Corporation M, Corporation M's funding and the manner in which Corporation M's Directors are selected, we conclude with respect to your ruling request that contributions to Plan X by Corporation M on behalf of its employees are considered contributions by an agency or instrumentality of State A for purposes 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.

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

Sincerely yours,

(signed) JOYCE E. FLOYD

Joyce E. Floyd
Chief, Employee Plans
Technical Branch 2

Enclosures:
Deleted Copy of this Letter
Notice of Intention to Disclose