

INTERNAL REVENUE SERVICE

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November 26, 1999

Entity E =

State S =

This responds to your letter of June 3, 1999 and subsequent correspondence, on behalf of Entity E, requesting a ruling concerning the proposed amended and restated deferred compensation plan (the "Plan") which E intends to be an eligible deferred compensation plan under section 457 of the Internal Revenue Code of 1986. E is represented to be a political subdivision of State S and thus to be an eligible governmental entity described in section 457(e)(1)(A).

The facts presented are as follows. Under the Plan an employee of E may elect to defer compensation he or she would have received for services rendered to Entity E until separation from service with the employer, death, or until the occurrence of an unforeseeable emergency. The Plan also includes a provision permitting a participant to receive an in-service distribution of \$5,000.00 or less from his or her account in certain limited circumstances set forth thereunder and in accordance with section 457(e)(9)(A). The Plan also includes a provision permitting a participant to make a plan-to-plan transfer under section 457(e)(10) to another eligible section 457(b) plan in certain limited circumstances set forth therein.

The participant's election to defer compensation under the Plan must generally be filed prior to the beginning of the yearly or half-yearly period in which his or her salary reduction agreement becomes effective. The Plan provides for a maximum amount that may be deferred by a participant in any taxable year and also provides for a catch-up computation under section 457(b)(3) for amounts deferred for one or more of the participant's last three taxable years ending before he attains normal 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 of section 457 including the section 457(c) coordinated deferral provision.

With certain limitations, a participant may elect the manner in which his or her

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deferred amounts will be distributed. A distribution election must be made prior to the date any such payment must commence to the participant. For purposes of the catch-up computation, the Plan specifies the normal retirement age as 65 or such earlier age (but not earlier than age 55) elected by the participant under his or her deferral agreement. It is represented that under E's qualified plan, a participant who retires at age 55 would be entitled to an immediate distribution of his or her entire accrued retirement benefits without any actuarial or other reduction. If the participant fails to make a timely election, distribution will commence at the time and in the manner set forth in the Plan. The Plan also includes a provision permitting a one-time additional election by a participant to further defer commencement of his distributions under the Plan after the first permissible payout date if distribution from his account has not already commenced. The manner and time of benefit payout must meet the distribution requirements of sections 401(a)(9) and 457(d) of the Code.

In accordance with section 457(g), the assets of the Plan will be held in a trust established pursuant to a written agreement that constitutes a valid trust under state law. The Plan further provides that, in accordance with section 457(g) of the Code, the trustee of its assets must hold all the section 457 plan's assets for the exclusive benefit of the participants and their beneficiaries, and that all amounts deferred under the Plan must be transferred to the trust within an administratively reasonable time period. The rights of any participant or beneficiary to payments pursuant to the Plan are generally nonassignable.

The Plan provides that distribution to an alternate payee pursuant to a domestic relations order may occur or commence only when the participant himself becomes eligible to receive distributions under the Plan and under section 457(d). If such alternate payee receives rights to amounts in a participant's account under a domestic relations order, the Plan may establish and maintain a separate account for such beneficiary. The Plan may make distributions from such account pursuant to the domestic relations order to the alternate payee at or after the time section 457(d) permits distributions from the participant's account.

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

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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 ½, 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 ½.

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

Section 1.457-2(f)(4) provides, among other things, that, for purposes of the catch-up computation, a plan may define normal retirement age as any range of ages ending no later than age 70½ and beginning no earlier than the earliest age at which the participant has the right to retire under the eligible employer's basic pension plan without the employer's consent and to receive immediate retirement benefits without actuarial or similar reduction because of retirement before some later specified age in the employer's basic pension plan.

Section 457(f) provides that if a section 457 plan is or becomes an ineligible plan then the deferred compensation shall be included in the gross income of the participant or beneficiary for the first taxable year in which there is no substantial risk of forfeiture of the rights to such compensation, and the tax treatment of any amount made available under such plan to a participant or beneficiary shall be determined under section 72 relating to annuities.

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.

Based upon the facts and representations submitted, the provisions of the

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amended and restated Plan and the trust agreement summarized above, and the other documents presented, we conclude as follows:

1. The amended and restated Deferred Compensation Plan established by Entity E constitutes an eligible deferred compensation plan as defined in section 457(b) of the Internal Revenue Code of 1986.
2. Amounts of compensation deferred in accordance with the amended and restated 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 a participant or beneficiary (including one named in a domestic relations order) in accordance with the terms of the Plan.
3. E's Plan will not become an ineligible plan described in section 457(f) solely because its administrator or trustee complies with a domestic relations order requiring the distribution of the benefits of a participant in pay status (currently eligible to receive distributions) under section 457(d)(1)(A) to the alternate payee named in the order (such as the participant's spouse or ex-spouse) to meet the participant's obligations with respect to alimony, support, or division of marital rights.
4. The trust established under E's section 457(b) Plan is treated under section 457(g) as exempt from federal income taxation pursuant to section 501(a).
5. The Plan's provision allowing a participant to elect a normal retirement age between ages 55 and 65 for purposes of the catch-up computation complies with the requirements of section 457(b)(3) and § 1.457-2(f)(4).

No opinion is expressed concerning the timing of the inclusion in income of amounts deferred under any deferred compensation plan other than E's amended and restated Plan described above. In addition, this ruling applies only to deferrals made after the date this ruling was issued. If either the Plan or the trust agreement associated with the Plan is significantly modified, this ruling will not necessarily remain applicable. This ruling is directed only to Entity E and to the participants and beneficiaries of its Plan and applies only to E's amended and restated Plan submitted on September 30, 1999 and to the original trust agreement document submitted on June 3, 1999. Section 6110(k)(3) of the Internal Revenue Code provides that it may not be used or cited as precedent.

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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. 99-1, 1999-1 I.R.B. 6, 47. However, when the criteria in section 12.05 of Rev. Proc. 99-1 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

Sincerely yours,

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Assistant Chief, Branch 1
Office of the Associate Chief Counsel
(Employee Benefits and Exempt Organizations)

Enclosure:

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