DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

200644032

AUG 09 2006

Uniform Issue List: 403.04-05

SE:T:EP:RA:T1

Attn:

Legend:

Organization A

Organization B

Organization C

Plan S

State M

Dear :

This is in response to a request for a ruling submitted on your behalf by your authorized representative dated August 12, 2003, as supplemented by correspondence dated June 28, 2004, July 27, 2004, July 28, 2004, October 5, 2004, October 28, 2004, November 29, 2004, December 2, 2004, December 22, 2004, January 18, 2005, April 6, 2006, April 25, 2006 and July 21, 2006, under section 403(b) of the Internal Revenue Code (the "Code"). The following facts and representations were submitted in connection with your request.

Organization A is a not for profit, non-stock corporation established under the laws of State M on November 12, 2002. Organization A provides direct care services to persons with developmental disabilities. Previously, on December 16, 2002, Organization B and Organization C were reorganized by creating Organization A and approving Organization A's Articles of Incorporation and its Bylaws. Effective July 1, 2003, pursuant to this reorganization, all of the employees of Organizations B and C were transferred to Organization A. Organizations B and C remain as shell corporations with no employees. Organizations A, B and C are organizations described in Code section 501(c)(3) and exempt from tax under section 501(a).

Organization A maintains Plan S which is a plan intended to be described under Code section 403(b)(9). Plan S was previously maintained by Organization B for its employees. On May 13, 1992, the Internal Revenue Service issued a private letter ruling to Organization B concluding that Plan S was a plan described under Code section 403(b)(9). Following the reorganization described above when the employees of Organizations B and C were transferred to Organization A, Organization A adopted Plan S effective July 1, 2003. Plan S currently covers only employees of Organization A, including the prior employees of Organization B and Organization C. On January 10, 2005, the Service issued a ruling,

effective on the adoption of certain plan amendments, that Plan S constituted a church plan under section 414(e) effective July 1, 2003.

Plan S provides for both elective contributions ("Elective Deferrals") and discretionary contributions that include matching contributions ("Non-Elective Contributions"). Sections1.16 and 1.17 of Plan S generally define an Eligible Employee as any employee of Organization A. Sections 3.1 and 3.2 of Plan S provide that an Eligible Employee may participate in Plan S, for purposes of Elective Deferrals and Non-Elective Contributions, on the date of the employee's employment with the employer. Plan S provides that it is intended to be a retirement income account under Code section 403(b)(9) and is funded through annuity contracts and custodial accounts.

Elective Deferrals are made under Plan S pursuant to a salary reduction agreement under which an Eligible Employee may select a dollar amount or percentage of compensation to be contributed to Plan S. Section 4.2 of Plan S provides that an election to make Elective Deferrals may not be made with respect to compensation that is currently available on or before the execution of such election. Section 1.39 of the Plan provides that Elective Deferrals are fully vested at all times.

Sections 4.2 and 4.6 of Plan S limit the maximum amount that may be contributed annually to Plan S. Section 4.2 limits the amount of Elective Deferrals pursuant to Code section 402(g) to $14,000 for 2005, $15,000 for 2006, and $15,000 as adjusted under sections 415(d) and 402(g)(5) for years thereafter. This section also provides the catch-up rule under section 402(g)(7) for participants who have 15 years of service with an employer that is eligible to maintain a church plan within the meaning of section 414(e). The maximum amount under the catch-up rule is the least of: $3,000, $15,000 less prior elective deferrals made under this catch-up election, or $5,000 multiplied by years of service reduced by prior Elective Deferrals made under this Plan and other plans of the Employer.

Section 4.2 of Plan S also provides a catch-up rule for participants age 50 or older. For participants 50 or older, there is an additional catch-up contribution of $3,000 for 2004, $4,000 for 2005, and $5,000 for 2006. Thereafter, the amount of the catch-up will be adjusted as provided under Code sections 415(d) and 414(v)(2)(C).

Section 4.6(a) of Plan S limits annual additions in the limitation year to the lesser of 100 percent of 415 Compensation, or $40,000 as adjusted under Code section 415(d). Section 4.6(c) of Plan S defines the "limitation year" as the calendar year. Section 1.25 defines the term "415 Compensation" to mean all salary from the Employer includible in gross income for the employee's most recent one-year period of service, including Elective Deferrals under 402(g)(3) and amounts not included in the employee's gross income by reason of section 125 or 457(b). Annual additions are defined by Plan Section 4.6 (b) to include Elective Deferrals, Non-Elective Contributions, and any sum credited to a Participant's Account and a Participant's Elective Account for any limitation year, excluding rollover contributions and loan repayments. Annual additions under other plans required to be aggregated with Plan S are counted for purposes of the 415 limit.

Section 4.2(c) of Plan S provides that notwithstanding any other Plan provision, Elective

Deferrals may not be distributed prior to a participant's severance from employment, death, disability, attainment of age 59 and 1/2, or financial hardship.

Under Section 5.5(d) of Plan S, distributions must begin by April 1 of the calendar year immediately following the later of the calendar year in which a participant attains age 70 and ½ or retires. This section also provides that distributions will be made in accordance with the minimum distribution incidental benefit requirement under section 1.401(a)(9)-2 of the federal Income Tax Regulations.

Section 5.13 of Plan S provides for the optional direct rollover of an eligible rollover distribution to another eligible retirement plan. This section defines an eligible rollover distribution as any distribution of all or any portion of the balance to the credit of a distributee, except that such distributions do not include any distribution that is one of a series of substantially equal periodic payments made (not less frequently than annually) for the life (or life expectancy) of the distributee or the joint lives (or life expectancies) of the distributee and the distributee's designated beneficiary, or for a period of ten years or more; any distribution that is required under Code section 401(a)(9); any hardship distribution; any amount less than $500; and any amount that is not otherwise includible in gross income. Section 5.13 defines the term "eligible retirement plan" to mean an individual retirement account under section 408(a), an individual retirement annuity under section 408(b), an annuity plan described in section 403(b), a qualified plan under section 401(a), a qualified annuity plan under section 403(a), and a 457(b) plan.

Based on the above facts and representations, you request a ruling that Plan S is a retirement income account within the meaning of Code section 403(b)(9).

Code section 403(b)(1) provides that amounts contributed by an employer to purchase an annuity contract for an employee (or for a minister described in Code section 414(e)(5)(A)) are excludable from the gross income of the employee or minister in the year contributed, provided: (A) the employee or minister performs services for an organization which is exempt from tax under Code section 501(a) as an organization described in section 501(c)(3); (B) the 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) except in the case of a contract purchased by a church, such contract meets the nondiscrimination requirements of Code section 403(b)(12); and (E) in the case of a contract purchased under a salary reduction agreement, the contract meets the requirements of Code section 401(a)(30). Section 403(b)(12) defines "church" for purposes of paragraph (1)(D) to mean an organization described in section 3121(w)(3)(A), including an organization described in section 3121(w)(3)(B).

Code section 403(b)(9) provides that a retirement income account provided by a church shall be treated as an annuity contract described in section 403(b), and amounts paid by an employer described in paragraph (1)(A) to such an account shall be treated as amounts contributed by the employer for an annuity contract for the employee on whose behalf such account is maintained. The term "retirement income account," for purposes of this section, means a defined contribution program established or maintained by a church, a convention or association of churches, including an organization described in section 414(e)(3)(A), to

provide benefits under section 403(b) for an employee described in paragraph (1) or his beneficiaries.

Code section 401(a)(30) generally provides that a trust is not qualified under section 401(a) unless it limits elective deferrals to the amount of the limitation in effect under section 402(g)(1).

Code section 402(g)(1) provides, generally, that the elective deferrals of any individual for taxable years beginning in 2005 shall be included in such individual's gross income to the extent the amount of such deferrals exceeds $14,000. This amount is increased to $15,000 for taxable years beginning in 2006 and thereafter.

Code section 402(g)(3)(C) provides that the term "elective deferrals" includes, in part, with respect to any taxable year, any employer contribution to purchase an annuity contract under section 403(b) under a salary reduction agreement.

Code section 402(g)(7) provides that, in the case of a qualified employee of a qualified organization, with respect to employer contributions used to purchase an annuity contract under section 403(b) under a salary reduction agreement, the limitation of section 402(g)(1), as modified by section 402(g)(4), for any taxable year shall be increased by whichever of the following is the least: (i) $ 3,000, (ii) $ 15,000 reduced by amounts not included in gross income for prior taxable years by reason of this paragraph, or (iii) the excess of $ 5,000 multiplied by the number of years of service of the employee with the qualified organization over the employer contributions described in paragraph (3) made by the organization on behalf of such employee for prior taxable years (determined in the manner prescribed by the Secretary). A "qualified organization" for these purposes means any educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches and includes any organization described in section 414(e)(3)(B)(ii) and a "qualified employee" means any employee who has completed 15 years of service with the qualified organization.

Code section 414(v) generally provides for a "catch- up" of elective deferrals for eligible participants age 50 or over. This section limits the amount of such additional deferrals to an amount not greater than the lesser of (i) the applicable dollar amount, or (ii) the excess, if any, of the participant's compensation over any other elective deferrals of the participant for such year. The applicable dollar amount is $ 1,000 in calendar year 2002; that amount increases by $ 1,000 per year for four years until the applicable dollar amount is $ 5,000 per year in year 2006 and thereafter.

Code section 415(a)(2) requires that an annuity contract described in section 403(b) satisfy the limitations under section 415 and that the portion of an annuity contract that does not satisfy section 415 limits will not be treated as a contract described under section 403(b). Section 415(c)(1) limits annual additions to a participant's account to the lesser of $ 40,000 or 100 percent of the participant's compensation. Section 415 (c)(3)(E) provides that, for purposes of paragraph (1), in the case of an annuity contract described in section 403(b), the term "participant's compensation" means the participant's includible compensation determined under section 403(b)(3). Section 403(b)(3) generally defines "includible

compensation" to mean the amount of compensation received from an employer described in section 403(b)(1)(A) that is includible in gross income for the most recent one-year period of service.

Code section 403(b)(10) requires that arrangements pursuant to section 403(b) must satisfy requirements similar to the requirements 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) regarding direct rollovers are met.

Code section 403(b)(11) 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)) may not be paid prior to when the employee attains age 59 1/2, severs employment, dies, becomes disabled (within the meaning of section 72(m)), or encounters hardship. Such a contract may not provide for the distribution of any income attributable to such contributions in the case of hardship.

Code section 401(a)(9), generally, provides that benefits must commence by April 1 of the calendar year following the later of the calendar year in which the employee attains 70 1/2, or the calendar year in which the employee retires, and specifies required minimum distribution rules for the payment of benefits from retirement plans.

In the prior letter ruling dated January 10, 2005, the Service ruled that Plan S qualifies as a church plan under Code section 414(e) effective July 1, 2003 on the adoption of certain plan amendments. Under Plan S, elective deferrals are fully vested at all times, and Plan S does not meet the requirements of an annuity contract under Code section 403(a). Plan S is maintained by Organization A, a 501(c)(3) organization, for its employees and thus satisfies the requirement that annuity contracts be purchased by an eligible employer on behalf of its employees. Plan S imposes the limit required by section 403(b)(1)(E) and 401(a)(30). Section 4.2 of Plan S specifically limits Elective Deferrals to the dollar limit under section 402(g), as increased by the catch-up rule provided under section 402(g)(7) for which Organization A, as a qualified organization, is eligible. Section 4.2 also provides for catch-up Elective Deferrals under section 414(v) for participants who reach age 50 prior to the end of the taxable year. In accordance with section 415(a)(2), Section 4.6(a) of Plan S properly limits annual additions to the lesser of 100 percent of compensation or $40,000 for the limitation year, taking into account required aggregation.

Plan S also satisfies the requirement of Code section 403(b)(11) that amounts attributable to Elective Deferrals not be distributed before the attainment of age 59 1/2, severance from employment, death, disability, or hardship. Section 5.13 of Plan S provides that participants have the option of directly rolling over an eligible retirement distribution to an eligible retirement plan, as these terms are defined by the Code. Finally, Plan S provides the minimum distribution requirements of sections 403(b)(10) and 401(a)(9) relating to the amount and timing of minimum distributions. Accordingly, we rule that Plan S constitutes a retirement income program within the meaning of section 403(b)(9).

This ruling is conditioned on the timely adoption of the amendments submitted in connection with this request. This ruling is limited to the form of Plan S, excluding any form defects that may violate the nondiscrimination or coverage requirements of Code section 403(b)(12). This ruling does not extend to any operational violations of section 403(b) by Plan S, now or in the future.

This ruling is directed only to the taxpayer who requested it. Code section 6110(k)(3) provides that it may not be used or cited by others as precedent.

The original of this letter has been sent to your authorized representative in accordance with a power of attorney on file in this office. Any questions regarding this ruling should be addressed to .

Sincerely,

Carlton A. Watkins

Carlton A. Watkins, Manager
Employee Plans Technical Group 1

Enclosures:
Deleted Copy of this Letter
Notice of Intention to Disclose, Notice 437