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Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Contact Person:

Telephone Number:

In Reference to:
T:EP:RA:T3

Date:

OCT 30 2000

Legend:

Employer A =

Company B =

Company C =

Company D =

Project M =

Congregation N =

Plan X =

Plan Y =

Dear :

This is in response to your request for a ruling dated April 15, 1998, submitted by your authorized representative, with respect to an arrangement under section 403(b) of the Internal Revenue Code. Letters dated August 4, 1998, April 27, 1999, July 9, 1999, April 17, 2000, and September 22, 2000, supplemented the request.

Employer A is an organization described in section 501(c)(3) of the Code. The board of trustees of Employer A established Plan X, effective **********. Employer A has amended and restated Plan X, effective as of **********.

All contributions under Plan X are used to purchase individual annuities issued to each participant. Under Plan X, employees can purchase tax-sheltered annuities from

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Company B, Company C, or Company D. All contributions made by Employer A are used to purchase annuities from Companies B, C, or D, as directed by participants. All contracts are designed to meet the requirements of section 403(b) of the Code.

Only eligible employees may participate in Plan X. Eligible employee is defined in Article XI of Plan X as any regular faculty member or any regular non-faculty employee classified as exempt who is employed by Employer A. However, certain administrators who were first employed by Employer A prior to **********, and who made an irrevocable election to participate in Plan Y shall not be an eligible employee. A non-faculty employee (i) who was first employed by Employer A prior to **********, (ii) who was eligible to participate in Plan Y prior to **********, and (iii) whose position was classified as exempt pursuant to Project M shall not be an eligible employee if such employee made an irrevocable election effective ********** to remain a participant in Plan Y. A non-faculty employee (i) who was first employed by Employer A prior to **********, (ii) who was eligible to participate in Plan X prior to **********, and (iii) whose position was classified as non-exempt pursuant to Project M, shall be an eligible employee if such employee made an irrevocable election effective ********** to continue participating in Plan X. Any leased employee deemed to be an employee of Employer A shall not be an eligible employee. Eligible employee shall not include (i) employees whose employment is incidental to their educational program, (ii) adjuncts, (iii) post-doctoral research associates, (iv) interns, (v) visiting scholars, (vi) employees whose employment with Employer A is temporary, (vii) employees hired on a project basis or for a short-term assignment, or (viii) exempt employees in any subcategory of an employee classification level. A member of a religious order other than a member of Congregation N shall be an eligible employee only in the event the member or the member's order so elects, and a member of Congregation N shall be a member only in the event that order so elects.

Plan X provides for three types of contributions: (1) non-elective, non-matching contributions (including "Mandatory Participant Contributions" under section 3.1(A) of Plan X which are required of all eligible employees as a condition of employment, and "University Contributions" under section 3.1(C)); (2) salary reduction contributions under section 3.1(B); and (3) rollover contributions of eligible rollover distributions under section 3.1(D).

Participants may contribute, under the salary reduction agreement, a percentage of their regular salary to Plan X in excess of 5 percent of such regular salary, subject to the limits on elective deferrals. An eligible employee may enter into a salary reduction agreement with Employer A agreeing to contribute each pay period elective deferral contributions to Plan X. Such contributions are made on a tax-deferred basis, and such contributions shall reduce the regular salary otherwise payable to the participant, and shall be paid in cash to Companies B, C, or D. The salary reduction agreement shall be effective only with respect to regular salary received on or after the date such agreement is executed and shall be binding on the parties and irrevocable with respect to the regular salary earned while the salary reduction agreement is in effect. A participant may suspend the salary reduction agreement with respect to amounts not yet earned.

An eligible employee may contribute to Plan X, in cash as a rollover contribution, a prior distribution from a tax-sheltered annuity plan described in section 403(b) of the Code. Section 3.7 of Plan X provides that a distributee receiving an eligible rollover distribution under Plan X may elect to have the distribution rolled over in a direct rollover to an eligible retirement plan.

Contributions to Plan X in any plan year, when combined with any other contributions made on behalf of a participant in Plan X are limited to the amount of the exclusion allowance as set forth in section 403(b)(2) of the Code, as provided in section 3.2(C) of Plan X. The maximum amount of elective deferrals under Plan X , combined with elective deferrals under any cash or deferred arrangements under sections 401(k), 408(k), or 403(b) are limited under section 3.2(B) of Plan X to $9,500 (as increased by the cost of living adjustment for the year). Pursuant to section 3.2(B) of Plan X, this limitation may be increased by a qualified participant (if a participant has more than 15 years of service with Employer A). Section 3.2(D) of Plan X limits overall annual additions to those of section 415 of the Code.

Under section 3.2(D)(1) of Plan X, the limits set forth in Plan X pertaining to section 415 of the Code, shall be adjusted to take benefits accrued, under other plans of Employer A, into account.

Under Plan X all contributions to Plan X will be nontransferable (section 4.3) and nonforfeitable (section 5.1).

Pursuant to section 6.6 of Plan X, the entire interest of each participant will commence distribution beginning no later than April 1 of the calendar year following the calendar year in which the participant attains age 70 ½, over the life of the participant or over the lives of the participant and a designated beneficiary. In the case of a participant who attained age 70 ½ before January 1, 1988, distributions need not commence until April 1 following the calendar year in which the participant terminates service with Employer A. Effective January 1, 1997, and notwithstanding anything to the contrary in section 6.6, each participant who has attained age 70 ½ in calendar years 1996, 1997, or 1998, may elect to defer commencement of his or her entire interest under Plan X until April 1 of the calendar year following the later of the calendar year in which such participant attains age 70 ½ or the calendar year in which such participant actually retires.

Pursuant to section 6.1(A) of Plan X, distributions from the annuity contracts may not be made prior to the time any participant separates from service, dies or becomes disabled, or attains age 59 ½ . No distributions may be made on account of a participant's financial hardship, except to the extent that the participant is otherwise entitled to a distribution under Plan X. Section 6.6 provides that all distributions will be made in accordance with section 401(a)(9) of the Code, including the minimum distribution incidental benefit requirements of section 1.401(a)(9)-2 of the Proposed Income Tax Regulations.

Based on the foregoing, you request the following rulings:

1. Plan X satisfies the requirements of the Internal Revenue Code as applicable to a 403(b) program and amounts contributed on behalf of employees by Employer A (other than employee after-tax contributions) shall be excluded from the employees' gross income in the year of contribution to the extent such amounts do not exceed the applicable limits described in the Code.

2. Plan X, as designed, satisfies the nondiscrimination requirements applicable to 403(b) plans.

3. Plan X correctly sets forth the limitations of sections 401(m), 402(g), 403(b), and 415(c) and (e) of the Code applicable to 403(b) plans.

4. Plan X's method of accounting for benefits accruing under Plan Y is permissible under section 403(b) of the Code.

5. Plan X's treatment of contributions which exceed the limits under section 403(b)(2) of the Code is permissible.

6. Plan X correctly sets forth the method to calculate the Any Year Limit under section 415(c)(4)(B) of the Code.

Section 403(b)(1) of the Code provides that amounts contributed by an employer to purchase an annuity contract for an employee are excludable from the gross income of the employee in the year contributed to the extent of the applicable "exclusion allowance", provided (1) the employee performs services for an employer which is exempt from tax under section 501(a) of the Code as an organization described in section 501(c)(3), or the employee performs services for an educational institution (as defined in section 170(b)(1)(A)(ii) of the Code) which is a state, a political subdivision of a state, or an agency or instrumentality of any one or more of the foregoing; (2) the annuity contract is not subject to section 403(a) of the Code; (3) the employee's rights under the contract are nonforfeitable except for failure to pay future premiums; (4) 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, (5) 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).

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.

Section 403(b)(10) of the Code requires that arrangements pursuant to section 403(b) of the Code 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.

Section 401(a)(9) of the Code, generally, provides that the required beginning date for commencement of benefits is April 1 of the calendar year following the later of the calendar year in which the employee attains age 70 ½, or the calendar year in which the employee retires. Section 401(a)(9) specifies required minimum distribution rules for the payment of benefits from qualified plans.

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)) 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)), 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.

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 plan, providing for elective deferrals, to the limitation in effect under section 402(g)(1) for taxable years beginning in such calendar year.

Section 402(g)(1) of the Code provides, 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.

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 $9,500) 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)(8) of the Code 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.

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 in section 403(b)(2).

Section 415(c)(4)(B) of the Code states that in the case of amounts contributed for an annuity contract described in section 403(b) for any year in the case of a participant who is an employee of an educational organization, a hospital, a home health service agency, a health and welfare service agency, or a church, convention or association of churches, or an organization described in section 414(e)(3)(B)(ii), at the election of the participant there is substituted for the amount specified in paragraph (1)(B) the least of (i) 25 percent of the participant's includible compensation (as defined in section 403(b)(3)), plus $4,000; (ii)the amount of the exclusion allowance determined for the year under section 403(b)(2); or (iii) $15,000.

In this case, you represent that Employer A, an employer described in section 501(c)(3) of the Code, has established Plan X as its section 403(b) program for its employees. All contributions and the earnings thereon are fully vested and nonforfeitable at all times. Plan X does not meet the requirements of a section 403(a) annuity contract. The restrictions of transferability are present in Plan X as required by section 401(g) of the Code.

Plan X satisfies the limits, under section 403(b)(11) of the Code, that amounts attributable to elective deferrals shall not be distributable earlier than upon the attainment of age 59 1/2, separation from service, death, disability, or hardship. In addition, Plan X satisfies the section 403(b)(10) requirements and limits contributions in accordance with sections 403(b)(2) and 415 of the Code. Also, the salary reduction agreement which each eligible employee of Employer A who becomes a participant in Plan X may elect to enter into meets all of the applicable requirements of the Code and regulations.

Accordingly, we conclude with respect to ruling requests one, three, and six, that Plan X satisfies the requirements of the Internal Revenue Code as applicable to a 403(b) program and amounts contributed on behalf of employees by Employer A (other than employee after-tax contributions) shall be excluded from the employees' gross income in the year of contribution to the extent such amounts do not exceed the applicable limits described in the Code. We also conclude that Plan X correctly sets forth the limitations of sections 402(g), 403(b), and 415(c) (including 415(c)(4)(B)) and (e) of the Code applicable to 403(b) plans.

This ruling is contingent upon the adoption of the amendments to Plan X, as stipulated in your correspondence dated April 15, 1998, August 4, 1998, and April 17, 2000, and will have no effect unless such proposed amendments are adopted.

We are unable to address ruling request two, that part of ruling request three that asks us to rule on section 401(m), and ruling requests four and five because this ruling is limited to the form, rather than the operation, of Plan X, excluding any form defects that may violate the nondiscrimination requirements of section 403(b)(12) and 401(m). 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 this ruling may not be used or cited by others as precedent.

Pursuant to a power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,

/s/ Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3
Tax Exempt and Government Entities Division

Enclosures:
Notice 437
Deleted copy of ruling letter

CC: