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

TAX EXEMPT AND GOVERNMENT ENTITIES DIVISION

UIL: 529.00-00

Date:
DEC 17 2002

Contact Person:

Identification Number:

Telephone Number:

Legend

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X =
Y =

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Dear Sir or Madam:

This is in response to X's request for a ruling that the prepaid tuition plan ("the Program") established by X is a qualified tuition program meeting the requirements of section 529 of the Internal Revenue Code ("Code") as amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 (the "Act").

X was organized on April 1, 1999, as a Delaware limited liability company for the purpose of establishing and maintaining a prepaid tuition program in accordance with section 529 of the Code. The operation of the Program, and the rights, responsibilities, and duties of X as the administrator of the Program (Administrator), the educational institutions participating in the Program (Participating Institutions), the purchasers of Tuition Certificates under the Program (Owners), and the designated beneficiaries of those certificates, will be as set forth in the following agreements (referred to herein as the Program Documents):

1. The Consortium Agreement (referred to herein as the Consortium Agreement) of X, which will act as Administrator of the Program;
2. The Prepaid Tuition Plan Agreement (referred to herein as the Program Agreement) between X, as Administrator, and the Participating Institutions, which establishes the Program;
3. The Trust Agreement under which the Administrator, X, will appoint Y as Trustee of a trust fund to hold the assets of the Program for the exclusive benefit of designated beneficiaries of the Program; and

4. The Enrollment Agreement between X and each Owner of a Tuition Certificate providing annual tuition benefits under the Program.

X is organized under the Consortium Agreement, which describes the governance structure of X and generally provides the rights, duties, and obligations of the institutions that become members of X (also referred to as "Participating Institutions" where the context requires). X presently has one member, T, a private university. X has received indications of interest from a large number of tax-exempt private colleges and universities within the United States which have supported its efforts. Upon the Internal Revenue Service's ruling or determination that the Program meets the requirements of section 529 of the Code, X anticipates that additional colleges and universities will become members of X and participate in the Program.

The Consortium Agreement provides that all members of X must participate in the Program, and only members of X are eligible to participate in the Program. Under the Consortium Agreement, an institution is eligible to become a member of X only if at all times the institution is a non-profit organization which (i) qualifies as an "eligible educational institution" within the meaning of section 529(e)(5) of the Code, (ii) is an operating educational organization described in section 481 of the Higher Education Act of 1965 (20 USC 1088), (iii) has a faculty and student body, (iv) is described within section 170(b)(1)(A)(ii) of the Code that is also a tax exempt public charity within sections 501(c)(3) and 509(a)(1) of the Code or any successor provision, and (v) has received a determination of exempt status letter from the Internal Revenue Service. In addition, each member must have at least a in total assets and be an "accredited investor" as that term is defined in Regulation D, Rule 501, of the Securities Act of 1933.

Each member institution receives one membership unit in X upon making a capital contribution to X. Each member institution is entitled to one vote on matters requiring member approval, including the election of the Board of Directors. A member institution may be expelled from X under certain circumstances which are set forth in Consortium Agreement.

Member institutions elect the Board of Directors of X. The Board of X consists of three classes of directors, each class consisting of up to seven members. Board members are elected for three year staggered terms. The current board of directors is made up almost entirely of various officers and employees of private colleges and universities. The Program Documents provide that once the Program becomes operational, at least 75 percent of the members of the Board must be employees of member institutions. Officers of X have also been selected by the Board.

Under the Consortium Agreement, the operation, activities, and affairs of X shall be managed by or under the direction of the Board of Directors. The Board has the right, power, and authority to establish, maintain, operate, and administer the Program in compliance with section 529 of the Code. The Board may invest money; make distributions; solicit and accept grants, loans, and other aid from any person or federal, state, or local government; charge, impose, and collect administrative fees; procure insurance; sue and be sued; have perpetual

succession; execute and deliver contracts; and exercise any and all other acts and powers that permit the Board to perform its duties.

The Program Documents provide for the establishment of a trust (the Program Trust) to hold, for the exclusive benefit of designated beneficiaries, the funds received by the Program. The Program Documents provide that the amounts paid for Tuition Certificates and investment earnings thereon, as well as any other funds or credits allocable to the Program Trust, shall be promptly deposited or credited by the Administrator to the Program Trust. X represents that the trustee of the Program Trust will be Y, which is a federally chartered savings bank and is an investment adviser registered with the Securities and Exchange Commission. X represents that Y is specifically authorized to exercise, and a substantial part of its business consists of exercising, fiduciary powers similar to those exercised by national banks under authority of the Comptroller of the Currency. X represents that Y has FDIC insurance and is subject to supervision and examination by the Office of Thrift Supervision.

The Trust Agreement provides that the Trustee shall not commingle assets of the Program Trust with other property except in a "common trust fund" or "common investment fund" (within the meaning of section 408(a)(5) of the Code). The Trust Agreement provides that the Program Trust shall be administered, construed and enforced according to the laws of a particular State. The Trust Agreement provides that X, as Administrator, has the authority to direct the Trustee, with respect to investment guidelines for the assets of the Program Trust and the disbursement of funds, consistent with the Program Documents and the requirements of section 529 of the Code. The Administrator also has the authority to appoint an investment manager of the Program Trust.

The Trust Agreement provides that the Program Trust is established for the exclusive benefit of the designated beneficiaries of the Program without regard to whether the designated beneficiary actually enrolls at a Participating Institution. The Trust Agreement provides that at no time prior to the satisfaction of all liabilities with respect to the beneficiaries under the Program shall any part of the Program Trust be used for any purposes other than for the exclusive benefit of such beneficiaries, including the payment of reasonable costs for the maintenance and administration of the Program for such beneficiaries. The Trust Agreement provides that the Trustee, the Administrator and each investment manager of the Program Trust shall discharge their respective duties with respect to the Program Trust with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

The Consortium Agreement provides that it is the responsibility of the Board of Directors of X to adopt investment objectives and policies, to hire and evaluate investment managers, and to establish and monitor policy implementation and investment performance. An investment committee, a majority of the members of which must be Board members, acts on behalf of the Board in supervising each investment manager charged with managing funds of X and any funds held in trust for designated beneficiaries under the Program. The Program Agreement and the Enrollment Agreement provide that no Owner or designated beneficiary will have authority to direct the investment of any certificate purchase price or earnings thereon.

The Trust Agreement only authorizes disbursements from the Program Trust for the payment of reasonable costs and expenses of administering the Program, for payments to Participating Institutions on account of redemption of Tuition Certificates, or for payments to Owners of Tuition Certificates for partial or full refund from the Program. The Trust Agreement provides that the Trustee shall not make loans from the Program Trust to the Administrator or to any Participating Institution.

The Trust Agreement provides that the Administrator, the Trustee, and each investment manager and other service providers will receive reasonable fees for their services. X represents that the Program will operate with general administration and marketing expenses being paid from the administrative fees paid to the Administrator or to third party contractors at the direction of the Administrator. X represents that no funds will be taken from the Program Trust for purposes of any Program development and promotion expenses involved in expansion of the Program, as distinguished from general administration and marketing expenses of Program operation covered by the fees charged for Program administration.

Under the Program Documents, each prospective purchaser will enter into a contract with the Administrator for the purchase of a Tuition Certificate. Each purchaser must designate an individual as the designated beneficiary of the annual tuition benefits represented by the Tuition Certificate. The Enrollment Agreement provides that the designated beneficiary may be changed to an "eligible substitute beneficiary," defined as any person who is a member of the family of the designated beneficiary as defined in section 529(e)(2) of the Code. The Program Agreement and the Enrollment Agreement provide that no interest in a Tuition Certificate and annual tuition benefits evidenced thereby may be pledged or used as security for a loan or any other obligation. All Tuition Certificates will be sold through X. No Certificates will be issued or sold directly by any Participating Institution.

Prior to any purchase, the Administrator will provide each prospective purchaser with written information describing the material terms of operation of the Program. The Enrollment Agreement provides that one Tuition Certificate will represent all payments made for a single designated beneficiary by a single owner during each program year. The Program Agreement and the Enrollment Agreement provide that payments for certificates must be made in cash, including a rollover from another Code section 529 plan, automatic or other withdrawal from a bank account, personal check, authorized payroll deduction plan, or other certified funds approved by the Administrator. The Enrollment Agreement provides that if at the end of the first two-year period under a new contract, the total payments under the contract are less than $500, the contract will be cancelled and the payments will be refunded to the purchaser without interest.

The Program Agreement provides that a separate account for benefits provided under the Program shall be maintained for each designated beneficiary. In addition, the Enrollment Agreement provides that the Owner will receive from the Administrator a quarterly statement showing the issue date and any activity on a Tuition Certificate. Such activity may include the amount of payments, refunds, and remaining annual tuition benefits. Upon request by the Owner, a copy of the quarterly statement will be sent to the designated beneficiary.

Under the Program Agreement, one "annual tuition benefit" will cover the cost of tuition and required fees for one full-time student for one academic year at a Participating Institution. Each Participating Institution must notify the Administrator by a certain date of the price at which it will sell, during the coming year, an annual tuition benefit under the Program. This amount will be determined by applying a percentage discount (determined by the institution) to the institution's then current annual tuition charges and required fees.

Depending upon the amount paid for a Tuition Certificate and the Participating Institution at which the Certificate is utilized, a Certificate may provide benefits varying between a fraction of one annual benefit at certain Participating Institutions and up to several annual tuition benefits at other institutions. Thus, the purchasing power of the Certificate will vary from institution to institution. Each prospective purchaser will have access to a schedule of the cost of annual tuition benefits at each Participating Institution at the time a Tuition Certificate is purchased, so that the purchaser will be able to determine the amount of annual tuition benefits available at each Participating Institution based upon the amount paid for a Tuition Certificate and the expected date of matriculation of the student. An annual tuition benefit may be utilized for a student, in whole or in part, in any given year of attendance at a Participating Institution, at the discretion of the Owner. Under the Program Agreement, each Participating Institution covenants that it will not discriminate in its admissions process in favor of or against applicants on the basis of their status as designated beneficiaries under the Program.

It is the intention of X to commence operations allowing only tuition and required fees to be purchased on a prepaid basis under the Program. The Program Agreement provides that Tuition Certificates shall not be issued with respect to any designated beneficiary for annual tuition benefits in excess of those necessary to pay for five years of undergraduate enrollment covering all applicable tuition and required fees of a student with the same expected date of enrollment as the designated beneficiary at the Participating Institution with the highest current undergraduate tuition. X represents that X will maintain records to insure that the total annual tuition benefits purchased on behalf of each designated beneficiary are not in excess of the amount required to pay for the tuition and required fees for five years for an undergraduate student with the same expected date of enrollment at the Participating Institution with the highest current undergraduate tuition. Under the Program Agreement, X shall maintain a separate account for annual tuition benefits under each Tuition Certificate for each combination of Owner and designated beneficiary.

Under the Program Documents, each Participating Institution assumes a continuing obligation to honor outstanding Tuition Certificates issued prior to and during the years of its participation in the Program and as a member of X. This obligation is not conditional upon receipt of funds in any specific amount from the Program Trust by the Participating Institution. The obligation to honor outstanding Tuition Certificates is enforceable by X and the Owner and designated beneficiary of a Tuition Certificate regardless of whether the amount of funds paid to the Participating Institution under the Program is less or more than the current cost of tuition and required fees provided to the beneficiary. X represents that a claim for tuition credit may be made against the Administrator, or its successor, or directly against a Participating Institution by the Owner or the designated beneficiary, as intended third party beneficiaries of the Program Agreement and of the Enrollment Agreement. The obligations of Participating Institutions on

outstanding Tuition Certificates also survive any dissolution or liquidation of X. A Participating Institution may withdraw from the Program if notice is given at least 120 days prior to the commencement of a program year. A Participating Institution has no obligation for Tuition Certificates issued by X after its withdrawal from the Program. Thus, a Participating Institution's obligation applies to all Tuition Certificates issued prior to and during a Participating Institution's period of membership in X and continues for those Certificates even after the Participating Institution withdraws as a member of X.

Under the Program Documents, each Participating Institution is obligated to grant credit against tuition costs and required fees to any enrolled student who is a designated beneficiary of a Tuition Certificate issued in a year when the Participating Institution was a member of X (or any prior year) and tendered, in whole or in part, in a qualifying period. The qualifying period is the period beginning 36 months after the Tuition Certificate was issued and ending on the 30th anniversary date the Tuition Certificate was issued. Annex A to the Enrollment Agreement provides the following example:

> Owner (A) purchases a Tuition Certificate in the face amount of $7,500. College X is a Participating Member in the Program. At the time of purchase of A's Tuition Certificate, current tuition and required fees at College X are $10,000. Accordingly, the Tuition Certificate could be used to provide a credit for 75 percent ($7,500/$10,000) of the cost of an Annual Tuition Benefit (annual tuition and required fees at College X). The Tuition Certificate is held by A for 10 years. The Designated Beneficiary (B) under the Tuition Certificate then is admitted and enrolls in College X. At the time of enrollment, current tuition and required fees at College X for one academic year are $30,000. If the entire Tuition Certificate is applied in payment of tuition and required fees at the time of enrollment at College X, B will receive a tuition credit for 75 percent of the cost of tuition and required fees for one academic year at College X and will be required to make a cash payment for the balance of 25 percent of such cost in the amount of $7,500 (25 percent x $30,000).

The Enrollment Agreement provides that at any time after the first anniversary of the date of issue of a Tuition Certificate, an Owner for any reason may request partial withdrawal or complete termination of a Tuition Certificate by delivering to the Administrator a properly completed request form. Further, on the death of a designated beneficiary, an Owner may request a complete refund of a Tuition Certificate irrespective of the one-year waiting period. If the Administrator receives from any owner a request for a Tuition Certificate refund, the Administrator shall direct the Trustee to pay the owner the "Refund Value" of such Tuition Certificate.

The Enrollment Agreement provides that the "Refund Value" for a Tuition Certificate is the amount determined by starting with the purchase price of the Tuition Certificate and annually compounding its value for all program years the Tuition Certificate was outstanding using the actual investment return percentage for all program years the Tuition Certificate was outstanding, provided that in no event shall such refund amount be:

i. greater than an amount determined by annually compounding the Certificate purchase price for all program years the Tuition Certificate was outstanding by an assumed annual positive two percent investment return percentage, or

ii. less than an amount determined by annually compounding the Certificate purchase price for all program years the Tuition Certificate was outstanding by an assumed negative two percent investment return percentage.

X represents that a claim for Refund Value may be made by the Owner of a Tuition Certificate against the Administrator, or its successor, or the Program Trust.

The Program Agreement and the Enrollment Agreement provide that the Administrator shall report the payment and distribution of all benefits under the Program for Federal income and state income tax purposes in accordance with the reporting rules applicable to prepaid tuition plans under section 529 of the Code.

Participating Institutions have no obligation to provide cash refunds of Tuition Certificates, except in situations where a Participating Institution has received payment from X for an enrolled student who subsequently withdraws from courses. In such case, X has no further obligation with respect to the surrendered Certificate and the Participating Institution is legally obligated to provide such student with a cash refund in the amount it would pay to any other withdrawing student under the Participating Institution's refund policy in effect at the time of such withdrawal.

The Program Documents provide that each Owner and each designated beneficiary is an intended third party beneficiary of the Program Agreement between X and each Participating Institution. The Program Agreement provides that, as a third party beneficiary, the Owner or the designated beneficiary shall have no ability to bring a suit for monetary or other damages against a Participating Institution, but shall be entitled to equitable relief in the form of specific performance compelling the Participating Institution to provide appropriate tuition credit in consideration of the tender of the Tuition Certificate or to provide a cash refund if the student withdraws from classes, as described above. X represents that the Program Agreement grants Owners and designated beneficiaries the contractual right to directly enforce the obligations of a non-performing Participating Institution to grant appropriate tuition credit to an enrolled student in consideration of the tender of a valid Tuition Certificate.

The Enrollment Agreement provides that, if the Administrator determines that an Owner of a Tuition Certificate made a material misrepresentation in the application, or that an Owner has acted fraudulently with respect to the Program, the Administrator may terminate the Tuition Certificate and pay the Owner less than the full Refund Value, provided that charges against the Refund Value are reasonable in amount and a written notice itemizing such charges is provided to the Owner.

Upon granting tuition credit under a Tuition Certificate to a designated beneficiary, the Participating Institution will present the Tuition Certificate (or a portion thereof) to the Administrator for redemption. Under the Program Documents, the Participating Institution will

receive a payment equal to the purchase price paid for the Tuition Certificate (or portion thereof), increased or decreased by the net investment return of the Program Trust, as adjusted for allocations to the Stabilization Fund, as discussed below.

X will certify for each program year the amount of net investment return realized on the Program Trust. X may establish ceilings or floors on the net investment return payable to Participating Institutions for redeemed Tuition Certificates in order to provide a more stabilized return on Tuition Certificates over the life of the Program. Where investment returns payable to a Participating Institution exceed a ceiling, the excess funds may be allocated to a "Stabilization Fund," and where such investment returns are less than an established floor, the Stabilization Fund may be used to cover a shortfall, provided there is a sufficient positive balance in the Stabilization Fund in the year of the shortfall. There shall be no carryover of an obligation to fund any remaining shortfall for any other year. The net investment return for each year, net of reasonable Program expenses and as adjusted to reflect any floor or ceiling established for that period, will be used in determining the amount of payments to Participating Institutions which provide educational services to designated beneficiaries under Tuition Certificates.

The amount of the net investment return will not affect the annual tuition benefits available to designated beneficiaries attending a Participating Institution as a student. No Participating Institution and no Owner or designated beneficiary has any direct right, claim, or interest in the monies held in the Program Trust except for amounts which have been authorized for payment under the Program Documents.

Under the terms of the Enrollment Agreement, the Administrator may determine that the Program cannot continue to operate upon a sound financial basis and the Administrator may terminate the Program. In such event, the Administrator will develop a plan setting forth the date on which the Program will terminate and providing for fulfillment of or payment on Program obligations under outstanding Tuition Certificates taking into account resources then available under the Program Trust for Program obligations. Under any termination plan, Participating Institutions will continue to be obligated to accept and honor Tuition Certificates in payment for educational services for a minimum of 20 years from the date of issuance of the applicable Tuition Certificate or one year from the administrative termination date described in the preceding sentence, whichever is later. If the Administrator determines to terminate the Program, the Administrator will send appropriate notice to each Owner of a Tuition Certificate. The termination plan may provide that each Tuition Certificate issued more than 20 years prior to the date of Program termination will be redeemed at its Refund Value, unless the Tuition Certificate is currently in use. For this purpose, a Tuition Certificate is "currently in use" if the designated beneficiary named on the Tuition Certificate on the date of termination is enrolled at a Participating Institution on the date of Program termination (or becomes enrolled within one year following the date of Program termination) and the Tuition Certificate is utilized within five program years following the date of Program termination.

The Consortium Agreement provides that X may not be dissolved if there are any remaining obligations on then-outstanding Tuition Certificates under the Program, leaving the Program without a successor administrator. Specifically, the Consortium Agreement provides that, if X is dissolved, liquidated or otherwise terminated, member institutions shall organize a

successor consortium entity to serve as the administrator of the Program. All the assets and liabilities of X will be transferred to, and assumed by, such successor entity and it will continue the business of X under the same name. Further, all membership units of member institutions will be converted into membership units in such successor entity having substantially identical terms.

X represents that the enforcement of the foregoing rights against these parties under outstanding Tuition Certificates will survive any termination of X and any successor of X because (i) the rights against the Program Trust derive from the fact that the Owner and the designated beneficiary are direct beneficiaries of the Program Trust and can enforce their rights as beneficiaries to obtain a refund, and (ii) the Owner and the designated beneficiary are intended third party beneficiaries of the Program Agreement between each Participating Institution and X. X represents that under the state law chosen as controlling, an intended third party beneficiary of a contract between two other parties may directly enforce the contract for the beneficiary's own benefit. This will allow direct enforcement of the Tuition Certificate by the Owner and the designated beneficiary against a Participating Institution, even in the event that X and any successor of X no longer exists. X represents that this right of enforcement of third party beneficiary claims against parties to a contract extends to the original parties and their successors in interest.

Section 529(a) of the Code provides for the exemption from federal income tax of qualified tuition programs.

Section 529(b)(1) of the Code provides, in part, that the term "qualified tuition program" means a program established and maintained by a state or agency or instrumentality thereof or by one or more eligible educational institutions - -

(A) under which a person-

(i) may purchase tuition credits or certificates on behalf of a designated beneficiary which entitle the beneficiary to the waiver or payment of qualified higher education expenses of the beneficiary, . . . and

(B) which meets the other requirements of this subsection.

Except to the extent provided in regulations, a program established and maintained by one or more eligible educational institutions shall not be treated as a qualified tuition program unless such program provides that amounts are held in a qualified trust and such program has received a ruling or determination that such program meets the applicable requirements for a qualified tuition program. For purposes of the preceding sentence, the term "qualified trust" means a trust which is created or organized in the United States for the exclusive benefit of designated beneficiaries and with respect to which the requirements of paragraphs (2) and (5) of section 408(a) are met.

Section 529(b)(2) of the Code provides that a program shall not be treated as a qualified tuition program unless it provides that purchases or contributions may only be made in cash.

Section 529(b)(3) of the Code provides that a program shall not be treated as a qualified tuition program unless it provides separate accounting for each designated beneficiary.

Section 529(b)(4) of the Code provides that a program shall not be treated as a qualified tuition program unless it provides that any contributor to, or designated beneficiary under, such program may not directly or indirectly direct the investment of any contributions to the program (or any earnings thereon).

Section 529(b)(5) of the Code provides that a program shall not be treated as a qualified tuition program if it allows any interest in the program or any portion thereof to be used as security for a loan.

Section 529(b)(6) of the Code provides that a program shall not be treated as a qualified tuition program unless it provides adequate safeguards to prevent contributions on behalf of a designated beneficiary in excess of those necessary to provide for the qualified higher education expenses of the beneficiary.

Section 529(d) of the Code provides that each officer or employee having control of the qualified tuition program or their designee shall make such reports regarding such program to the Secretary and to designated beneficiaries with respect to contributions, distributions, and such other matters as the Secretary may require. The reports required by this subsection shall be filed at such time and in such manner and furnished to such individuals at such time and in such manner as may be required by the Secretary.

Section 529(e)(5) of the Code provides that the term "eligible educational institution" means an institution –

(A) which is described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088), as in effect on the date of the enactment of this paragraph (enacted Aug. 5, 1997), and

(B) which is eligible to participate in a program under title IV of such Act.

Section 408(a)(2) of the Code defines "trustee" as a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

Section 408(a)(5) of the Code provides that the assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

Section 408(n) defines the term "bank" to include a bank as defined in section 581. Section 581, in turn, defines the term "bank" to include a bank or trust company incorporated and doing business under the laws of the United States (including laws relating to the District of Columbia) or any State, a substantial part of the business of which consists of receiving

deposits and making loans and discounts, or of exercising fiduciary powers similar to those permitted to national banks under authority of the Comptroller of the Currency, and which is subject by law to supervision and examination by State, Territorial, or Federal authority having supervision over banking institutions.

Section 7701(a)(9) of the Code provides that, when used geographically, "United States" includes only the States and the District of Columbia.

Section 7701(a)(30) of the Code provides that a citizen or resident of the United States, a domestic partnership and a domestic corporation are each United States persons. In addition, a trust is a United States person if "(i) a court within the United States is able to exercise primary supervision over the administration of the trust, and (ii) one or more United States persons have the authority to control all substantial decisions of the trust." See also Treas. Reg. § 301.7701-7(a)(1).

Section 301.7701-7(c) provides that a trust satisfies the court test if – (i) The trust instrument does not direct that the trust be administered outside of the United States; (ii) The trust in fact is administered exclusively in the United States; and (iii) The trust is not subject to an automatic migration provision (a provision that would cause the trust to migrate to a foreign jurisdiction if a United States court attempted to assert jurisdiction).

Section 301.7701-7(d)(1)(i) provides that for purposes of the control test the term United States person means a United States person within the meaning of section 7701(a)(30). For example, a domestic corporation is a United States person, regardless of whether its shareholders are United States persons.

Section 301.7701-7(d)(1)(ii) provides that the term substantial decisions means those decisions that persons are authorized or required to make under the terms of the trust instrument and applicable law and that are not ministerial. Decisions that are ministerial include decisions regarding details such as the bookkeeping, the collection of rents, and the execution of investment decisions.

Section 301.7701-7(d)(3)(iii) provides that the term control means having the power, by vote or otherwise, to make all of the substantial decisions of the trust, with no other person having the power to veto any of the substantial decisions. To determine whether United States persons have control, it is necessary to consider all persons who have authority to make a substantial decision of the trust, not only the trust fiduciaries.

X is a Delaware limited liability company organized for the purpose of establishing and maintaining a prepaid tuition program that sells Tuition Certificates which entitle a designated beneficiary to the waiver or payment of certain qualified higher education expenses at one or more private colleges or universities participating in the Program. Only members of X are eligible to participate in the Program. The Consortium Agreement requires each member institution to qualify as an "eligible educational institution" within the meaning of section 529(e)(5) of the Code and as an operating educational institution described in section 481 of the Higher Education Act of 1965. The Agreement is more restrictive than section 529(e) of the

Code in that the member must also qualify as a public charity described in sections 501(c)(3) and 509(a)(1) of the Code or any successor provisions. Thus, each of the members of X meets the requirements for an "eligible educational institution" as defined in section 529(e)(5).

X is a membership organization in which each member has one vote. The members of X elect the Board of Directors, which is responsible for the operation of the Program, including hiring personnel and electing the officers of X. The powers granted to the Board in the Consortium Agreement enable the Board to make rules and oversee the operation of the Program. Once the Program becomes operational, at least 75 percent of X's Board of Directors must be employees of member institutions. Therefore, the Participating Institutions control X and are actively involved in an ongoing basis in the administration of the Program. Accordingly, X is established and maintained by its Participating Institutions, which are eligible educational organizations, as required by section 529(b)(1).

The Trust Agreement provides that the trust is to be administered, construed, and enforced according to the laws of a particular State, and does not provide for administration outside of the United States. Under the Trust Agreement, X, a Delaware limited liability company, serves as the Administrator and has the authority to direct the Trustee, Y, with respect to investment guidelines of the trust and to appoint any investment manager. X represents that Y, a federally chartered savings bank, will be the Trustee. Under these facts, the Program Trust established by the Trust Agreement will be a domestic trust, within the meaning of section 7701(a), and will be a trust created or organized in the United States, within the meaning of section 529(b)(1).

X represents that Y is specifically authorized to exercise, and a substantial part of its business consists of exercising, fiduciary powers similar to those exercised by national banks under authority of the Comptroller of the Currency. X represents that Y has FDIC insurance and is subject to supervision and examination by the Office of Thrift Supervision. Thus, Y is a bank as defined in sections 408(a)(2) and 408(n) of the Code. The Trust Agreement provides, in pertinent part, that the trustee shall not commingle assets of the Program Trust with other property except in a "common trust fund" or "common investment fund," within the meaning of section 408(a)(5) of the Code.

The Trust Agreement provides that the Trustee will hold and invest the assets of the Program Trust for the exclusive benefit of the designated beneficiaries. Additionally, the Trust Agreement provides that at no time prior to the satisfaction of all liabilities with respect to beneficiaries under the Program shall any part of the Program Trust be used for any purposes other than for the exclusive benefit of such beneficiaries, including the payment of reasonable costs for the maintenance and administration of the program for such beneficiaries. The Trust Agreement only authorizes disbursements from the Program Trust for the payment of reasonable costs and expenses of administering the Program, for payments to Participating Institutions on account of redemption of Tuition Certificates, or for payments to Owners for partial or full refund from the Program. Finally, the Program Documents provide that the Owner of a Tuition Certificate who requests a refund and surrenders a Tuition Certificate will receive a refund equal to the purchase price plus an annual rate of return. The annual rate of return is determined based on the actual investment return on Program Trust assets during the years the

Tuition Certificate was outstanding, provided that the annual rate of return cannot exceed a 2% gain or be less than a 2% loss.

In addition, the Trust Agreement provides that the Trustee, the Administrator and each investment manager of the Program Trust shall discharge their respective duties with respect to the Program Trust with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

The rights of designated beneficiaries (and owners of Tuition Certificates) are protected in the Program by (1) assets held in a trust for the exclusive benefit of the designated beneficiaries; (2) the provision under the Consortium Agreement for a successor administrator that will assume X's obligations, in the event that X is dissolved; (3) the direct obligation of a Participating Institution to provide tuition benefits (and in some case a refund of tuition) to the Owner and designated beneficiary of a Tuition Certificate under the third party beneficiary principles of contract law, as reinforced by the language of the Program Agreement; and (4) the right to enforce the Tuition Certificates or receive a refund on the termination of the Program, as described in this letter.

Certificate purchase prices and investment earnings thereon must be promptly deposited into the Program Trust. In addition to making disbursements for the payment of tuition benefits or refund amounts, the Trustee may only pay for the reasonable costs of maintenance and administration of the Program. Loans to the administrator or any participating eligible educational institution from the Program Trust are prohibited.

Based on the foregoing, X has demonstrated that that the Program Trust is a qualified trust created for the exclusive benefit of the designated beneficiaries. Thus, the requirements of section 529(b)(1) of the Code are met for purposes of amounts held in a "qualified trust."

A prospective purchaser will enter into a contract with X to purchase annual tuition benefits for a designated beneficiary in the form of a Tuition Certificate. Tuition Certificates will cover the cost of tuition and required fees for attendance by the designated beneficiary at eligible educational institutions participating in the Program. Each Participating Institution will independently set the annual tuition cost for such attendance at the respective Participating Institution.

All Tuition Certificates will be sold through X. Purchases of Tuition Certificates may only be paid in cash, including a rollover from another Code section 529 plan, automatic or other withdrawal from a bank account, personal check, authorized payroll deduction plan, or other certified funds approved by the Administrator, as required under section 529(b)(2) of the Code.

The Program Agreement provides that a separate account for benefits provided under the Program shall be maintained for each designated beneficiary. In addition, the Enrollment Agreement provides that each Owner of a Tuition Certificate will receive from the Administrator a quarterly statement showing the issue date of and any activity on a Tuition Certificate. Such activity may include the payments, refunds, and remaining annual tuition benefits. Upon

request by the Owner, a copy of the quarterly statement will be sent to the designated beneficiary. Thus, the requirements of section 529(b)(3) of the Code are met.

The Consortium Agreement provides that it is the responsibility of the Board of Directors of X to adopt investment objectives and policies, to hire and evaluate investment managers, and to establish and monitor policy implementation and investment performance. An investment committee, a majority of the members of which are members of the Board of X, acts on behalf of the Board in meeting and reviewing with each investment manager charged with managing funds of X and any funds held in trust for designated beneficiaries under the Program. The Program Agreement and the Enrollment Agreement provide that no owner or designated beneficiary will have authority to direct the investment of any certificate purchase price or earnings thereon. Accordingly, the requirements of section 529(b)(4) are met.

The Program Agreement and the Enrollment Agreement provide that no interest in a Tuition Certificate and the annual tuition benefits evidenced thereby may be pledged or used as security for a loan or any other obligation as required by section 529(b)(5) of the Code.

The Program Agreement provides that Tuition Certificates shall not be issued with respect to any designated beneficiary for annual tuition benefits in excess of those necessary to pay for five years of undergraduate enrollment covering all applicable tuition and required fees of student with the same expected date of enrollment as the designated beneficiary at the Participating Institution with the highest current undergraduate tuition. X will maintain records to insure that the total annual tuition benefits purchased on behalf of each designated beneficiary are not in excess of the amount required to pay for the tuition and required fees for five years for an undergraduate student with the same expected date of enrollment at the Participating Institution with the highest current undergraduate tuition. Based on the foregoing, the requirements of section 529(b)(6) of the Code are met.

Based on the above, we rule as follows:

The Program established by X meets the requirements for exemption from federal income tax as a qualified tuition program described in section 529 of the Code.

This ruling is based on the facts and representations submitted. The ruling is not valid to the extent that the Program is not operated in the manner set forth above, or there are changes in the purposes or operations of X or the Program from that set forth above.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

There are no final regulations for section 529 of the Code. Please be advised that the validity of this ruling may be affected by the issuance of final regulations as well as any transitional rules contained therein.

The Administrator must report the payment and distribution of all benefits under the Program for Federal income and state income tax purposes in accordance with the reporting rules applicable to qualified tuition programs under section 529 of the Code.

Because this letter could help resolve any future questions about the Program's exempt status, please keep a copy of this ruling in the organization's permanent records.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

Pursuant to a power of attorney on file with this office, we are sending a copy of this ruling letter to your authorized representative.

Sincerely,

(signed) Robert C. Harper, Jr.
Robert C. Harper, Jr.
Manager, Exempt Organizations
Technical Group 3