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

201031043

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

MAY 11 2010

T:EP:RA:T3

LEGEND:

Employer A:

Plan X:

State M:

Dear

This is in response to a request submitted by your authorized representative on your behalf for a private letter ruling, dated January 12, 2005, as supplemented by letters dated April 12, 2005, November 15, 2005, May 11, 2006, December 4, 2006, January 4, 2008, June 30, 2008, and April 6, 2010, concerning the applicability of section 415(m) of the Internal Revenue Code ("Code") to an excess plan and the tax consequences of certain related transactions. Your authorized representative has submitted the following facts and representations in support of your request.

Employer A is a hospital district organized as a political subdivision of State M under a State M statute. Employer A adopted Plan X, a money purchase pension plan, for the benefit of certain of its eligible employees, originally effective as of July 1, 1980. Employer A is the only adopting employer of Plan X and only employees and former employees of Employer A are currently, or have ever been, participants in Plan X. No employees or former employees of any non-governmental entity are currently, or have ever been, participants in Plan X. Employer A owns and operates all of its facilities and it has not contracted with any third parties to operate any of such facilities.

Plan X is intended to be qualified under Code section 401(a) and is also represented to be a governmental plan as defined in Code section 414(d). Plan X is administered by the Board of Directors of Employer A. The Board of Directors has the authority to amend Plan X. Pursuant to the terms of Plan X, Employer A makes employer contributions on behalf of eligible

participants at a fixed employer contribution rate set forth in Plan X. Plan X participants are permitted to make after-tax contributions to Plan X.

Section 1.8 of Plan X will be amended to state that "Company" means Employer A and any successor by merger, purchase, reorganization or otherwise that is a "Governmental Employer". "Governmental Employer" will be defined in Plan X as the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing within the meaning of Code section 414(d).

Section 1.16(a) of Plan X will be amended to provide that an "Adopting Employer" is Employer A or any other Governmental Employer that adopts Plan X.

Section 14.1 of Plan X will be amended to provide that any subsidiary or affiliate of Employer A that is a Governmental Employer may, with the consent of the Board of Directors, become a party to Plan X by adopting Plan X for some or all of its employees and by executing the trust agreement if required under such trust agreement.

On June , 200 the Board of Directors of Employer A approved an amendment to Plan X which added an appendix to Plan X setting forth an arrangement which was intended to be a qualified governmental excess benefit arrangement in accordance with Code section 415(m) ("Arrangement"). Plan X will be amended to remove this appendix, and the Arrangement is now set forth in a document separate from Plan X.

The Arrangement states that it is maintained solely for the purpose of providing to participants in Plan X that part of the employer contributions that otherwise would have been contributed by Employer A on behalf of such participants pursuant to Plan X but which were not contributed because of the limitations on contributions imposed by Code section 415. No other contributions are allowed. No contributions under the Arrangement will be made on behalf of a participant for any plan year in which a participant's contributions under Plan X do not exceed the limitations imposed by Code section 415. Benefits payable to or on behalf of a participant in the Arrangement will equal the participant's account balance under the Arrangement. The Arrangement provides that participants in Plan X automatically participate in the Arrangement if contributions to Plan X on their behalf exceed the limits of Code section 415(c). Participation in the Arrangement by such participants is mandatory.

Under the Arrangement, no election is provided at any time to any participant (directly or indirectly) to defer compensation. No participant shall be paid benefits under, or make withdrawals from, the Arrangement before the participant's termination of employment with Employer A. A participant's rights under the Arrangement cannot be alienated.

Employer A maintains a rabbi trust ("Rabbi Trust") for the purpose of holding the contributions made by Employer A under the Arrangement, paying benefits under the Arrangement, and paying any expenses of maintaining the Arrangement not paid directly by Company A. The Rabbi Trust is separate from Plan X's related trust, and Rabbi Trust principal and earnings thereon are held separately from the other funds of Employer A. The Rabbi Trust will not accept contributions from Plan X, invest Plan X funds, or pay Plan X benefits. The Rabbi Trust is an irrevocable grantor trust under applicable state law and under federal law.

Plan X and its related trust offer multiple investment alternatives to a Plan X participant in which the participant may invest the amounts credited to the account of the participant. Contributions to the Arrangement on behalf of a participant may be, but are not required to be, invested according to the investment elections made by such participant with respect to his or her account under Plan X. Each participant's bookkeeping account balance under the Arrangement and Rabbi Trust will be charged or credited with earnings, gains, losses or expenses based such investment elections.

Based on the above facts and representations, your authorized representative has requested the following rulings on your behalf:

1. The Arrangement is a qualified governmental excess benefit arrangement as defined in Code section 415(m)(3);

3. Neither the adoption of the Arrangement, the establishment of the Rabbi Trust, the contemplated contribution of funds to the Rabbi Trust, nor the crediting of earnings on the Rabbi Trust assets will constitute a transfer of property to a participant in the Arrangement for purposes of Code section 83 or section 1.83-3 of the Treasury Regulations;

4. Neither the adoption of the Arrangement, the establishment of the Rabbi Trust, the contemplated contribution of funds to the Rabbi Trust, nor the crediting of earnings on the Rabbi Trust assets will constitute a contribution to a non-exempt employees' trust under Code section 402(b);

5. Neither the adoption of the Arrangement, the establishment of the Rabbi Trust, the contemplated contribution of funds to the Rabbi Trust, nor the crediting of earnings on the Rabbi Trust assets will cause any amount to be included in the gross income of a participant in the Arrangement or his or her beneficiaries under the cash receipts and disbursements method of accounting pursuant to either the constructive receipt doctrine under Code section 451, or the economic benefit doctrine;

6. Under Code section 451, amounts distributed under the Arrangement and from the Rabbi Trust will be included in the gross income of a recipient who is on the cash receipts and disbursements method of accounting in the year in which such amounts are actually paid or otherwise made available to the recipient, whichever is earlier;

7. No amount will be considered to have been made available to a participant in the Arrangement as a result of the fact that the participant has a right to designate the "deemed investment" of amounts credited to that participant's account under the Arrangement and the Rabbi Trust;

8. The limits on contributions contained in Code sections 457(b)(2) and 457(c) do not apply to contributions under the Arrangement and contributions to the Arrangement should not be taken into account in determining whether any other plan maintained by Employer A is an eligible deferred compensation plan within the meaning of Code section 457(b);

9. Participants in the Arrangement will not be taxable pursuant to Code section 457(f) on any amounts contributed to or held or distributed under the Arrangement or by the Rabbi Trust; and

10. Income of the Rabbi Trust will constitute income derived from the exercise of an essential governmental function exempt from tax under Code section 115 and section 415(m)(1);

Requested rulings 2 and 12 were withdrawn by your authorized representative in a letter dated May 11, 2006. In addition, requested ruling 11 was withdrawn by your authorized representative in a letter dated December 4, 2006.

With respect to your first requested ruling, Code section 415(m) sets forth the treatment of qualified governmental excess benefit arrangements. Code section 415(m)(1) provides in part that, in determining whether a governmental plan (as defined in section 414(d)) meets the requirements of section 415, benefits provided under a qualified governmental excess benefit arrangement shall not be taken into account.

Section 415(m)(3) defines such an arrangement as a portion of a governmental plan which meets the following three requirements: (A) such portion is maintained solely for the purpose of providing to participants in the plan that part of the participant's annual benefit otherwise payable under the terms of the plan that exceeds the limitations on benefits imposed by section 415 ("excess benefits"); (B) under such portion no election is provided at any time to the participant (directly or indirectly) to defer compensation; and (C) excess benefits are not paid from a trust forming a part of such governmental plan unless such trust is maintained solely for the purpose of providing such benefits.

In the present case, the Arrangement is a portion of Plan X, which your authorized representative has stated is a governmental plan as described in Code section 414(d). According to the terms of the Arrangement, its only stated purpose is to provide participants in Plan X that portion of a participant's benefits that would otherwise be payable under the terms of Plan X except for the limitations on benefits imposed by Code section 415. The Arrangement does not allow participants to defer compensation. The terms of the Arrangement limit participation to Plan X participants for whom contributions would exceed the Code section 415 limits. Therefore, we have determined that the Arrangement is a portion of a governmental plan which is maintained solely for the purpose of providing to Plan X participants that part of the participant's annual benefit otherwise payable under the terms of Plan X that exceeds the section 415 limits, and, as such, meets the requirements of section 415(m)(3)(A).

Your authorized representative has stated in accordance with the terms of the Arrangement that participation is automatic and mandatory for Plan X participants for whom contributions are limited by Code section 415. Thus, we have determined that no direct or indirect election is provided at any time to participants to defer compensation, and, accordingly, the requirements of section 415(m)(3)(B) are met.

Code section 415(m)(3)(C) requires that the trust from which excess benefits are paid must not form a part of the governmental plan (in this case, Plan X) which contains the excess benefit arrangement, with a certain exception for trusts maintained solely for the purpose of providing such benefits. In the present case, the Rabbi Trust is a grantor trust and it is maintained

separately from Plan X. Contributions to the Rabbi Trust consist only of the amounts that could not be contributed to Plan X because of the limitations of section 415(c) and the amount required to pay administrative expenses. Therefore, we have determined that the requirements of section 415(m)(3)(C) are met.

Since the Arrangement satisfies all of the requirements of Code section 415(m)(3), we conclude with respect to your first requested ruling that the Arrangement is a qualified governmental excess benefit arrangement as defined in Code section 415(m)(3).

With respect to your third, fourth, fifth and sixth requested rulings, section 415(m)(2) provides that "for purposes of this chapter, (A) the taxable year or years for which amounts in respect to a qualified governmental excess benefit arrangement are includible in gross income by a participant, and (B), the treatment of such amounts when so includible by the participant, shall be determined as if such qualified governmental excess benefit arrangement were treated as a plan for the deferral of compensation which is maintained by a corporation not exempt from tax under this chapter and which does not meet the requirements for qualification under section 401."

Ruling 1 has already determined that the Arrangement meets the legal requirements of section 415(m) of the Code for qualified governmental excess benefit arrangements. Accordingly, the tax treatment of the amounts distributed under the Arrangement to the participants is determined as if such qualified governmental excess benefit arrangement were treated as a plan for the deferral of compensation which is maintained by a corporation not exempt from tax under this chapter and which does not meet the requirements for qualification under section 401. State M has represented that the trust established in connection with the Arrangement is a grantor trust pursuant to State M law and for Federal income tax purposes.

For purposes of determining the taxation of nonqualified deferred compensation arrangements, § 83 of the Code provides that the excess (if any) of the fair market value of property transferred in connection with the performance of services over the amount paid (if any) for the property is includible in the gross income of the person who performed the services for the first taxable year in which the property becomes transferable or is not subject to a substantial risk of forfeiture.

Section 1.83-3(e) of the regulations provides that for purposes of § 83 of the Code the term "property" includes real and personal property other than money or an unfunded and unsecured promise to pay money or property in the future. Property also includes a beneficial interest in assets (including money) transferred or set aside from claims of the transferor's creditors, for example, in a trust or escrow account.

Section 402(b) of the Code provides generally that contributions made by an employer to an employees' trust that is not exempt from tax under § 501(a) are included in the employee's gross income in accordance with § 83, except that the value of the employee's interest in the trust will be substituted for the fair market value of the property in applying § 83. Under § 1.402(b)-1(a)(1) of the regulations, an employer's contributions to a non-exempt employees' trust are included as compensation in the employee's gross income for the taxable year in which the contribution is made, but only to the extent that the employee's interest in such contribution is substantially vested, as defined in the regulations under § 83.

In this case, the Arrangement's related trust (the Trust) was established and is maintained for the purpose of providing benefits under the Arrangement. The Trust is intended to be a grantor trust under Revenue Procedure 92-64, 1992-2 C.B. 422, is represented as such, and is maintained separately from the Arrangement. Accordingly, with respect to your third requested ruling, we conclude that neither the adoption of the Arrangement, the establishment of the Trust, the contemplated contribution of funds to the Trust, nor the crediting of earnings on Trust assets will constitute a transfer of property to a participant for purposes of § 83 of the Code or § 1.83-3(e) of the regulations. In addition, with respect to your fourth requested ruling, we conclude that neither the adoption of the Arrangement, the establishment of the Trust, the contemplated contribution of funds to the Trust, nor the crediting of earnings on Trust assets will constitute a contribution to a non-exempt employees' trust under § 402(b).

Section 451(a) of the Code and § 1.451-1(a) of the regulations provide that an item of gross income is includible in gross income for the taxable year in which actually or constructively received by a taxpayer using the cash receipts and disbursements method of accounting. Under § 1.451-2(a), income is constructively received in the taxable year during which it is credited to a taxpayer's account, set apart or otherwise made available so that the taxpayer may draw on it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Various revenue rulings have considered the tax consequences of nonqualified deferred compensation arrangements. Rev. Rul. 60-31, Situations 1-3, 1960-1 C.B. 174, holds that a mere promise to pay, not represented by notes or secured in any way, does not constitute receipt of income within the meaning of the cash receipts and disbursements method of accounting. See also Rev. Rul. 69-650, 1969-2 C.B. 106, and Rev. Rul. 69-649, 1969-2 C.B. 106.

Under the economic benefit doctrine, an employee has currently includible income from an economic or financial benefit received as compensation, though not in cash form. Economic benefit applies when assets are unconditionally and irrevocably paid into a fund or trust to be used for the employee's sole benefit. Sproull v. Commissioner, 16 T.C. 244 (1951), aff'd per curiam, 194 F.2d 541 (6th Cir. 1952), Rev. Rul. 60-31, Situation 4. In Rev. Rul. 72-25, 1972-1 C.B. 127, and Rev. Rul. 68-99, 1968-1 C.B. 193, an employee did not receive income as a result of the employer's purchase of an insurance contract to provide a source of funds for deferred compensation because the insurance contract is the employer's asset, subject to claims of the employer's creditors.

Accordingly, with respect to your fifth requested ruling, we conclude that neither the adoption of the Arrangement, the establishment of the Trust, the contemplated contribution of funds to the Trust, nor the crediting of earnings on Trust assets will cause an amount to be included in the gross income of a participant or his or her beneficiaries under the cash receipts and disbursements method of accounting pursuant to either the constructive receipt doctrine, within the meaning of § 451 of the Code, or the economic benefit doctrine.

In addition, with respect to your sixth requested ruling, we conclude that, under § 451 of the Code, amounts distributed under the Arrangement and from the Trust will be included in the gross income of a recipient who is on the cash receipts and disbursements method of accounting in the year in which such amounts are actually paid or otherwise made available to the recipient, whichever is earlier. With respect to your seventh requested ruling, we conclude that no amount will be considered to have been made available to a participant merely because

participants have a right to designate the "deemed investment" of amounts credited to their accounts under the Arrangement.

With respect to your eighth and ninth requested rulings, Code section 457(a)(1)(A) provides that in the case of a participant in a governmental eligible deferred compensation plan, any amount of compensation deferred under such 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 to the participant or beneficiary.

Code section 457(e)(14) provides that subsections (b)(2) and (c) of Code section 457 do not apply to any qualified governmental excess benefit arrangement (as defined in section 415(m)(3)), and benefits provided under such an arrangement will not be taken into account in determining whether any other plan is an eligible deferred compensation plan within the meaning of Code section 457(b).

Code section 457(f)(1) governs the tax treatment of a participant in a plan of an eligible employer, if the plan provides for a deferral of compensation, but is not an eligible deferred compensation plan. The term "eligible employer" is defined in Code section 457(e)(1), and includes a state or any political subdivision or any agency or instrumentality of a state, and any other tax-exempt organization. Code section 457(f)(2) states that section 457(f)(1) does not apply to a qualified governmental excess benefit plan described in section 415(m).

In the first ruling, we concluded that the Arrangement is a qualified governmental excess benefit arrangement as defined in section 415(m)(3). Accordingly, with respect to your eighth requested ruling, we conclude that the limits on contributions contained in Code section 457(b)(2) and Code section 457(c) do not apply to contributions under the Arrangement and contributions to the Arrangement should not be taken into account in determining whether any other plan maintained by Employer A is an eligible deferred compensation plan within the meaning of Code section 457(b). With respect to your ninth requested ruling, we conclude that participants in the Arrangement will not be taxable pursuant to Code section 457(f) on any amounts contributed to or held or distributed under the Arrangement by the Rabbi Trust.

With respect to your tenth requested ruling, Code section 415(m)(1) provides that "[I]ncome accruing to a governmental plan (or to a trust that is maintained solely for the purpose of providing benefits under a qualified governmental excess benefit arrangement) in respect of a qualified governmental excess benefit arrangement shall constitute income derived from the exercise of an essential governmental function upon which such governmental plan (or trust) shall be exempt from tax under section 115." Ruling 1 has already determined that the Arrangement meets the legal requirements of section 415(m) of the Code for qualified governmental excess benefit arrangements.

Accordingly, with respect to your tenth requested ruling, we conclude that income of the Rabbi Trust will constitute income derived from the exercise of an essential governmental function exempt from tax under Code section 115 and section 415(m)(1).

This ruling letter is based on the assumption that Plan X is a governmental plan as described in Code section 414(d) and that it meets all of the applicable requirements under Code section 401(a). It is also based on the assumption that the amendments described above are executed.

In addition, this ruling letter is conditioned on the taxpayer's executing and adopting the revised Rabbi Trust Agreement submitted on April 2010 and on the taxpayer's adopting Amendment No. 1 (submitted on January 20 to its Arrangement.

This ruling letter 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 as precedent.

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

If you have any questions about this letter, please contact (ID ) at
Please refer to

Sincerely yours,

Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures
Notice 437
Deleted copy of ruling letter

Cc: