Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:TEGE:EB:QP2
PLR-120660-09

Date:
October 09, 2009

Legend

X =

Plans =

Dear :

This is in response to your request for a ruling regarding substantially similar deferred compensation plans (the Plans) established by X, an organization exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code (the Code). You ask whether the adoption of proposed amendments to the Plans, which were established between and , will cause amounts deferred under the Plans to be subject to section 457 of the Code as amended by section 1107 of the Tax Reform Act of 1986, Pub. L. No. 99-514 (the Act).

Under the Plans, a stated amount was deferred each month on behalf of a participant into a bookkeeping account. X states that there have been no increases in the deferrals since the Plans were established.

The Plans will be amended to specify the time of payment after the occurrence of a distribution event and provide the opportunity for participants to change the time or form of payment under the Plans.

Section 1107(c)(3)(A) of the Act amended the Code to provide that, generally, section 457 is applicable to deferred compensation plans established and maintained by organizations exempt from tax for taxable years beginning after December 31, 1986. Section 1107(e)(3)(B)(ii) of the Act provides that section 457 does not apply to amounts deferred under a plan that are deferred from taxable years beginning after December 31, 1986, pursuant to an agreement that was in writing on August 16, 1986, and on such date provides for a deferral for each taxable year covered by the agreement of a fixed amount or of an amount determined pursuant to a fixed formula.

A-28 of Notice 87-13, 1987-2 C.B. 432, provides, in part, that section 457 shall not apply to deferrals of compensation that would have been paid or made available (but for the deferred compensation plan) in taxable years of an individual beginning after December 31, 1986, under a deferred compensation plan of a tax-exempt organization to the extent that such deferrals were fixed pursuant to a written plan on August 16, 1986. For purposes of this grandfather rule, in the case of a deferred compensation plan that is in the nature of a defined benefit plan, deferrals of amounts that are allocable to taxable years of the individual are to be treated as deferrals of compensation that would have been paid or made available in such taxable years (but for the deferred compensation plan).

A deferral with respect to an individual is treated as fixed on August 16, 1986, to the extent that a written plan on such date provided for such deferral for each taxable year of the plan and such deferral was determinable on such date under written terms of the plan as a fixed dollar amount, a fixed percentage of a fixed base amount (e.g., amount of regular salary, commissions, bonus, or total compensation), or an amount to be determined under a fixed formula. An example of a fixed formula is a deferred compensation plan that is in the nature of a defined benefit plan under which the deferred compensation to be paid to an employee in the future (e.g., on or after separation from service) is in the form of an annual benefit equal to 1 percent of each of the employee's years of service with the employer times the employee's final average salary.

A-28 of Notice 87-13 also provides that a deferral with respect to an individual is treated as fixed on August 16, 1986, to the extent that a written plan on such date provided for such deferral and the deferral is the same as the deferral in effect with respect to such individual under such plan on August 16, 1986, even if on such date the written plan did not fix the amount of deferral. Thus, for example, if under a written plan on August 16, 1986, an employee could elect to have up to 5 percent of regular salary deferred and if, on August 16, 1986, the employee had a 5 percent deferral election in effect, subsequent deferrals of the employee's regular salary are to be treated as having been fixed on August 16, 1986, for purposes of this grandfather rule for as long as such deferral continues to be 5 percent of the employee's regular salary. Similarly, for example, if, under a specified formula in a written plan on August 16, 1986, an

employee earned additional deferred compensation amounts for each year of service with the employer, additional deferred amounts attributable to years of service after December 31, 1986, are to be treated as having been fixed on August 16, 1986, for purposes of this grandfather rule for as long as such deferrals continue to be determined under the formula in effect on August 16, 1986.

An amount of deferral that is pursuant to a written plan on August 16, 1986, will cease to be treated as fixed on such date, and thus will be subject to section 457, as of the effective date of any modification to the written plan that directly or indirectly alters the fixed dollar amount, the fixed percentage or the fixed base amount to which the percentage is applied, or the fixed formula. Similarly, an amount of deferral that is pursuant to a written plan on August 16, 1986, that is treated as fixed on such date because it is the same deferral amount that was in effect under such plan on August 16, 1986, and thus will be subject to section 457, as of the effective date of any modification to the amount of the deferral (i.e., any modification to the specified dollar amount, specified percentage of a specified base amount, or specified formula, whichever is applicable).

Based on the above cited authorities, it is our determination that the amendments to the Plans do not cause amounts deferred under the Plans to become subject to section 457, as amended by section 1107 of the Act.

If the Plans are amended to modify, directly or indirectly, the amount of the deferrals under the plans, this ruling will not apply to amounts deferred under the plans or agreements.

No opinion is expressed with regard to the timing of the inclusion in income of amounts deferred under these Plans.

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

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed or implied concerning the application of section 409A of the Code to any such transaction or item. If the Plans are significantly modified, this ruling will not necessarily remain applicable.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Cheryl E. Press
Senior Technician Reviewer, Qualified Plans
Branch 2 (Employee Benefits)
(Tax Exempt & Government Entities)

Enclosure (1)