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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

201142033

JUL 2 5 2011

SE:T:EP:RA:T2

***Uniform Issue List*: 403.00-00**

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LEGEND:

University F = **********

State A = **********

Plan X = **********

Date 1 = **********

Date 2 = **********

Year 1 = **********

Dear **********,

This is in response to the July 27, 2009, letter submitted on your behalf by your authorized representative, in which you request a ruling on the application of the universal availability requirement under section 403(b)(12)(A)(ii) of the Internal Revenue Code (the "Code"). The following facts and representations support your ruling request:

University F, the taxpayer, represents that it is a public educational institution described in section 170(b)(1)(A)(ii) of the Code and an agency or instrumentality of State A as defined in Treas. Reg. § 1.403(b)-2(b)(20). The University F system includes in State A. University F purchases annuity contracts that qualify under section 403(b) of the Code for its employees. All contributions to such annuity contracts are made pursuant to salary reduction agreements and are comprised of elective deferral contributions.

For years prior to Year 1, each University F campus separately administered a 403(b) program for its respective employees. Therefore, each campus was individually responsible for taking on administrative activities for the 403(b) plan. Each employee eligible to participate in the 403(b) plan chose an annuity provider and signed an agreement allowing University F to reduce his or her salary and forward the elective deferral contribution to the annuity company chosen by the employee. University F represents that under this procedure, the number of annuity providers receiving contributions from employees of University F in various locations rose to a level which made administration of the program burdensome.

In Year 1, University F determined it would be more efficient to administer a 403(b) program on a system wide basis. In order to implement that change, University F decided to consolidate the number of companies permitted to solicit University F employees and issue annuity policies under which payroll deduction would be processed through the University's payroll system. University F initiated a competitive bid process and selected four (4) companies to be allowed to issue new annuity policies to University employees. All other companies were informed that they could no longer solicit University employees for the issuance of new annuity policies.

An employee who had an existing annuity contract with a company that was no longer eligible to issue new policies was allowed to continue making salary reduction contributions on such contract provided the company signed an information sharing agreement with University F. Under this process, nine (9) companies were permitted to continue to receive contributions under the 403(b) plan from employees with existing contracts.

In anticipation of meeting the requirements of the final 403(b) regulations (T. D. 9340), which mandates the adoption of a written plan, University F adopted Plan X, a written plan document on Date 1, effective as of Date 2. Plan X incorporates all of the employees previously participating in a 403(b) plan established by any of the campuses of University F. As part of the written plan document, University F designated two classes of annuity company vendors:

and

is defined in Plan X as "an approved Vendor who has a signed Information Sharing Agreement with the University F System and who is allowed to receive new funds from existing and new Participants."

is defined in Plan X as "an approved Vendor who has signed an Information Sharing Agreement with the University F system who is allowed to maintain Individual Agreements, but who are not permitted to receive new contributions from existing and new Participants."

Due to concern for the application of the universal availability requirements, Plan X does not allow to receive contributions under the plan, and thus currently defines consistent with this approach.

**Ruling Requested**

University F requests a ruling that the universal availability rule is satisfied if, pursuant to a written plan, all new employees and all other employees who wish to enter into new 403(b) qualifying contracts may elect to have the employer make contributions of more than $200 pursuant to a salary reduction agreement to the same limited number of annuity companies selected and approved by the employer, while employees who have existing contracts with other vendors (not available to other employees) may also elect to have contributions made to those other companies with which they have an existing contract.

**Law**

Section 403(b) of the Code provides for certain qualifying annuity contracts to be purchased for employees who perform services for an educational organization. Section 403(b)(1)(D) of the Code requires contracts, except those purchased by a church, to be purchased under a plan which meets the nondiscrimination requirements of section 403(b)(12) of the Code.

Section 403(b)(12)(A) of the Code provides that for the purposes of paragraph 1(D), a 403(b) plan meets the nondiscrimination requirements of section 403(b)(12) of the Code if -

"(i) with respect to contributions not made pursuant to a salary reduction agreement, such plan meets the requirements of paragraphs (4), (5), (17) and (26) of section 401(a), section 401(m), and section 410(b) in the same manner as if such plan were described in section 401(a), and

(ii) all employees of the organization may elect to have the employer make contributions of more than $200 pursuant to a salary reduction agreement if any employee of the organization may elect to have the organization make contributions for such contracts pursuant to such agreement. "

The flush language at the end of section 403(b)(12)(A) of the Code provides that for the purposes of section 403(b)(12)(A)(i), "a contribution shall be treated as not made pursuant to a salary reduction agreement if under the agreement it is made pursuant to a 1-time irrevocable election made by the employee at the time of initial eligibility to participate in the agreement or is made pursuant to a similar arrangement involving a one-time irrevocable election specified in regulations."

The flush language at the end of section 403(b)(12)(A) of the Code further provides that for the purposes of section 403(b)(12)(A)(ii), there may be excluded any employee who is a participant in an eligible deferred compensation plan (within the meaning of section 457) or a qualified cash or deferred arrangement of the organization or another 403(b) plan and any nonresident alien described in section 410(b)(3)(C). Subject to the conditions applicable in section 410(b)(4), there may also be excluded for purposes of section 403(b)(12)(A)(ii) employees who are students performing services described in section 3121(b)(10) and employees who normally work less than 20 hours per week.

Section 403(b)(12)(C) of the Code provides that, for purposes of section 403(b)(1)(D), the requirements of section 403(b)(12)(A)(i) (other than those relating to section 401(a)(17)) do not apply to a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof).

Treas. Reg. § 1.403(b)-5(a) states that under section 403(b)(12)(A)(i) of the Code, employer contributions and after-tax employee contributions to a section 403(b) plan must satisfy sections 401(a)(4), 401(a)(17), 401(m) and 410(b) in the same manner as a qualified plan under section 401(a). Treas. Reg. 1.403(b)-5(a)(2) states that the requirements of Treas. Reg. § 1.403(b)-5(a)(1) do not apply to section 403(b) elective deferrals.

Treas. Reg. § 1.403(b)-5(b)(1) provides that the universal availability requirement under section 403(b)(12)(A)(ii) of the Code requires that all employees of the eligible employer be permitted to have 403(b) elective deferrals contributed on their behalf if any employee of the eligible employer may elect to have the organization make 403(b) elective deferrals. Further, the employee's right to make elective deferrals also includes the right to designate 403(b) elective deferrals as designated Roth contributions.

Treas. Reg. § 1.403(b)-5(b)(2) provides that an employee is not treated as being permitted to have section 403(b) elective deferrals contributed on his behalf unless the employee is provided an effective opportunity to do so. Treas. Reg. § 1.403(b)-5(b)(2) further provides that whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections. Further, a 403(b) plan satisfies the effective opportunity requirement of Treas. Reg. § 1.403(b)-5(b)(2) only if, at least once during any plan year, the plan provides an employee with an effective opportunity to make (or change) a cash or deferred election (as defined at Treas. Reg. § 1.401(k)-1(a)(3)) between cash or a contribution to the plan.

Treas. Reg. § 1.403(b)-5(b)(2) states that an effective opportunity includes the employee's right to have 403(b) elective deferrals made on his or her behalf up to the lesser of the applicable limits in Treas. Reg. §1.403(b)-4(c) (including any permissible catch-up elective deferrals under Treas. Reg. §1.403(b)-4(c)(2) and (3)) or the applicable limits under the contract with the largest limitation, and applies to part-time employees as well as full-time employees. An effective opportunity is not considered to exist if there are any other rights or benefits (other than rights or benefits listed in Treas. Reg. § 1.401(k)-1(e)(6)(i)(A), (B), or (D)) that are conditioned (directly or indirectly) upon a participant making or failing to make a cash or deferred election with respect to a contribution to a section 403(b) contract.

Treas. Reg. § 1.401(k)-1(e)(6)(i)(A), (B), and (D) (referenced by Treas. Reg. § 1.403(b)-5(b)(2)) provide that benefits relating to a matching contribution (as defined in §1.401(m)-1(a)(2)) made by reason of an election, any benefit right or feature (such as a plan loan) that requires or results in, an amount to be withheld from an employee's pay, or any benefit that is provided at the employee's election under a plan described in section 125(d) in lieu of an elective contribution under a qualified cash or deferred arrangement may be made contingent upon an employee making elective contributions.

**Analysis**

University F proposes that employees that had been participating under the 403(b) plan prior to consolidation have the option to continue making contributions under those contracts or be able to choose to contribute to the new vendors Under their proposal, all employees enrolled after the consolidation of the plans are only eligible to defer under the

To comply with the universal availability requirement in section 403(b)(12)(A)(ii) of the Code and Treas. Reg. § 1.403(b)-5(b)(1), all employees (subject to the permitted exclusions under section 403(b)(12)(A)(ii)) and Treas. Reg. § 1.403(b)-5(b)(4)) must be permitted to make salary deferrals under the 403(b) plan. This ruling does not address the application of the exclusion rules under section 403(b)(12)(A)(ii) of the Code and Treas. Reg. § 1.403(b)-5(b)(4)) to Plan X.

Treas. Reg. § 1.403(b)-5(b)(2) provides that an employee is not treated as being permitted to make elective deferral contributions pursuant to a salary reduction agreement under Treas. Reg. § 1.403(b)-5(b)(1) unless given an effective opportunity to have elective deferrals made on his or her behalf. Treas. Reg. § 1.403(b)-5(b)(2) provides that satisfaction of effective opportunity is based on all the relevant facts and circumstances, including notice of the availability of

the election, the period of time during which an election may be made, and any other conditions on elections.

The issue presented in University F's ruling request is whether the proposed transaction - giving certain employees the ability to defer under both the (with such term being redefined under Plan X to allow for continuing deferrals under such contracts) and and other employees the ability to defer only under - would result in the failure to satisfy the effective opportunity requirement of Treas. Reg. § 1.403(b)-5(b)(2) and consequently the failure of Plan X to satisfy the universal availability requirement of section 403(b)(12)(A)(ii) of the Code and Treas. Reg. § 1.403(b)-5(b).

This ruling does not consider all the facts and circumstances relevant to a determination of whether all employees of University F have an effective opportunity or whether Plan X satisfies the effective opportunity requirement of Treas. Reg. § 1.403(b)-5(b)(2). The facts and circumstances that are described in Treas. Reg. § 1.403(b)-5(b)(2) pertain to notice, timing, and conditions on elections that could limit or condition an employee's opportunity to have section 403(b) elective deferrals contributed on the employee's behalf.

Under University F's proposal, employees commencing participation after Year 1 are restricted to the under Plan X. Employees that were participants in Plan X prior to Year 1 and were making elective deferral contributions to a contract with a have the option to defer under and The mere fact that certain employees (those who have the option to defer under both and would have more deferral options than other employees does not limit or condition an employee's opportunity to have section 403(b) elective deferrals contributed on the employee's behalf under Plan X. Thus, University F's proposal to create two (2) classes of vendors and providing that only some of the Plan's participants will be eligible to defer under both classes in and of itself does not cause the requirements of effective opportunity in Treas. Reg. § 1.403(b)-5(b)(2) to be violated and does not in and of itself cause Plan X to fail to satisfy the universal availability requirement of § 403(b)(12)(A)(ii) and Treas. Reg. § 1.403(b)-5(b).

**Conclusion**

The universal availability requirement under section 403(b)(12)(A)(ii) of the Code and Treas. Reg. § 1.403(b)-5(b) will not be violated merely as a result of University F creating two classes of annuity providers, and under Plan X, with some employees eligible to defer under both classes of vendors and other employees eligible to defer under only one class of vendors. are allowed to solicit contracts for all employees that

are participants after Year 1. can solicit contributions from those employees that were participants under their contracts prior to the merger and reduction of vendors under Plan X.

The ruling applies solely to elective deferral contributions made by employees pursuant to a salary reduction agreement with University F.

No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations, which may be applicable thereto.

This letter is directed only to the taxpayer, University F, who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

If you wish to inquire about this ruling, please contact ********** at (***) ***-****. Please address all correspondence to SE:T:EP:RA:T2.

Copies of this letter have been sent to your authorized representatives in accordance with a Power of Attorney on file in this office.

Sincerely yours,

Donzell Littlejohn, Manager
Employee Plans Technical Group 2

Enclosures:
Deleted copy of ruling letter
Notice of Intention to Disclose