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Legend

Board =

State S =

Plan =

State Regulations =

Dear

This responds to your letter of February 14, 2011, and subsequent correspondence, on behalf of State S and its Board, requesting a ruling concerning State S's amended and restated deferred compensation plan (the "Plan") which is intended to meet the eligible deferred compensation plan requirements under section 457(b) of the Internal Revenue Code of 1986 (the "Code"), as amended under the Economic Growth and Tax Relief Reconciliation Act of 2001 and subsequent legislation. The Plan has been adopted by State S and other employers which are state or local governmental entities within State

S. The other governmental entities within State S which are permitted to adopt the Plan are represented to be eligible employers as described in section 457(e)(1)(A) of the Code.

On December 23, 2004, the Internal Revenue Service ruled, in PLR 200517004, that the Plan, as amended and restated at that time, was an eligible state governmental deferred compensation plan under section 457(b). The Plan has been amended and restated again to include a number of revisions taking into account subsequent statutory changes under the Code such as the amendment to section 402A enacted by the Small Business Jobs Act of 2010, effective after December 31, 2010, authorizing a governmental section 457(b) plan to implement a qualified Roth contribution program.

Under the Plan a participant may elect to defer compensation that would have been received for services rendered to a governmental employer in State S in any taxable year until death, severance from employment, attainment of age 70½, the participant's absence from employment for qualifying military service as described in the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act") and in the related Notice 2010-15, or until the occurrence of an unforeseeable emergency. The Plan also includes a provision allowing an elective in-service distribution of \$5,000.00 or less to be paid to a participant in certain limited circumstances set forth thereunder and in section 457(e)(9)(A).

The Plan allows participants to take loans from their plan accounts, subject to certain restrictions. Loans made under the Plan are subject to rules in the Plan, section 72(p) of the Code and § 1.457-6(f)(2) of the Income Tax Regulations, including provisions restricting the maximum amount and term of a plan loan.

The Plan permits participants to defer compensation on a pre-tax basis. The plan also permits employees of the State (and other adopting employers with compatible payroll systems) to elect to make designated Roth contributions on an after-tax basis in accordance with the provisions of sections 402A(c) and 457.

The Plan provides that all elections to defer compensation (including, if applicable, associated Roth designations under section 402A(c)(1)(B)) and any modifications made to such elections must be made prior to the beginning of the month in which the related compensation would have been paid in the absence of a deferral election.

The Plan provides for a maximum amount that may be deferred by a participant in any taxable year and also provides for a catch-up contribution election for amounts deferred for one or more of the participant's last three

taxable years ending before the year in which a participant attains normal retirement age under the Plan. In addition, the Plan provides for the age 50 plus catch-up contributions described in section 414(v). However, the Plan provides that a participant can only use one of the two catch-up contribution provisions during a single year. The amounts that may be deferred under the annual maximum limitation and the catch-up provisions are within the limitations of section 457 including the section 457(c) coordinated deferral provision.

With certain limitations, a participant, beneficiary or alternate payee may elect the manner in which deferred amounts will be distributed. The Plan provides that the manner and time of benefit payout must meet the minimum distribution requirements of section 401(a)(9).

The Plan provides that amounts of compensation deferred thereunder are to be transferred to and held in a trust described in section 457(g)(1) for the exclusive benefit of the participants and their beneficiaries. All amounts deferred under the Plan must be transferred to the trust within an administratively reasonable time period set forth in the Plan. Such trust was established pursuant to a written agreement which provides that it will be operated in accordance with the State S Regulations and section 457(g). The trust also provides that amounts invested therein will be held for the exclusive benefit of the Plan's participants and their beneficiaries. The rights of any participant or beneficiary to payments pursuant to the Plan are generally nonassignable and not subject to pledge, transfer or encumbrance.

Section 457 provides rules for the deferral of compensation by an individual participating in an eligible deferred compensation plan as defined in section 457(b). Section 457(b) provides that an eligible deferred compensation plan must be maintained by an eligible employer. Section 457(e)(1)(A) provides that an eligible employer includes a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

Section 457(a)(1)(A) provides that in the case of a participant in an eligible governmental deferred compensation plan, any amount of compensation deferred under the 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.

Under section 402A(a), applicable retirement plans may include a qualified Roth contribution program. Section 402A(e)(1) provides that eligible governmental deferred compensation plans are applicable retirement plans for taxable years beginning after December 31, 2010. Section 402A(a)(1) provides that elective deferrals of compensation which are designated Roth contributions under qualified Roth contribution

programs are not excluded from income in the year of deferral. Section 402A(d)(1) provides that qualified distributions from designated Roth accounts are not includable in gross income.

Section 457(b)(5) states that an eligible deferred compensation plan must meet the distribution requirements of section 457(d). Under section 457(d)(1)(A), an eligible plan must provide that amounts will not be distributed to participants or beneficiaries before: (i) the calendar year in which the participant attains age 70½, (ii) the participant has had a severance from employment with the employer, or (iii) the participant is faced with an unforeseeable emergency. Under the HEART Act, a participant may be deemed to have had a severance from employment during periods of qualified military service.

Revenue Ruling 2004-12, 2004-1 C.B. 478, states that if a plan separately accounts for amounts attributable to an individual's rollover contribution to the plan, such segregated amounts may be distributed at any time. Section 457(d)(3) provides that in-service distributions may be made in amounts which do not exceed the dollar limitation under section 411(a)(11)(A).

Section 457(g) provides that a plan maintained by an eligible governmental employer shall not be treated as an eligible deferred compensation plan unless all assets and rights purchased with such deferred compensation amounts and all income attributable to such amounts, property, or rights of the plan are held in trust for the exclusive benefit of participants and their beneficiaries. Section 457(g)(2)(A) provides that a trust described in section 457(g)(1) shall be treated as an organization exempt from tax under section 501(a).

Section 1.457-7(b)(3) provides that, in accordance with section 72(p), the amount of any loan from an eligible governmental plan to a participant or beneficiary is generally treated as having been received as a plan distribution under section 72(p)(1) except to the extent set forth in section 72(p)(2) and § 1.72(p)-1 (relating to loans that do not exceed a maximum amount and that are repayable in accordance with certain terms).. Thus, except to the extent a loan from a governmental section 457(b) plan satisfies section 72(p)(2), § 1.72(p)-1 and § 1.457-6(f)(2), any amount loaned from an eligible governmental plan to a participant or beneficiary is includable in the gross income of the borrower for the taxable year when the loan is made. If a loan made under the Plan meets the requirements established under the Plan, the loan would satisfy the requirements of section 72(p)(2), § 1.72(p)-1 and § 1.457-6(f)(2), and thus would not be treated as a taxable distribution under section 72(p)(1) solely because the loan was made.

Based upon the provisions of the Plan summarized above and the documents presented, including the written trust agreement, we conclude as follows:

1. The Plan, as restated effective January 1, 2011 and further amended through August 26, 2011, constitutes an eligible deferred compensation plan as defined in section 457(b).
2. Under section 457(a)(1)(A), amounts of pre-tax compensation deferred in accordance with the terms of the Plan, including any income attributable to such amounts, will be includible in the recipient's gross income for the taxable year or years in which amounts are paid to a participant or beneficiary in accordance with the terms of the Plan.
3. Qualified distributions from the qualified Roth contribution program maintained pursuant to the Plan's provisions will not be included in income under section 402A(d)(1).
4. Assuming that it is a valid trust under State S law, the trust associated with the Plan will be treated as an organization exempt from taxation under section 501(a) in accordance with section 457(g)(2)(A).
5. Provided that loans from the Plan are made in accordance with the Plan's provisions, the making of such loans will not be treated as distributions subject to current taxation under section 72(p)(1).

No opinion is expressed concerning the timing of the inclusion in income of amounts deferred under any deferred compensation plan other than the above described Plan or as to the federal tax consequences of the transaction under any other section of the Code or statute other than those specifically stated above. If the Plan is modified, this ruling will not necessarily remain applicable. This ruling is directed only to State S and the Board and applies only to the amended and restated Plan submitted on February 14, 2011, as subsequently amended and adopted by the Board on August 26, 2011. In addition, this ruling applies only to the trust agreement submitted on February 14, 2011. Section 6110(k)(3) of the Internal Revenue Code provides that this ruling may not be used or cited as precedent.

Sincerely,

----- Cheryl Press -----

Cheryl Press  
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Enclosure (1)