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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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The Honorable Jon Kyl
United States Senate
Washington, DC 20510

Dear Senator Kyl:

This letter responds to your correspondence dated February 13, 2012. You requested a clarification of the status of public charter schools as agencies or instrumentalities of a state for purposes of the definition of the term "governmental plan" under section 414(d) of the Internal Revenue Code (the Code).

Section 414(d) of the Code generally defines a governmental plan as a plan that the government of the United States, the government of any state or its political subdivisions, or any of their agencies or instrumentalities establishes or maintains for employees of the entity. On November 8, 2011, the Treasury Department and the IRS published an Advance Notice of Proposed Rulemaking (ANPRM) relating to the definition of a governmental plan under section 414(d) of the Code (copy enclosed). An ANPRM, which is typically issued early in the rulemaking process, describes an anticipated regulatory approach and seeks input from the public about the guidance under consideration. The ANPRM includes, as an attachment, draft proposed regulations that, in part:

- Define key terms in the definition of governmental plan, including the terms "United States," "States," and "political subdivision of a State"
- Describe the multiple factors under consideration for determining whether an entity is an agency or instrumentality of the United States or an agency or instrumentality of a State or a political subdivision of a State
- Provide rules for determining whether a governmental entity has established and maintained a plan for purposes of section 414(d) of the Code

You wrote that the ANPRM provides that charter school employees would not be eligible to participate in a governmental plan within the meaning of section 414(d) of the

Code. The ANPRM does not specifically exclude charter schools as governmental entities. A facts and circumstances test determines whether an entity is a governmental entity. This test depends on all facts relating to the particular entity in question. The preamble to the guidance under consideration specifically provides that no one factor will determine whether an entity is a governmental entity. In addition, the factors in the guidance under consideration are generally a compilation of factors from various revenue rulings and court cases dating back to 1957.

In cooperation with the Department of Labor and Pension Benefit Guaranty Corporation, the Treasury Department and the IRS will review comments we received in response to the ANPRM, as well as input from the general public at the public hearings and town hall meetings. The IRS and the Treasury Department, as well as the Department of Education, plan to meet with representatives from the charter school community to hear their concerns on the ANPRM. This meeting has been scheduled for May 7, 2012.

After evaluating the comments, the cooperative process for drafting a notice of proposed rulemaking (NPRM) will begin. After issuing the NPRM, the Treasury Department and the IRS will once again give the public an opportunity to submit comments. Recognizing that we have never issued regulations on the definition of governmental plans within the meaning of section 414(d) of the Code, we anticipate that, once issued, the regulations will have transition rules. The ANPRM specifically requests comments on transitional relief. We also anticipate that any regulations would not be effective any earlier than the plan year beginning after the date of publication of the Treasury decision adopting the rules as final regulations.

I hope this information is helpful. If you have any questions, please call me at _____, or _____.

Sincerely,

Victoria A. Judson
Division Counsel/Associate Chief Counsel
(Tax Exempt & Government Entities)

Enclosure