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TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

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

UIL: 401.00-00

MAY 19 2004

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Attn: \*\*\*\*\*  
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Legend:

System S: \*\*\*\*\*

State A: \*\*\*\*\*

Plan X: \*\*\*\*\*

Board M: \*\*\*\*\*

Statute P: \*\*\*\*\*

Statute R: \*\*\*\*\*

Department D: \*\*\*\*\*

Group B Employee: \*\*\*\*\*

Group B Member: \*\*\*\*\*

Secretary C: \*\*\*\*\*

Dear \*\*\*\*\*:

This is in response to your letter dated May 28, 2003, supplemented by correspondence dated August 20, 2003, submitted on your behalf by your authorized representative in which you request a ruling with respect to certain distributions from Plan X.

The following facts and representations have been submitted on your behalf:

System S is an independent state agency of State A that conducts the day-to-day administration of Plan X. System S is administered by Board M, a board of trustees consisting of nine members. The Governor of State A appoints five members who must be confirmed by an affirmative vote of a majority of those voting in each house of the State A General Assembly. The Joint Rules Committee of the State A General Assembly appoints the other four members of Board M who must be confirmed by the affirmative vote of a majority of those voting in each house of the State A General Assembly.

The statutory provisions governing the operation of Plan X are codified at Statute P. Plan X provides retirement benefits to Group B Employees, who are state police officers. Membership in Plan X is compulsory for all Group B Employees. You represent that Plan X is a defined benefit plan intended to satisfy the requirements of Code section 401(a).

Section 51.1-205A of Statute P, Normal Retirement, currently provides that any member (i.e., Group B Employee) in service at his normal retirement date with five (5) or more years of creditable service may retire upon written notification to Board M, setting forth the date the retirement is to become effective. A Group B Member is defined in Plan X as any person included in the membership of Plan X as provided in Statute P. Plan X defines normal retirement date as a member's sixtieth (60) birthday. Members attaining age seventy (70) must retire, unless appointed by the Governor of State A or elected by the people.

Section 51.1-205E of Statute P provides that the effective date of retirement shall be after the last day of service of the member, but shall not be more than ninety (90) days prior to the filing of the notice of retirement.

Section 51.1-206A.1 of Statute P provides that the service retirement allowance, which is an annual retirement allowance, payable for life for a member retiring at normal retirement, shall equal 1.70 percent of his average final compensation multiplied by the amount of creditable service. For retirements between October 1, 1994 and December 31, 1998, any Group B Employee who is a member or beneficiary of a retirement system administered by Board M shall receive an additional retirement allowance equal to three percent of the service or disability retirement allowance payable under that section. Under the current provisions of Statute P, a member who separates from service (retires) after attainment age 60 with 5 or more years of creditable service or attainment of age 50 with 25 years of creditable service is eligible to receive an unreduced retirement allowance. Your representative has informed us that the covered employees typically retire once they have attained 25 years of creditable service and age 50, and then go on to employment with other unrelated employers.

Section 51.1-206C of Statute P currently provides that a member of Plan X who is reemployed in a position covered by Plan X or any other retirement system

that is administered by System S after retiring and commencing payment of benefits generally has his or her benefit payments suspended.

On March 18, 2003, the Governor of State A signed into law Statute R, which amended and reenacted section 51.1-205 and section 51.1-206 of Statute P.

Section 51.1-205A, normal retirement, has been amended by Statute R to provide that any member in service at his normal retirement date with five or more years of creditable service (i) as a member in Plan X; (ii) as a member in the retirement system established by Chapter 2.1 (Section 51.1-211) of Title 51.1), or (iii) while earning the benefits permitted by section 51.1-138 may retire upon written notification to Board M, setting forth the date the retirement is to become effective. Further, any member in service at age sixty (60) or older with five (5) or more years of creditable service as a member in the retirement system (Plan X) established by that chapter may elect to retire and receive a retirement allowance pursuant to that chapter and may continue to receive a retirement allowance notwithstanding that such person is employed as a Group B Employee or as an employee, as defined in section 51.1-124.3, of Department D for a period of up to one year. Such period may be extended for up to one additional year with the prior approval of Secretary C.

Section 51.1-206D was added to Statute P by Statute R. Section 51.1-206D provides that if a member in service at age sixty (60) or older with five (5) or more years of creditable service elects, pursuant to subsection A of section 51.1-205 of Statute P, to receive a service retirement allowance pursuant to that chapter while employed as a Group B Employee or as an employee, as defined in section 51.1-124.3, of Department D, then his service performed and compensation received while receiving such retirement allowance shall not increase, decrease, or affect in any way his retirement benefits before, during, or after the payment of such retirement allowance. Section 51.1-206C of Statute P continues to suspend benefit payments, except that that section has been amended to exempt from the suspension of benefit provisions payments to members who elect to retire under subsection A of section 51.1-205 of Statute P.

Based on the foregoing, the following ruling is requested:

That, if a distribution of the service retirement allowance begins to be paid to a member upon his or her reaching normal retirement age (60) with five (5) years of service while the member is still employed, such payment from Plan X will not violate the rule against in-service distributions from a pension plan.

Section 6.04 of Revenue Procedure 2003-1, 2003-11.R.B. 123, provides that the Employee Plans Technical Office ordinarily will not issue rulings on matters involving a plan's qualified status under Code section 401(a). These matters are generally handled by the Employee Plans Determinations program. Although the

Employee Plans Technical Office will not ordinarily rule on matters involving plan qualification, rulings may be issued where, among other things, the Service determines that it is in the interest of good tax administration to provide guidance to the taxpayer with respect to such qualification issue. The ruling requested concerns the effect Statute R would have on the continued qualified status of Plan X under Code section 401(a).

Section 401(a) of the Code prescribes the requirements which must be met for qualification of a pension, profit-sharing, or stock bonus plan.

Section 1.401-1(b)(1)(i) of the Income Tax Regulations provides that a pension plan, within the meaning of Code section 401(a), is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. The regulations provide further, however, that a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses, except as described in section 401(h).

Section 411(a)(8) of the Code defines "normal retirement age" as the earlier of (1) the time a plan participant attains normal retirement age under the plan, or (2) the later of (a) the time a plan participant attains age 65, or (b) the tenth anniversary of the time a plan participant commences participation in the plan.

Section 411(a)(9) of the Code defines "normal retirement benefit" as the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to medical benefits and disability benefits not in excess of the qualified disability benefit.

Rev. Rul. 71-24, 1971-1 C.B. 114, provides that normal retirement age is the time from which definitely determinable benefits under a pension plan become fixed and payable. An employee who has reached such age and has fulfilled the service requirement and other uniformly applicable provisions of the plan must be permitted to retire and to commence receiving the benefits payable thereunder. Arrangements, however, may be mutually made for continued employment beyond normal retirement age. In such event, provision may be made with respect to the treatment of the pension benefits such as, for example, payment as though the employee had actually retired, deferment to actual retirement without increment for the interval between the normal retirement date and actual retirement, or actuarial equivalent on actual retirement of the benefit at normal retirement age. Whatever provisions are made, however, must be uniformly applied to all participants.

Rev. Rul. 71-147, 1971-1 C.B. 116, provides that ordinarily the normal retirement age under a pension or annuity plan is the lowest age specified in the plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on service to date of retirement at the full rate set forth in the plan. Ordinarily, the normal retirement age under pension and annuity plans is 65, but a different age may be specified provided that if it is lower than 65 it represents the age at which employees retire in the particular company or industry and is not a device to accelerate funding. This revenue ruling was subsequently modified by Rev. Rul. 78-120, 1978-1 C.B.117 and superseded by Rev. Rul. 80-276, 1980-1 C.B. 276. In both of those rulings, changes were made, in view of the enactment of the Employee Retirement Income Security Act of 1974 to allow an employer to designate a normal retirement age.

In this case, Plan X provides that a member who has attained normal retirement age, which is age 60, and who has five or more years of creditable service may retire and receive the retirement allowance at the full rate specified in Section 51.1-206A.1 of Statute P.

Section 51.1-205A, as amended by Statute R, in pertinent part, provides that a member in service who elects to retire at age sixty (60) with five (5) or more years of creditable service may continue to receive a retirement allowance notwithstanding that such person is employed as a Group B Employee or as an employee, as defined in section 51.1-124.3, of Department D for a period of up to one year. Section 1.51-206D, as added by Statute R, provides, in pertinent part, that if a member meeting the requirements of subsection A elects to receive a service retirement allowance while still employed, then his service performed and compensation received while receiving such retirement allowance shall not increase, decrease, or affect in any way his retirement benefits before, during, or after the payment of such retirement allowance.

Statute P provides that upon retiring at his normal retirement age, a member's retirement allowance commences in the form of monthly annuity payments. Statute P further provides that a member may elect to retire at his or her normal retirement age and receive a service retirement allowance. Statute R, in part, allows these members to commence distribution of such service retirement allowance while those members are still employed. The service retirement allowance at normal retirement age payable to a member who retires at normal retirement age is the full rate as specified in Plan X and is not affected (neither increased nor decreased) by the service performed or the compensation earned subsequent to attaining normal retirement age.

The prohibition against in-service distributions in a pension plan is consistent with the purpose of a pension plan, i.e., to provide, primarily, retirement benefits at retirement. Here, the normal retirement age is not a subterfuge to avoid this prohibition. In fact, covered employees typically retire earlier than age 60.

The provision of section 51.1-205A of Statute R that is the subject of this ruling continues to ensure that the distribution provisions of Plan X are consistent with the purpose of a pension plan because the benefits that are payable to a Group B Employee who elects to retire upon attainment of age 60 or older with five or more years of creditable service is the full benefit the employee is entitled to receive from Plan X notwithstanding that such employee continues to be employed in a position covered by Plan X and such date is later than when covered employees typically retire.

Based on the foregoing, we conclude that if a distribution of the service allowance begins to be paid to a member upon his or her reaching normal retirement age (age 60) with five (5) years of service while the member is still employed, such payment from Plan X will not violate the rule against in-service distributions from a pension plan. (Note that because this distribution option will commence only after the attainment of age 60, there is no issue with respect to the additional tax imposed by section 72(t) of the Code).

This ruling is conditioned on Plan X otherwise satisfying the requirements of Code section 401(a). Further, this ruling is limited to members of Plan X who elect to retire at their normal retirement date, as defined in Plan X, and whose retirement service allowance is the full rate as determined under section 51.1-205A of Plan X.

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

A copy of this letter is being sent to your authorized representative pursuant to a power of attorney on file in this office.

If you have any questions concerning this ruling, please contact  
SE:T:EP:RA:T:2, at

Sincerely yours,

(signed) **JOYCE E. FLOYD**

Joyce E. Floyd, Manager  
Employee Plans Technical Group 2

Enclosures:

Deleted copy of this ruling  
Notice of Intent to Disclose