INTERNAL REVENUE SERVICE 200135043

Uniform Issue List: 414.07-00

T:EP:RA:T1

JUN 5 2001

EIN:

LEGEND:

State A =
Plan X =

Act C =

Ladies and Gentlemen:

This is in response to your request for a private letter ruling submitted on July 7, 1999, supplemented by letters dated March 8, 2000, June 16, 2000, July 25, 2000, and October 2, 2000, concerning whether the status of Plan X as a governmental plan under section 414(d) of the Internal Revenue Code ("Code") will be adversely affected by covering employees of certain volunteer fire departments. You also request a ruling on whether section 414(h)(2) of the Code will continue to apply to Plan X with respect to the mandatory employee contributions that the fire department employees are required to make to Plan X.

Pursuant to state statute, State A established Plan X for the purpose of providing retirement benefits for employees of counties, cities, and towns and other eligible employers. State A asserts that

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Plan X is a contributory defined benefit plan which satisfies the requirements for a qualified plan under section 401(a) of the Code, as applicable to a governmental plan as defined in section 414(d), and that its related trust is exempt from taxation under section 501.

Under the law of State A, before the enactment of Act C, Plan X provided benefits to, among other employees of local governments, firefighters employed by a fire department operated by a county, incorporated city or town. On June 8, 1999, the law of State A was amended, under Act C, to broaden coverage of firefighters under Plan X to also include full-time paid firemen employed by a corporation that provides fire protection services under contract to counties, cities or towns and that is supported in whole or part by municipal or county funds ("incorporated fire department"). An incorporated fire department is one that is incorporated as a nonprofit corporation under the law of State A.

Under Plan X each participant's mandatory employee contribution amount is deducted and paid over to the plan. Pursuant to state statute, these employee contributions may be "picked up" by the participant's employer so that they are treated as employer contributions under section 414(h)(2) of the Code.

The law of State A requires an incorporated fire department, as well as a fire department operated by a county, city or sanitary district as a division of that governmental unit, to become certified by the Commissioner of Insurance to perform fire-fighting services in State A. Oversight of fire departments by the Commissioner of Insurance includes routine inspections as well as requiring periodic approval of certification (every three to five years). The Commissioner of Insurance has adopted regulations with requirements for such fire departments regarding personnel staffing, training, execution of written contracts with local governments, alarm systems, fire equipment, and building facilities.

The governing body of an incorporated fire department is the corporation's board of directors elected by members of the corporation; the board typically includes volunteer firefighters or fire district residents. The board elects a fire chief who functions as the chief executive officer of the corporation and handles the day-to-day operations, including the hiring and firing of employees.

State A has submitted with its ruling request a copy of a sample contract between a local government unit and an incorporated fire department, which State A asserts shows a typical relationship between the two parties. The contract provides, in part, the following:

> . . . .
>
> WHEREAS, the [local government unit] desires to standardize its contractural [sic] arrangements with all rural volunteer fire departments in the COUNTY
>
> NOW THEREFORE, in consideration of the mutual promises and agreements herein contained and the mutual benefits to be derived therefrom, the parties hereto promise and agree as follows:
>
> . . . .
>
> [Article I, section 2] Incorporation:. . . . The FIRE DEPARTMENT will adopt By-Laws which . . . shall have reasonable provisions entitling ***any*** resident in the area of responsibility of the FIRE DEPARTMENT to be a voting member of the corporation and enabling such members to participate in the affairs of the corporation at least in one annual meeting. The By-Laws shall vest in a Board of Directors ***the authority to manage the affairs of the corporation*** without a vote of the membership to the extent permitted by [State law]. [Emphasis added].

The contract further provides that the incorporated fire department will provide to the local government unit a budget estimate, establish records and accounts, and present to the local government unit the results of an annual audit. The local government unit may inspect all such records and accounts.

Sources of funding for an incorporated fire department vary and include payments made by the local government unit under contract (county or city), and,

to the extent that a county is authorized under State A law, from taxes levied by the county upon the residents of the fire district served by the incorporated fire department. Pursuant to State A law, county revenue raised by the levy of said taxes shall be kept in a separate and special fund, to be used only for furnishing fire protection services within said district. Also, the county is required to set the rate of tax based on an annual budget estimate, submitted by the incorporated fire department, setting forth the financial requirements for providing fire protection services for the year in said fire district.

Based on the foregoing facts and representations, you request the following rulings:

(1) That, under the law of State A, as amended on June 8, 1999, deeming employees of a fire department which is not a department of a municipal government, a county government, or a sanitary district maintained by such government entity but which is incorporated as a nonprofit corporation under the law of State A and is certified by the Commissioner of Insurance to be employees of the local county, incorporated city, or town unit for purposes of providing certain State-funded employee benefits, including membership in Plan X, will not adversely affect the status of Plan X as a governmental plan under section 414(d) of the Code.

(2) That the applicability of the provisions of section 414(h)(2) of the Code to Plan X will not be adversely affected by including as members therein the full-time employees of the fire departments, as described in (1) above, and that the mandatory contributions of such employees to Plan X which may be assumed and paid by the employer will be considered picked up pursuant to section 414(h)(2) of the Code to the same extent such contributions by other members of Plan X are so considered.

Section 414(h)(2) of the Code provides that, in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, where the contributions of employing units are

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designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up will be treated as employer contributions.

Section 414(d) of the Code provides that a governmental plan means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Revenue Ruling 89-49, 1989-1 C.B. 117, provides that a plan will not be considered a governmental plan merely because the sponsoring organization has a relationship with a governmental unit or some quasi-governmental power. It holds that one of the most important factors to be considered in determining whether an organization is an agency or instrumentality of the United States or any state or political subdivision thereof is the degree of control that the federal or state government has over the organization's everyday operations. Other factors listed in Revenue Ruling 89-49 include: (1) whether there is specific legislation creating the organization; (2) the source of funds for the organization; (3) the manner in which the organization's trustees or operating board are selected; and (4) whether the applicable governmental unit considers the employees of the organization to be employees of the applicable governmental unit. Although all of the above factors are considered in determining whether an organization is an agency of a government, the mere satisfaction of one or all of the factors is not necessarily determinative.

According to the facts presented in Revenue Ruling 89-49, the citizens of a municipality in a State organized a volunteer fire company to provide fire protection services to their community. The company was incorporated under the State's nonprofit corporation statute. Under its charter, the company is managed by a board of trustees elected by the volunteer firefighters. The company entered into contracts with several municipalities, including the municipality where it was created, under which the

company agreed to provide fire protection services to the municipalities. Under the contracts, the municipalities agreed that the operations of the company would be under the exclusive control of the board of trustees. The funds for the company are provided in part by community donations from the residents of the municipalities served by the company and in part by payments made by municipalities under the contracts with the company. The company established a retirement plan for its employees. The municipalities do not make any direct contributions to the retirement plan. The employees were never treated by the State as employees of the state or a political subdivision thereof.

Revenue Ruling 89-49 concluded that the retirement plan established by the company is not a governmental plan within the meaning of section 414(d) of the Code. Specifically, the Revenue Ruling cited as the reasoning for its conclusion that (1) the degree of control which the municipalities exert over the fire company is minimal, (2) although the company was incorporated under a nonprofit corporation statute, there was no specific legislation which affiliated the company with the state, (3) the company's expenses are, in part, paid by the community donations, (4) the board of trustees which controls the company's basic operations is elected by the volunteer firefighters, and (5) the State has not treated the company's employees as employees of the state or political subdivision thereof.

In the instant case, applying the principles set forth in Revenue Ruling 89-49, the legislation in question, Act C, is an act that merely expands coverage in Plan X to include those employees who work for incorporated fire departments. The legislative authorization for the formation of such nonprofit fire protection service corporations is the same general legislation covering all corporate charters, under the jurisdiction of the Secretary of State A, and thus was not specifically enacted to establish such incorporated fire departments.

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We find the degree of control exercised by the local governmental unit (county or city) over the actual operations of the incorporated fire department to be minimal. The State A nonprofit corporation statute, as well as the sample contract described above, provide that the Board of Directors of the incorporated fire department has the authority to manage the affairs of the corporation. Furthermore, the members of the incorporated fire department typically include volunteer firefighters and fire district residents. Also the Board of Directors elects a fire chief, who is not a public official, to be responsible for the everyday operations of the incorporated fire department. There is no evidence that the local governmental unit under contract considers the employees of the incorporated fire department to be its employees, other than deeming employees of an incorporated fire department to be employees of the local governmental unit for purposes of participation in Plan X. Although the incorporated fire department is supported in whole or in part by municipal or county funds, we do not find this factor to be determinative of agency or instrumentality status in this case. Thus, we conclude that the incorporated fire department is not an agency or instrumentality of State A or of a political subdivision thereof.

Accordingly, as for the first ruling requested, under the law of State A, as amended on June 8, 1999, deeming employees of a fire department which is not a department of a municipal government, a county government, or a sanitary district maintained by such government entity but which is incorporated as a nonprofit corporation under the law of State A and is certified by the Commissioner of Insurance to be employees of the local county, incorporated city, or town unit for purposes of providing certain State-funded employee benefits, including membership in Plan X, will adversely affect the status of Plan X as a governmental plan under section 414(d) of the Code.

Similarly, since we have determined in accordance with Revenue Ruling 89-49 that an incorporated fire department in State A does not qualify as an agency or

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instrumentality of State A or a political subdivision thereof, it is concluded with respect to ruling request two that the applicability of the provisions of section 414(h)(2) of the Code to Plan X will be adversely affected by including as members therein the full-time employees of the incorporated fire departments, and that the mandatory contributions of such employees to Plan X which may be assumed and paid by the employer will not be considered picked up pursuant to section 414(h)(2) to the same extent such contributions by other members of Plan X are so considered.

Sincerely yours,

John Swieca

John Swieca, Manager
Employee Plans Technical Group 1
Tax Exempt and Government
Entities Division

Enclosures:
Deleted copy of letter ruling
Form 437