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Date:
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cc. Edward J. Lilly, Executive Director
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Legend

Board	= State of New York Deferred Compensation Board EIN: 13-3702288
State S	= State of New York
Model Plan	= Deferred Compensation Plan for Employees of [Name of Local Employer]
State Regulations	= Part 9002 of the Board's Rules and Regulations

Dear Mr. Laverriere:

This responds to your letter of February 14, 2011, and subsequent correspondence, on behalf of State S and its Board, requesting a ruling concerning an amended and restated model deferred compensation plan (the "Model Plan") which is intended to meet the requirements of an eligible deferred compensation plan 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. Adoption of the Model Plan is restricted to local public employers in State S for the benefit of their employees. The amended an restated Model Plan has been or will be adopted only by employers that are state and local governmental entities which are eligible employers under section 457(e)(1)(A) of the Code.

On December 23, 2004, the Internal Revenue Service ruled in PLR 200517005, that the Model Plan, as amended and restated at that time was an eligible state deferred compensation plan under section 457(b). The Model 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 plan to implement a qualified Roth contribution program.

Under the Model Plan a participant may elect to defer compensation that would have been received for services rendered to a governmental employer within 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 Model 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), as well as a provision permitting the employer or its plan administration committee to make a mandatory cash-out of such amounts in those circumstances.

The Model Plan also permits the adopting employer or its plan administration committee to establish a program which would allow participants to take loans from their plan accounts, subject to certain restrictions. Loans made under the Model Plan are subject to rules in the Plan, section 72(p) and in § 1.457-6(f)(2) of the Income Tax Regulations, including provisions restricting the maximum amount and term of a plan loan.

The Model Plan permits participants to defer compensation on a pre-tax basis. The Model Plan also permits the adopting employer or its plan administration committee to allow participants to elect to make designated Roth contributions on an after-tax basis in accordance with the provisions of sections 402A(c) and 457(b).

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

The Model 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 Model Plan also provides for the age 50 plus catch-up contributions described in section 414(v). However, the Model 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 Model Plan provides that the manner and time of benefit payout must meet the minimum distribution requirements of section 401(a)(9).

The State Regulations require an eligible employer which adopts the Model Plan to establish a trust described in section 457(g) and to arrange for a trustee to hold the amounts deferred under the employer's Model Plan for the exclusive benefit of its participants and beneficiaries. The Model Plan provides that amounts of compensation deferred thereunder must be transferred to and invested in a trust described in section 457(g)(1) for the exclusive benefit of the participants and their beneficiaries within an administratively reasonable time period. The rights of any participant or beneficiary to payments pursuant to the Model 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 the 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 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 includible in the gross income of the borrower for the taxable year when the loan is made. If a loan made under the Model Plan meets the requirements established thereunder, 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 Model Plan summarized above, and the documents presented, including the State Regulations, we conclude as follows:

1. The Model Plan, as amended and restated through August 26, 2011 and approved by the Board, 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 Model Plan, including any income attributable to the deferred compensation, 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 a qualified Roth contribution program maintained pursuant to the Model Plan's provisions will not be included in income under section 402A(d)(1).

4. Provided that loans are made in accordance with the provisions of the Model Plan, 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 with terms other than those in the above-described Model Plan or as to the federal tax consequences under any other section of the Code or statute other than those specifically stated above. If the Model Plan's terms are modified, this ruling will not necessarily remain applicable. This ruling is directed only to State S and the Board and applies only to the terms of the Model Plan submitted on February 14, 2011, as amended through August 26, 2011 and approved by the Board. In addition, this ruling applies to an adopting eligible employer only if it establishes a trust satisfying the requirements of the Model Plan and the State Regulations. 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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(Employee Benefits)
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Enclosure (1)

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