Uniform Issue List No. 414.07-00; 401.29-00

200244021

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

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AUG - 5 2002

Attention: **********
Secretary

Legend:

Association = **********

Corporation C = **********

Plan X = **********
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State M = ********

Ladies and Gentlemen:

On March 31, 2000, your authorized representative requested a letter ruling as to whether Corporation C may maintain a qualified cash-or-deferred arrangement under section 401(k)(4)(B)(i) of the Internal Revenue Code ("Code").

To support your ruling request, your representative has submitted the following facts and representations:

Corporation C is a State M not-for-profit corporation, that the Service determined to be exempt from tax as a business league described in section 501(c)(6) of the Code in a letter dated July 14, 1998. Corporation C is essentially a joint venture between the public and private sectors and is intended to create

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products and services that benefit , the and consumers.

The primary activity of Corporation C is the development and operation of a information network system and the operation and maintenance of a database. Through the information network and the database, Corporation C provides information of record regarding and other in each state, territory, and insular possession of the United States. The goals of Corporation C in developing the information network and the database are: to provide a source of information to companies that can be utilized during background checks before appointing to sell for them; to streamline the licensing and appointment process; and to facilitate the sharing of information regarding actions taken against by state .

The information network provides an electronic transactional link between industry and to facilitate the exchange o r information. This results in an electronic communication network comprising state departments, companies testing locations. designated service centers, licensing vendors, and indi . The . database facilitates uniformity among state licensing systems, establishing a repository of information for use by companies. The database contains demographic, biographical, licensing, and appointment information about persons who are or were previously licensed as and persons who sought such licensing. The database also contains information about disciplinary actions involving such persons. The database includes an on-line library of licensing and appointment requirements maintained by each state. This library provides a central source of information for companies, and . The database can be accessed electronically by state regulated companies or , which must pay fees for using the system. These fees. which in totaled approximately $****** include access fees for the information network and database, annual personal identification number fees, and one-time customer activation fees.

Although the is the sole member of Corporation C, it has limited powers with respect to Corporation C. Management and control over Corporation C are vested in member board of directors. Specified from the industry choose directors. directors are selected by the and each of these directors must be a member of the or a duly authorized representative of the who is officially connected with the member's department or principally employed by that department. The executive

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vice president of the . serves as the director, ex officio, with power to vote. The term of each director is one year, and a director may be removed only by action of the entity or entities that selected the director.

Any act by a majority of the directors present at a meeting (at which a quorum is present) constitutes an act of the board of directors. However, a vote by the directors is required: (1) to amend the articles of incorporation or bylaws; (2) to authorize any payment or distribution of money or other assets or the provision of services to the or any state (although no payment may be made to or for the benefit of any state except to implement programs of Corporation C); (3) to adopt Corporation C's annual budget (this applies until five years following the date of incorporation of or the date upon which the initial investment by the is repaid by Corporation C); (4) to authorize the expansion of Corporation C into new lines of business, and (5) to adopt a schedule of fees to be charged for access to any programs provided by Corporation C. The by-laws define a vote as the affirmative vote of directors until the later of five years following the date of incorporation or the date upon which the initial investment by the is repaid (at which time a vote will be the affirmative vote of directors).

The officers of Corporation C include a president, who serves as the chief executive officer, one or more vice-presidents, a treasurer, a secretary, and such other officers as may be selected to fill positions created by resolution of the board of directors. The officers are selected by majority vote of the board of directors. The officers need not be members of the or official representative of members of the . Instead, the officers can be individuals from the private sector. Presently, the vice president of Corporation C is a individual, and the other Corporation C officers are officials or employees of the

Corporation C received an initial capital investment of $*** from the This investment was obtained by solicitations from a national trade organization representing the In addition, the has loaned Corporation C approximately $*** (including principal and interest).

Currently, Corporation C receives substantially all its revenues in the form of user fees and sale proceeds paid by private businesses or individuals in the It is anticipated that the user fees paid by the will enable Corporation C to repay its debt and thereafter will cover all expenses of operation (most of the initial capital investment made by the will be repaid by offsets against access and activation fees). Corporation C's continuation

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as a going concern depends on its ability to generate sufficient cash flow through access and activation fees.

As a non-profit entity, no part of the net earnings or property of Corporation C may inure to the benefit of, or be distributed to, any member, director, or officer of Corporation C or to other private individuals (other than payment of reasonable compensation for services rendered). Upon dissolution or winding up of Corporation C, any remaining assets after payment of all debts and liabilities will be distributed to the or to any state, provided that the assets are used primarily to implement the programs of Corporation C.

Your authorized representative requested a ruling to the effect that Corporation C is eligible to maintain a qualified cash-or-deferred arrangement under section 401(k)(4)(B)(i) of the Code.

Section 401(k)(4)(B) of the Code concerns eligibility of state and local governments and tax exempt organizations to maintain a qualified cash-or-deferred arrangement.

Section 401(k)(4)(B) of the Code, as amended by the Small Business Job Protection Act of 1996, Public Law 104-188, permits tax-exempt organizations, for plan years beginning after December 31, 1996, to include cash or deferred arrangements as part of plans maintained by them (generally profit-sharing plans). Section 401(k)(4)(B)(i) of the Code (tax-exempts eligible) provides that except as provided in clause (ii), any organization exempt from tax under this subtitle may include a qualified cash or deferral arrangement as part of a plan maintained by it.

However, state and local governments continue to be ineligible to include such arrangements (if not otherwise grandfathered) in plans that they maintain. Section 401(k)(4)(B)(ii) of the Code (entitled "Governments ineligible") provides that a cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof.

Section 414(d) of the Code provides that, for purposes of this part, the term "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, considered whether a retirement plan established by a volunteer fire company was a governmental plan within the meaning of section 414(d) of the Code. The Rev. Rul. went on to state that one of

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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 is the degree of control that the state or government has over the organization's everyday operations. Other factors 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 government 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 or instrumentality of a government, the mere satisfaction of one or all of the factors is not necessarily determinative.

The rationale used in Rev. Rul. 89-49 for determining whether an organization is an agency or instrumentality of the United States or any state or political subdivision would be equally applicable whether the determination is being made for purposes of section 414(d) of the Code or for purposes of section 401(k)(4)(B).

In the instant case, Corporation C has been determined by the Service to be exempt from tax as an organization described in section 501(c)(6) of the Code. As demonstrated above, the most important factor in the Rev. Rul. shows that the private-sector has substantial control of the daily operations of Corporation C. of the directors are appointed by the private-sector. The has limited control over Corporation C, even though directors are represented by the . Corporation C was not established by legislation. With respect to funding, Corporation C is indebted to the / as well as the for its initial capital investment. Corporation C will repay its debt to both the and to the through revenues generated by commercial uses of the information network and the database. After, that, it is expected that Corporation C will support itself from those revenues. Thus, the long-term funding is not governmental. In addition, of the positions on the Corporation C board of directors are reserved for representatives from the There is no requirement that the officers of Corporation C be public officials: instead, the officers may include both governmental officials (such as members of the and individuals from the private sector Presently, the vice-president is from the sector. Although of the directors are chosen by the , the directors from the hold a critical veto over major actions of the board of directors because a is required to change revenue production and major operations of Corporation C. Although Corporation C provides support to the through the information network and the database it also serves the , by providing private-sector access to the information network and the database. Furthermore, the non-regulatory activities and

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functions, and the treatment of its employees as non-governmental employees also indicate that Corporation C is not a governmental agency or instrumentality of a state for purposes of section 414(d) of the Code. Under these circumstances, we do not believe that Corporation C is precluded from maintaining a cash-or-deferred arrangement under section 401(k)(4)(B)(ii) because it is not an agency or instrumentality of a state.

Based solely on the facts submitted, we conclude that Corporation C is eligible to maintain a qualified cash-or-deferred arrangement under section 401(k)(4)(B)(i) of the Code for its employees.

This ruling is directed only to the taxpayer that 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 has been sent to your authorized representative in accordance with a power of attorney on file in this office.

If you have any questions please contact at

Sincerely yours,

/s/ Alan Pipkin

Alan C. Pipkin, Manager
Employee Plans Technical Group 4

Enclosures:
Deleted copy of this letter
Notice of Intention to Disclose, Notice 437