

**RULING REQUEST SUBMISSION
EXPEDITED HANDLING REQUEST
CITY OF SAN JOSE**

June 13, 2012

EXPEDITED HANDLING REQUESTED

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Internal Revenue Service
Attention: EP Letter Rulings
P.O. Box 27063
McPherson Station
Washington, D.C. 20038

Re: RULING REQUEST SUBMISSION
EXPEDITED HANDLING REQUEST
CITY OF SAN JOSE
EIN: 94-6000419

Dear Sir or Madam:

The City of San Jose ("City"), acting through the Council of the City of San Jose ("City Council"), hereby submits this request for certain rulings.

EXPEDITED HANDLING

The City believes that it has a compelling need for expedited handling of this request. Factors outside the City's control create a real "business need" for a ruling in order to avoid serious consequences to the City, the Plans, and, most importantly, the members of the Plans. The City has submitted this request as soon as possible after ballot measure proposal pursuant to Resolution No. 76158 was introduced affecting the Plans. The City's ability to provide its citizens with essential services, including police protection, fire protection, street maintenance, libraries, and community centers, has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. Resolving the tax issue raised by the ballot measure proposal is critical for ensuring the City can provide reasonable and sustainable post employment benefits while delivering essential services to the residents of the City.

PURPOSE OF THE BALLOT MEASURE PROPOSAL AND THE SUSTAINABLE
RETIREMENT BENEFITS AND COMPENSATION ACT

Pursuant to Resolution No. 76158, the City Council has submitted a ballot measure proposal that would add a new Article XV-A to the San Jose City Charter by enacting the Sustainable Retirement Benefits and Compensation Act ("Act"). The ballot measure proposal was passed in a special municipal election held on June 5, 2012. The Act will allow the City

Council to modify City pensions and benefits provided to current employees and to establish reduced pensions and benefits for new employees as follows:

- Unless they voluntarily opt in to the Voluntary Election Program ("VEP"), individuals who are current employees of the City on the effective date of the Act and who are not covered under the "Tier 2 program" discussed below will have their compensation adjusted through additional retirement contributions in increments of 4% of pay per year, up to a maximum of 16% additional retirement contributions.
- The City Council will adopt the VEP, which will give current employees who are members of the Police and Fire Department Retirement Plan ("Police and Fire Plan") or the Federated City Employees' Retirement Plan ("Federated Plan") as of the effective date of the Act a one-time limited period to enroll in an alternative retirement program. The program will preserve an employee's earned benefit accrual and only change the benefit accrual for an employee's future service with the City. The implementation of the VEP is contingent on approval of the Service, and is the focus of this request. If a current employee does nothing they will remain in their current plan – the Police and Fire Retirement Plan or the Federated Employees' Retirement System.
- If the VEP is not implemented for any reason, including the lack of approval from the service, all employees will be subjected to the compensation adjustment described above.
- The City Council will adopt a retirement program referred to as "Tier 2" for new employees hired on or after the ordinance enacting such Tier 2 program is adopted. That program is not the subject of this ruling request.

INFORMATION REQUIRED BY REVENUE PROCEDURE

The following information and representations in this ruling request follow the structure as provided in Revenue Procedure ("Rev. Proc.") 2012-4, 2012-1 I.R.B. 125.

A. STATEMENT OF FACTS

As described below, the ruling request deals exclusively with the impact of the election for members pursuant to the Act set forth in the ballot measure proposal. However, to provide a complete picture to the Service, we have provided a brief description of the affected plans and their governing structures.

1. Taxpayer Information: Statements Required by Section 9.02(1)(a)

As required by Sections 9.02(1) and 9.02(3) of Rev. Proc. 2012-4, this ruling request contains a complete statement of all material facts related to the matters considered in the request. An analysis of the applicable statutory and regulatory provisions that govern the Plan is included below in the appropriate portions of the "Statement of Law and Analysis" section. All material facts in documents attached as Exhibits are analyzed in this ruling request and are not merely incorporated by reference.

These rulings are respectfully requested by the City Council, which is vested with all the powers of the City and determining all matters of policy pursuant to Article IV, Section 400 of the San Jose City Charter ("Charter").

Identifying information for the City is as follows:

City of San Jose
San Jose City Hall
200 East Santa Clara Street
San Jose, CA 95113
Attn: Ed Moran
(408) 535-3500
EIN: 94-6000419

The accounting period and overall method of accounting for the City is as follows:

The City uses a July 1 to June 30 accounting period.

2. Description of the City Council and Facts Relating to the Transaction as Required by Sections 9.02(1)(b), 9.02(1)(c), and 9.02(2)

a. General Description of the City Council

The City Council consists of eleven (11) members, one of whom will be the Mayor, each of whom will have the right to vote on all matters coming before the City Council. Except as otherwise provided in the Charter, each member of the City Council, except the Mayor, will be elected at a Regular Municipal Election by one of ten (10) Districts designated by number within the City. To be a City Council member, a person must satisfy all of the following conditions:

(i) The person must have been a citizen of the United States for at least one year immediately preceding the commencement of the term for which the person is elected or the date upon which the person is appointed.

(ii) The person must have been a resident of the City and, excepting the Mayor, of the District represented by the person as member, for at least thirty (30) days immediately preceding the last day specified by law for the filing of nomination papers with the City Clerk for such office or, if appointed, preceding the date of the person's appointment to fill a vacancy.

(iii) If elected to office at a Regular Municipal Election, the person must have been a registered elector of the City on the last day specified by law for the filing of nomination papers with the City Clerk for such office.

(iv) If appointed to such office, the person must have been a registered elector of the City at the time of the person's appointment.

A City Council member may serve for two (2) successive four-year terms.

3. **Summary Description of the Plans and Facts Relating to the Transaction as Required by Sections 9.02(1)(b), 9.02(1)(c), and 9.02(2)**

a. **General Description of the Plans¹**

The Federated Plan is a single employer defined benefit plan. The Federated Plan was established effective July 1, 1975. The Police and Fire Plan is a single employer defined benefit plan. The Police and Fire Plan was established effective February 1, 1962.

The governing provisions of the Federated Plan are set forth in Chapter 3.28 of Title 3, Article II of the San Jose Municipal Code ("SJMC"). The governing provisions of the Police and Fire Plan are set forth in Chapter 3.36 of Title 3, Article II of the SJMC.

The Federated Plan and the Police and Fire Plan (collectively, "Plans") are intended to qualify under Internal Revenue Code ("Code") §§ 401(a) and 414(d) as qualified retirement plans. On January 27, 2011, the Plans submitted requests for compliance statements and favorable determination letters from the IRS under the streamline procedures of the voluntary compliance program and Cycle E. The Federated Plan received a compliance statement on February 24, 2012. The Cycle E filings for the Plans are still currently pending.

b. **Governing Documents**

A copy of the relevant portions of Chapters 3.28 and 3.36, Title 3, Article II of the SJMC is attached as Exhibit I.

4. **Description of Current Retirement Benefits under the Plans**

a. **Current Retirement Benefits**

The current retirement benefits provided under the Plans are summarized in the chart on page 6.

- Generally, the monthly retirement allowance for members of the Federated Plan is calculated using the following formula: Final Compensation x 2.5% x Years of Service.
- The monthly retirement allowance for police officer members of the Police and Fire Plan is calculated as follows: Final Compensation x 2.5% x years of service for the first 20 years of service, and Final Compensation x 4% x years of service for the next 10 years of service.
- For firefighter members of the Police and Fire Plan, the monthly retirement allowance is final average salary x 2.5% for the first 20 years of service, and final

¹ Capitalized terms in this ruling request have the meanings ascribed to them in the statutes and rules that constitute the Plan documents unless otherwise defined.

average salary x 3% x years of service for firefighters with 20 or more years of service.

b. Current Contributions

All members of the Federated Plan are currently required to contribute 11.2% of compensation as employee contributions (which includes retiree health).

Police department members of the Police and Fire Plan are currently required to contribute 17.47% of compensation as employee contributions (which includes retiree health).

Fire department members of the Police and Fire Plan are currently required to contribute 15.62% of compensation as employee contributions (which includes retiree health).

c. Current Vesting

Members of the Federated Plan who have completed 5 years of service and attained age 55, and members of the Police and Fire Plan who have completed 20 years of service and attained age 50, are entitled to a vested retirement benefit. SJMC §§ 3.28.1080, 3.28.1110, 3.36.747, and 3.36.750. The eligibility requirements for retirement benefits under the Plans are provided under Part 4 of Chapter 3.28 of the Federated Plan and Part 2 of Chapter 3.36 of the Police and Fire Plan.

5. Sustainable Retirement Benefits and Compensation Act

This ruling request focuses on the impact of the Act on the members of the Plans who are current employees on the effective date of the Act. The Act, as outlined in the ballot measure proposal in Resolution No. 76158, is attached as Exhibit II. The Act does the following things that are the reason for this request:

1. *An employee of the City has the selection options set forth under the Act, as described below. These are the only elective provisions under the Act, and they are the subject of this ruling request.*

In accordance with the Act, current employees of the City who are members of either Plan may elect:

- (i) OPTION I – stay in the current Plan, in which case their compensation will be adjusted through additional employee retirement contributions in increments of 4% of pay per year, up to a maximum of 16% (but no more than 50% of the cost to fund unfunded pension liabilities), or
- (ii) OPTION II – become members of an alternative retirement program ("VEP") with respect to their future services.

2. *The City Council will adopt the Voluntary Election Program for all current employees who are members of the Plans as of the effective date of the Act.*

In accordance with the Act, the City Council will adopt the VEP, which will give current employees who are members of the Plans as of the effective date of the Act a one-time limited period to enroll in an alternative retirement program that will reduce their future pension benefit accruals under the Plans, and maintain the employee cost sharing as the current 3:8 ratio. The program will preserve an employee's previously earned benefit accrual and only change the benefit accrual for an employee's future service with the City. An employee (and his or her spouse or domestic partner, if legally required) who opts into the VEP will be required to sign an irrevocable election waiver acknowledging that he or she irrevocably relinquishes his or her existing level of retirement benefit accruals and has voluntarily chosen to reduce benefits as specified below. The VEP will have the features and limitations summarized in the comparison chart below. The implementation of the VEP is contingent upon receipt of approval from the Service.

6. Comparison of Retirement Structure under the Current Plan and the VEP

	Federated Plan (Current)	Police & Fire Plan (Current)	VEP (Future)
Accrual Rate	2.5% x Years of Service x Final Compensation	First 20 Years of Service: 2.5% x Years of Service x Final Compensation Police: 4% for next 10 years of service Fire: 3% for all years after 20 years of service	2.0% x years of service x "final compensation" (average annual earned pay of highest 3 consecutive years of service)
Eligibility Age for Service Retirement	Age 55	Age 50 with 25 Years of Service	Increase by 6 month each year to age 57 for Police and Fire and 62 for Federated Plan
Years of Service Eligibility to Retire at Any Age	30 Years of Service	30 Years of Service	Increase Years of Service by 6 months annually on July 1, starting July 1, 2017
Early Retirement Age			Age 55 for Federated Plan members and age 50 for Police & Fire Plan members (at an actuarially reduced equivalent)

Cost-of-Living Adjustments	3% annual COLA	3% annual COLA	1.5% annual COLA cap – (based on increase in consumer price index (San Jose, San Francisco, Oakland, BLS, CPI-U, December to December)
Employee Contribution Rates	Effective 6/23/13 , employees who elect not to opt in to the lower level of benefits will have a compensation adjustment through <u>additional</u> retirement contributions up to a max. of 16% in 4% increments, but no more than 50% of the unfunded liability. This is in addition to the current cost sharing of the Normal Cost.	Effective 6/23/13 , employees who elect not to opt in to the lower level of benefits will have a compensation adjustment through <u>additional</u> retirement contributions up to a max. of 16% in 4% increments, but no more than 50% of the unfunded liability. This is in addition to the current cost sharing of the Normal Cost.	Employee/employer share ratio will remain 3:8 (covering normal cost)
Year of Service Credit	1,739 hours of regular time worked	2,080 hours of regular time worked	

Notes:

The contribution adjustment will be treated as any other employee contributions. Accordingly, the additional payments will be made pre-tax pursuant to the applicable sections of the Code, and subject to withdrawal, return, and redeposit in the same manner as any other employee contributions. The employee contributions would be picked up.

The starting date for an employee's compensation adjustment will be June 23, 2012, regardless of whether the VEP has been implemented.

B. RULINGS REQUESTED

The City Council hereby requests the following specific rulings:

(1) That the mandatory employee contributions required to be made to the Plans by current employees that are picked up by the City as employer contributions on behalf of such employees pursuant to Section 3.28.765 of the Federated Plan and Section 3.36.1580 of the Police and Fire Plan, as applicable, shall continue to be treated as employer contributions to the Plans under Code Section 414(h)(2) for federal income tax purposes after such current employees make an election between the Plans and the VEP, including any default election.

(2) That these mandatory contributions made and picked up as described in Ruling 1, will not be included in gross income for federal income tax purposes for the employee until distributed or otherwise made available.

(3) That these mandatory contributions made and picked up as described in Ruling 1, do not constitute wages as described in Code Section 3401(a).

(4) That these mandatory contributions made and picked up as described in Ruling 1, will not be treated by the Plans as "annual additions" for purposes of Code Section 415(c).

(5) That the election contained in the Act will not create a "cash or deferred arrangement" within the meaning of Code Section 401(k).

JUSTIFICATION FOR RULINGS

Although Internal Revenue Code ("Code") Section 414(h) is not specifically listed among the list of Code Sections for which the national office issues letter rulings, the City Council believes this ruling request involves unique and specific provisions governing the Plans and, as a practical matter, the rulings requested herein are not likely to be addressed through the determination letter process. Furthermore, ruling on these issues is in the interest of good tax administration by providing valuable insight and guidance regarding the applicability of Code Section 414(h) treatment for designated employee contributions described in the Plans. The Service has recognized the need for rulings involving Code Section 414(h) by previously issuing letter rulings based on the unique circumstances and provisions affecting other taxpayers and also by providing a checklist for pick-up ruling requests in Appendix D of Revenue Procedure 2012-4.

C./D. STATEMENT OF LAW AND ANALYSIS

NOTE: For ease of review, we have combined the "Statement of Law" and the "Analysis" in each of the following sections.

Code Section 414(h)(2) provides that contributions otherwise designated as employee contributions shall be treated as employer contributions if: (1) the contributions are made to a

plan determined to be qualified under Code Section 401(a); (2) the plan is established by a State government or a political subdivision thereof; and (3) the contributions are picked up by the governmental employer. Although the Code itself does not detail exactly what constitutes a pick-up plan, several Revenue Rulings issued by the Service describe what constitutes such a plan.

1. The Appropriate Application of Revenue Ruling 2006-43 Supports Favorable Rulings on this Request

The most recent guidance issued by the Service on pick-ups is Revenue Ruling 2006-43, 2006-35 I.R.B. 329. The purpose of this revenue ruling was to amplify and modify Revenue Ruling 81-31, 1981-1 C.B. 255, Revenue Ruling 81-36, 1981-1 C.B. 255, and Revenue Ruling 87-10, 1987-1 C.B. 136.

The first prong of that revenue ruling, which dealt with "official action" in the adoption of a pick-up plan has been met by Section 3.28.765 of the Federated Plan and Section 3.36.1580 of the Police and Fire Plan, and actions taken by the City.

Therefore, we have focused on the second prong of that revenue ruling, which dealt with employee elections in a pick-up plan. Following is an excerpt from Revenue Ruling 2006-43:

a contribution to a qualified plan established by a State government will not be treated as picked up by the employing unit under §414(h)(2) unless the employing unit:

(2) Does not permit a participating employee from and after the date of the "pick-up" to have a cash or deferred election right (within the meaning of § 1.401(k)-1(a)(3)) with respect to designated employee contributions. Thus, for example, participating employees must not be permitted to opt out of the "pick up", or to receive the contributed amounts directly instead of having them paid by the employing unit to the plan.

We believe that the Service should apply Revenue Ruling 2006-43 to mean that, pursuant to the Act, current employees in the Plans electing between the Plans and the VEP should not be viewed as having a cash or deferred election right ("CODA"). The Service should grant the ruling requests because:

1. The election is a one-time irrevocable election.
2. The election is prospective – the election does not recharacterize prior contributions.
3. The particular election that is being provided to members is being provided for the first time to these employees.

4. The election is available to approximately 3,519 participants in the Federated Plan and 1,886 participants in the Police and Fire Plan.
5. The election is available to all similarly situated individuals in a reasonably equivalent manner.
6. Once the election is made, the pick-up designation applies to the mandatory contributions. There are no individual choices with respect to whether contributions are picked-up or not – either before or after the election. Therefore, there is no election provided to the employee "from and after the date" of the pick-up.
7. The Plans are broad-based plans, covering more than 21,868 members.

To provide context for our argument, we next survey the history of Code Section 414(h)(2), and we explain why we believe that history supports our position regarding the inapplicability of CODA rules to pick-ups in this case.

2. The History of Code Section 414(h)(2) Supports Favorable Rulings on This Request

Code Section 414(h)(2) was adopted as part of ERISA in 1974 to provide an exception for employees of state and local governments to the general rule that contributions to a qualified plan are not treated as employer contributions if designated as employee contributions. According to the legislative history of Code Section 414(h):

The provision gives effect to the source of the contributions as designated in the plan.

The same rule would apply to State and local governmental plans which now designate contributions as employee contributions, if the appropriate governmental bodies change the provisions of their plans.

However, some state and local government plans designate certain amounts as being employee contributions even though statutes authorize or require the relevant governmental units or agencies to "pick-up" some or all of what would otherwise be the employee's contribution. In other words, the governmental unit pays all or part of the employee's contribution but does not withhold this amount from the employee's salary. In this situation the portion of the contribution which is "picked-up" by the government is, in substance, an employer contribution for purpose of Federal tax law, notwithstanding the fact that for certain purposes of State law the contribution may be designated as an employee contribution. Accordingly, the bill provides in the case of a government pick-up plan, that the portion of the contribution which is paid by the government, with no withholding from the employee's salary, will be treated as an employer contribution under the tax law.

House Ways and Means Committee Report, H.Rep. 93-807 (1974), USCCAN 1974, p. 4810.²

The legislative history clearly demonstrates that the purpose of Code Section 414(h)(2) was to give effect to how employee and employer contributions are designated under the plan and/or by the employer action.

3. The Service's Guidance on 414(h) Supports Favorable Rulings on This Request

a. Service's First Post-ERISA Guidance on 414(h)

In GCM 36813 (8/16/76) and GCM 37161 (6/14/77), the Service discussed the factors that would have to be present in a state or municipal retirement, disability, or pension plan so that the plan would be considered substantially similar to the USCS plan so that employee contributions to the state or municipal plan should receive the same federal income tax treatment as employee contributions under the USCS plan – namely, the employee contributions would be taxable. These GCMs acknowledge that a state or local pick-up plan essentially changes the taxation result even if all factors are parallel between the governmental plan and the USCS plan. We believe this is an important starting point for our discussion because it indicates that an employer pick-up results in an alteration of the generally applicable rules of taxation for employee contributions.

b. Service's First Guidance on Pick-ups

To directly respond to Code Section 414(h)(2), the Service issued Revenue Ruling 77-462, 1977-2 C.B. 358, which provides that the employer-school district's agreement to pick up the mandatory employee contributions to a state pension plan are excludable from the employee's gross income "until such time as they are distributed or made available to the employees. See Section 402(a) of the Code."

c. Service's Guidance on Employer Designation and Employer vs. Employee Control

GCM 38194 (12/11/79) was issued after Revenue Ruling 77-462 as part of the Service's formal consideration that led to the issuance of Revenue Ruling 81-35, 1981-1 C.B. 255, and Revenue Ruling 81-36, 1981-1 C.B. 255 (referred to collectively as the "1981 Revenue Rulings"). That GCM set forth two criteria for determining whether there had been a valid pick-up:

² This is the committee report on H.R. 2, Section 1015. The conference committee report on ERISA is found at USCCAN 1974, p 5060. It states as follows: "To clarify present law, the [Conference Committee's] substitute for the House bill and the Senate amendment provides that amounts contributed to a qualified plan in taxable years beginning after December 31, 1973, are to be treated as employee contributions if they are designated as employee contributions under the plan. This rule does not apply, however, to government 'pick up' plans, where the contribution is paid by the government, with no withholding from the employee's salary, and these amounts would be treated as employer contributions, no matter how designated under the plan."

- (Criterion 1) The employer must specify that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee; and
- (Criterion 2) The employee must not be given the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the pension plan.

Revenue Ruling 81-35 and Revenue Ruling 81-36 were issued in January 1981, a year after GCM 38194.

- Under Revenue Ruling 81-35, a valid pick-up was not found where a particular employee entered into an agreement with his employer to have contributions made to the state's pension plan. The agreement was voluntary and was not entered into as a condition of employment.
- Under Revenue Ruling 81-36, a valid pick-up was found where an employee was required to contribute 10% to the state pension plan pursuant to a collective bargaining agreement. The pick-up plan was instituted during the employee's employment. Revenue Ruling 81-36 emphasized that pick-up was accomplished on behalf of all covered employees.

The 1981 Revenue Rulings track the GCM in concluding that the requirements necessary to constitute a valid pick-up under Section 414(h)(2) of the Code are:

- the employer must specify that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee; and
- the employee must not be given the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the pension plan.

If these criteria are met, picked-up contributions are not includable in gross income "until distributed or made available, as provided in Rev. Rul. 77-462." Rev. Rul. 81-36.

The key difference between Revenue Ruling 81-35 and Revenue Ruling 81-36 was the difference between an election by a single employee through an agreement with the employer (Revenue Ruling 81-35) and the agreement by the employer affecting all employees (Revenue Ruling 81-36). The facts in Revenue Ruling 81-36 are consistent with Revenue Ruling 77-462 – the pick-up applies "across the board" to employees in the plan.

d. Service's Guidance on Employee Control

Eleven months after the issuance of the 1981 Revenue Rulings, Counsel was once again asked to look at two pick-up arrangements to determine if they met the standards of Code Section 414(h)(2). In GCM 38820 (11/23/81), Counsel considered two situations where an employer had met the first prong of the prior GCM by specifying that the employer was picking-

up and paying the employee's contribution, but in each case there was an opportunity for the employee to elect to be a member of the plan or not to be a member of the plan. In each case, Counsel found that a valid pick-up existed.

In the GCM, Counsel essentially warns against a formalistic application of GCM 38194, and instead turns to the issue of "control":

There is no specific statutory basis for the criteria adopted in G.C.M. 38194. These criteria were adopted in lieu of the withholding test suggested in the legislative history because 'they identify the essential characteristics of pick-up plans and are more feasible to administer than criteria based on whether or not the amounts are 'withhold'.' Because these criteria were established principally for administrability and because the statute provides no specific basis for them, any interpretation of the criteria must conform to the statutory intent in enacting section 414(h)(2) and the general goals for pension plans.

Therefore, criteria 2 of G.C.M. 38194 must not be interpreted to prohibit 'pick-up' of amounts that are, in substance, employer contributions. This rationale suggests that criteria 2 should only be applied in cases in which an employee is considered to have the option to choose to receive the amounts directly rather than having them contributed to a plan because the employee is in fact controlling the amounts and, therefore, the contributions are not, in substance, employer contributions.

An option that would be impermissible under criteria 2 is one in which the employee will currently receive the amounts unless he must annually opt to have these amounts contributed on his behalf to the employer's pension plan. In this case the employee, not the employer, is in fact controlling the contributions.

GCM 38820.

We believe that GCM 38820 is very instructive in understanding the Service's analysis under the 1981 Revenue Rulings. We believe that, by reading GCM 38194, GCM 38820, and the 1981 Revenue Rulings together, it is clear that the Service has identified tests to determine whether a particular contribution is in fact an employer or an employee contribution. If the contribution is mandatory and if the employee has no choice whether to actually make (receive) the contribution in cash, then the substance of the contribution is that it is an employer contribution and can be so treated if the employer designates it as an employer contribution. We also think it is very important to note that the example provided in GCM 38820 refers to an employee **annually** opting into the pick-up. The election that is being provided under Act to current employees is a one-time irrevocable election between the two selection options.

We believe that the 1981 Revenue Rulings and the cited GCMs identify when the control of the employee contributions has passed from the employee to the employer so that they are in substance employer contributions. When a contribution crosses that threshold, the treatment of a contribution as an employer contribution should be complete for federal tax purposes.

The language of Code Section 414(h)(1) states that it applies to "this title." That is a different applicability provision than for other defined terms. For example, Code Sections 414(a), (d), (e)(1), (f), (g), (i), (j), (k) apply to "this part." Other definitions apply to specified Code Sections. For example, Code Section 414(b) applies to Code Sections 401, 408(k), 403(p), 410, 411, 415, and 416; Code Section 414(m) applies to Code Sections 401(a)(3), (4), (7), (16), and (26); 408(k) and (p), 410, 411, 415, and 416. However, Code Section 414(h) applies to the entire Title. Therefore, with respect to any Code provision affecting a qualified governmental plan, the pick-up provisions apply to permit an employer to pick-up any employee contributions such that they will be treated as employer contributions; and, certainly, no regulation promulgated by the Service under a different Code section should take precedence over a specific federal statute in the same title dealing with 414(h)(2).

Matching language from the relevant portions of the SJMC provide as follows:

A. For the purposes of this section, contributions "picked up" by the city means contributions to this plan which are designated as employee contributions but are treated as employer contributions for income tax purposes as authorized by Section 414(h)(2) of the Internal Revenue Code (26 U.S.C.A. 414(h)(2)).

B. Notwithstanding any other provisions of law, the city may pick up, for the sole and limited purpose of deferring taxes as authorized by Section 414(h)(2) of the Internal Revenue Code (26 U.S.C.A. 414 (h)(2)) and Section 17501 of the California Revenue and Taxation Code, all or a portion of the contributions required to be paid by a member of this plan.

C. Nothing herein shall be construed to mean that any contributions so picked up by the city are to be treated as city contributions for any purpose other than the sole and limited purpose specified herein. Any contributions so picked up by the city shall be paid into the retirement fund and shall be treated in the retirement fund in the same manner as such contributions would be treated if they had not been picked up by the city. The member shall have no right to receive such picked up contributions directly but instead they must be paid to the retirement fund.

D. Subject to applicable laws relating to meet and confer requirements, the city shall retain the authority periodically to increase, reduce or eliminate the pickup by the city of all or a portion of the contributions required to be paid by a member of this plan.

SJMC Section 3.28.765 of the Federated Plan; SJMC Section 3.36.1580 of the Police and Fire Plan.

In compliance with the Service's guidance, the City will treat picked up amounts as not includable in the members' gross income and will not report them as salary for federal income tax purposes. The federal taxable compensation of the employee is reduced by the amount equal to the picked-up contributions. Moreover, it is clear by the mandatory nature of the statutory provisions that members of the Plans are not entitled to receive such amounts directly in lieu of having such amounts picked up.

4. **The Court Cases Support Favorable Rulings on This Request and Are Consistent with the Service's Position on "Dual Treatment"**

The Fifth Circuit, in a *per curiam* opinion, acknowledged that State governments may not wish to, or may not be able to, effectively lower employee stated salaries in order to designate the pension contribution as one made by the employer. *Foil v. Commissioner*, 920 F.2d 1196, 1202 (5th Cir. 1990).

Congress clearly intended to provide special treatment of employee contributions in governmental plans in order to allow public employees to have pre-tax treatment of these contributions in those situations where state law or political forces did not allow the employer to actually reduce employee compensation in order to make an employer contribution. This is the fundamental view expressed by the Seventh Circuit in the Howell case:

The pick-up arrangement is one established by the state or local governmental employer within the meaning ascribed to this term by Congress. The pick-up program is designed to meet political and fiscal realities of these governments:

The distinction between employers' and employees' contributions is one example of the dominance of form over substance in the tax code. Perhaps aware that there was no substance — but substantial consequences for the revenue — in this distinction, Congress allowed governmental bodies (but not private employers) to select still a third label.

* * *

Section 414(h)(2) gives governmental employers a second name to use, in order to achieve the same result. Its function is evidently to avoid hurdles of state law that might prevent governments from designating pension contributions as 'employers' contributions and so deferring employees' tax. By 'picking up' contributions, governments may both preserve their internal characterization of the contributions and achieve the tax benefits that private employers regularly do when they make 'employers' contributions.

* * *

This exalts form over substance, no doubt. In tax, however, form and substance often coincide. The election between employers' and employees' contributions is nothing but form, and the new designation option in § 414(h)(2) simply continues the practice.

Howell v. U.S., 775 F.2d. 887 889-890 (7th Cir. 1985).

While this court decision refers to "deferring taxation," this phrase is not central to the court's ruling. The emphasis in the Howell court ruling is on the ability of the governmental

employer to select a third designation or "label" (a "picked-up" contribution) for certain contributions.

Furthermore, the Service has also recognized this third "label." In GCM 39540 (3/31/86), the Service addressed the issue of whether picked-up contributions can be treated as employer contributions for federal tax purposes and employee contributions for all other purposes. In reaching its conclusion that this dual treatment was permitted, the Service stated the following:

We believe that there are several reasons why their treatment for state tax and other purposes should not impact upon their federal tax treatment. The first reason is that the legislative history is not concerned with how the contributions were treated for any of the above-mentioned purposes. Rather, the legislative history was concerned with the fact that the employer pay all or part of the employee's contribution.

The second reason is that, although Rev. Rul. 77-462 provides that amounts "picked-up" are excluded from the employee's gross income until they are paid or otherwise made available (within the meaning of section 402(a)), this provision is only relevant to federal tax treatment and does not bind the state of ***. This is true with any provision of the Code, regulations, or revenue rulings that permit the exclusion of certain amounts from income. Therefore, the state is free to treat these amounts as it chooses with regards to its own state income tax. It also follows that the state is free to treat the "picked-up" amounts as it deems appropriate for other purposes. We believe that the exclusion cannot and should not be conditioned on its treatment for state tax and other purposes.

We believe that this GCM captures our views as well.

- The legislative history is "not concerned" how state law treats picked up contributions.
- The taxation of picked up contributions depends on their being "paid or otherwise made available (within the meaning of section 402(a))"

5. The Service Should Not Apply a 401(k) CODA Analysis to the Situation Presented in this Request

The second prong in Revenue Ruling 2006-43 prohibits a cash or deferred election ("CODA") with respect to picked-up contributions. In defining the CODA, the Revenue Ruling refers to the 2004 Final Regulations. We believe that the 2004 Final Regulations should not be applied when state law provides an irrevocable election to prospectively modify contributions or accruals under an existing broad-based qualified governmental defined benefit plan, that is available to all similarly situated members in a reasonably equivalent manner.

In the case of these active Plan members, the election to choose between the applicable selection options is an election:

- to prospectively modify contributions and accruals
- under existing qualified governmental defined benefit plans covering over 21,868 members that is available to all similarly situated individuals (approximately 5,405 of the 21,868 total)
- in exactly the same manner
- pursuant to a state law.

6. The Service Should Approve the 415 Analysis in Ruling Request 4

With respect to the ruling request with regard to Code Section 415(c), Section 1.415(b)-1(b)(1)(ii) of the Income Tax Regulations provides that, where a defined benefit plan provides for mandatory employee contributions, the annual benefit attributable to such contributions is not taken into account for purposes of Section 415(b) of the Code. Section 1.415(c)-1(a)(2) of the Income Tax Regulations further provides that the mandatory employee contributions are considered a separate defined contribution plan maintained by the employer that is subject to the limitations on contributions and other annual additions described in Section 415(c) of the Code. However, "contributions that are picked up by the employer as described in section 414(h)(2) are not considered employee contributions." Accordingly, with respect to this ruling request, the City Council requests a ruling that the picked-up contributions to the Plans by current employees made by the City, will not be treated as "annual additions" for purposes of Code Section 415(c).

Based upon what we believe is the appropriate application of Code Section 414(h)(2) and Revenue Ruling 2006-43, the criteria for a valid pick-up continue to be met with regard to the current employees' election with regard to the selection options so that there will continue to be an effective employer pick-up of all mandatory employee contributions to the Plans.

E. CONCLUSION

Based upon the foregoing analysis, the City requests that the Service rule favorably as requested above.

The City believes this qualification issue is of such importance and uniqueness, as outlined in the facts above, that a private letter ruling request must be made in this circumstance.

F. PROCEDURAL MATTERS

1. Revenue Procedure 2012-4 Statements:

Statement Required by Section 9.02(4) – Same Issues in an Earlier Return

The issues raised herein have not been included in an earlier return or in a return for any year of a related taxpayer.

Statement Required by Section 9.02(5)(a) – Same or Similar Previous Ruling

The same or similar issues have not been previously ruled on for the City, a related taxpayer, or a predecessor.

Statement Required by Section 9.02(5)(b) – Same or Similar Previous Request

The same or similar issues have not been previously requested to be ruled on but withdrawn by the City, a related taxpayer, or a predecessor.

Statement Required by Section 9.02(5)(c) – Same or Similar Request Pending

The same or similar issues have not been previously submitted by the City, a related taxpayer, or a predecessor, and no such ruling is pending.

Statement Required by Section 9.02(5)(d) – Same or Similar Other Request

The same or similar issues are not presently being submitted by the City, a related taxpayer, or a predecessor in another request.

Statement Required by Section 9.02(6) – Supporting Authority

The City believes that it has set forth in its analysis supporting authorities which address the issues discussed herein. The City believes that the law is not uncertain and further believes that the issues are adequately addressed by relevant authorities.

Statement under Section 9.02(7) – Contrary Authority

The only contrary material is Revenue Ruling 2006-43 which we have distinguished in our analysis above.

Statement Required by Section 9.02(8) – Identifying Pending Legislation

The Act, outlined in the ballot measure proposal of Resolution No. 76158 that was passed June 5, 2012, involves the issues herein.

Statement under Section 9.03(1) – Multiple Issues

The City is not requesting separate letter rulings on multiple issues.

Statement under Section 9.03(4)(a) – Facsimile Transmission

The City requests the Service to fax a copy of the letter ruling to Mary Beth Braitman and Terry A.M. Mumford at Ice Miller LLP, the City Council's authorized representatives. Their fax numbers are (317) 592-4616 and (317) 592-4713. The City Council waives any disclosure violation resulting from the fax transmission.

Statement under Section 9.03(5) – Conference

If the Service contemplates a ruling adverse to the City, we hereby request a prior conference on this matter.

7. **Administrative Requirements of Revenue Procedure 2012-4:**

Power of Attorney – Sections 9.02(11), 9.02(12) and 9.03(2)

A Power of Attorney for the undersigned is enclosed.

Deletions Statement and Checklist – Sections 9.02(9) and 9.02(17)

The statement of proposed deletions and the checklist, as required by sections 9.02(9) and 9.02(17) of Revenue Procedure 2012-4, precede this letter. As indicated in the separately attached deletions statement, the City simply requests that all names, addresses, and the taxpayer identification number be deleted prior to publication; therefore, a copy of the letter ruling request with deletions marked is not included in this request pursuant to the instructions set forth in section 9.02(9)(a) of Revenue Procedure 2012-4.

User Fee

Attached is a check payable to the Internal Revenue Service in the amount of \$10,000 as required by Section 9.02(14) of Revenue Procedure 2012-4 and Revenue Procedure 2012-8.

General:

If you have any questions regarding this matter or desire to establish a time and place for a conference, please do not hesitate to contact Mary Beth Braitman at (317) 236-2413 or Terry A.M. Mumford at (317) 236-2110, pursuant to the enclosed Form 2848, Power of Attorney and Declaration of Representative.

Very truly yours,

ICE MILLER LLP
Authorized Representatives

Mary Beth Braitman

Mary Beth Braitman

Terry A.M. Mumford

Terry A.M. Mumford

Enclosures

cc: Ed Moran

CITY OF SAN JOSE

VENDOR NO.	CHECK DATE	CHECK NO	CHECK TOTAL
05345	6/11/2012	5067636	\$10,000.00

Invoice Number	Invoice Date	Invoice Description	Invoice Amount	Net Amount
IRS RULING	2012/06/07	IRS RULING	\$ 10,000.00	\$ 10,000.00

THIS DOCUMENT IS PRINTED IN TWO COLORS. DO NOT ACCEPT UNLESS BLUE AND BROWN ARE PRESENT

CITY OF SAN JOSE
Finance - Disbursements
200 East Santa Clara Street
San Jose, CA 95113-1905

WELLS FARGO BANK, N.A.
116 HOSPITAL DRIVE
VAN WERT, OH 45991

56-382
412

CHECK NO.
5067636
6/11/2012

PAY CITY OF SAN JOSE **\$10,000.00**
ONE ZERO ZERO ZERO ZERO CTS CTS

***\$10,000.00*

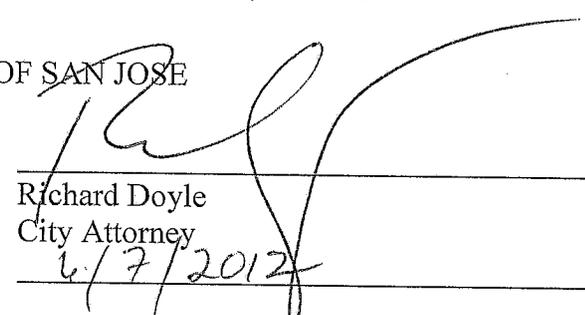
To The Order Of **INTERNAL REVENUE SERVICE OGDEN, UT 84201-0039**

City of San Jose
John F. Jones
City Manager

DECLARATION

Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request and such facts are true, correct, and complete.

CITY OF SAN JOSE

By: 

Name: Richard Doyle

Title: City Attorney

Date: 6/7/2012

EXHIBIT I

**Relevant Statutory Provisions of Chapters 3.28 and 3.36, Title 3, Article II of the
San Jose Municipal Code ("SJMC") Application to the Request**

RESOLUTION NO. 76158

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE REPEALING RESOLUTION NO. 76087 AND CALLING AND GIVING NOTICE OF, ON ITS OWN MOTION, THE SUBMISSION TO THE ELECTORS OF THE CITY OF SAN JOSE, AT A SPECIAL MUNICIPAL ELECTION TO BE HELD ON JUNE 5, 2012, A BALLOT MEASURE PROPOSAL TO AMEND THE SAN JOSE CITY CHARTER TO ADD A NEW ARTICLE XV-A TO REFORM CITY PENSIONS AND BENEFITS PROVIDED TO CURRENT EMPLOYEES AND ESTABLISH REDUCED PENSIONS AND BENEFITS FOR NEW EMPLOYEES AND TO PLACE OTHER LIMITATIONS ON PENSIONS AND BENEFITS

WHEREAS, Charter Section 1600 authorizes the City Council to set the date for a Special Municipal Election; and

WHEREAS, the City Council adopted Resolution No. 76087 and approved a ballot measure for the June 5, 2012 election but directed the City Clerk not to submit the ballot measure to the Registrar of Voters to allow time for further negotiations on the ballot measure language; and

WHEREAS, the City Council now desires to submit to the electors of the City of San José at a Special Municipal Election a ballot measure proposal to amend the San José City Charter to add a new Article XV-A to reform pensions and benefits for current employees, to establish reduced pensions and benefits for new employees and to place other limitations on pensions and benefits; and

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

SECTION 1. Resolution No. 76087 is hereby repealed.

SECTION 2. A Special Municipal Election is hereby called and ordered to be held in the City of San José on June 5, 2012, for the purpose of voting on a ballot measure to

amend the San José City Charter to add a new Article XV-A to reform pensions and benefits for current employees and to establish different pensions and benefits for new employees and to place other limitations on pensions and benefits. The proposed City Charter amendment is attached to this Resolution as Exhibit A.

SECTION 3. The ballot measure will be placed on the ballot for the June 5, 2012 election in the following form:

PENSION REFORM

To protect essential services, including neighborhood police patrols, fire stations, libraries, community centers, streets and parks, shall the Charter be amended to reform retirement benefits of City employees and retirees by: increasing employees' contributions, establishing a voluntary reduced pension plan for current employees, establish pension cost and benefit limitations for new employees, reform disability retirements to prevent abuses, temporarily suspend retiree COLAs during emergencies, require voter approval for increases in future pension benefits?

YES	
NO	

SECTION 4. The City Council hereby requests the Board of Supervisors of the County of Santa Clara, California to permit the Registrar of Voters of Santa Clara County to render to the City of San José such services as the City Clerk of the City of San José may request relating to the conduct of the above-described Special Municipal Election with respect to the following matters:

Coordination of election precincts, polling places, voting booths, voting systems and election officers; Printing and mailing of voter pamphlets; Preparation of tabulation of result of votes cast.

SECTION 5. The City Council hereby requests that the Registrar of Voters of the County of Santa Clara consolidate the Special Municipal Election called and ordered to be held on June 5, 2012 with any other election that may be held on that date.

SECTION 6. The City Council hereby authorizes the Board of Supervisors of Santa Clara County, California to canvass the returns of the Special Municipal Election.

SECTION 7. The City Council hereby directs the City Clerk to reimburse the County of Santa Clara in full for any of the above-mentioned services which may be performed by the Registrar of Voters, upon presentation of a bill to the City, with funds already appropriated to the City Clerk for election purposes.

SECTION 8. The City Council hereby directs the City Clerk to take all actions necessary to facilitate the Special Municipal Election in the time frame specified herein and comply with provisions of the Elections Code of the State of California, City Charter, Ordinances, Resolutions and Policies with regard to the conduct of the Special Municipal Election.

SECTION 9. Pursuant to Section 12111 of the California Elections Code and Section 6061 of the California Government Code, the City Council hereby directs the City Clerk to (a) cause a synopsis of the proposed measure to be published in the San José Mercury News, a newspaper of general circulation within the City of San José; (b)

consolidate the Notice of Measure to be Voted with the Notice of Election into a single notice; (c) transmit a copy of the Measure to the City Attorney and cause the following statement to be printed in the impartial analysis to be prepared by the City Attorney: "If you would like to read the full text of the measure, see www.sanjoseca.gov/clerk/elections/Election.asp or call 408-535-1260 and a copy will be sent at no cost to you."; and (d) do all other things required by law to submit the specified measure above to the electors of the City of San José at the Special Municipal Election, including causing the full text of the proposed measure to be made available in the Office of the City Clerk at no cost and posted on the City Clerk's website.

SECTION 10. Pursuant to Sections 9282 and 9285 of the California Elections Code, the City Council hereby approves the submittal of arguments for and against the ballot measure, if any, and authorizes the Mayor to author and submit a ballot measure argument in favor of the ballot measure and also approves the submittal of rebuttal arguments in response to arguments for and against the ballot measure and authorizes any member or members of the City Council to author and submit a rebuttal, if any.

SECTION 11. The City Council hereby directs the City Clerk to transmit a copy of the measure qualifying for placement on the ballot to the City Attorney for preparation of an impartial analysis.

Power of Attorney and Declaration of Representative

▶ Type or print. ▶ See the separate instructions.

OMB No. 1545-0150
 For IRS Use Only
 Received by:
 Name _____
 Telephone _____
 Function _____
 Date / /

Part I Power of Attorney

Caution: A separate Form 2848 should be completed for each taxpayer. Form 2848 will not be honored for any purpose other than representation before the IRS.

1 Taxpayer information. Taxpayer must sign and date this form on page 2, line 7.

Taxpayer name and address <u>City of San Jose</u> <u>San Jose City Hall</u> <u>200 East Santa Clara Street</u> <u>San Jose, CA 95113</u>	Taxpayer identification number(s) <p style="text-align: center;">94-6000419</p>
	Daytime telephone number <u>408-535-3500</u>
	Plan number (if applicable)

hereby appoints the following representative(s) as attorney(s)-in-fact:

2 Representative(s) must sign and date this form on page 2, Part II.

Name and address <u>Mary Beth Braitman</u> <u>ICE MILLER LLP</u> <u>One American Square, Suite 2900</u> <u>Indianapolis, IN 46282-0200</u> Check if to be sent notices and communications <input checked="" type="checkbox"/>	CAF No. <u>5000-85539R</u> PTIN _____ Telephone No. <u>317-236-2413</u> Fax No. <u>317-592-4616</u> Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/> Fax No. <input type="checkbox"/>
Name and address <u>Lisa Erb Harrison</u> <u>ICE MILLER LLP</u> <u>One American Square, Suite 2900</u> <u>Indianapolis, IN 46282-0200</u> Check if to be sent notices and communications <input checked="" type="checkbox"/>	CAF No. <u>0300-61442R</u> PTIN _____ Telephone No. <u>317-236-5806</u> Fax No. <u>317-592-4802</u> Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/> Fax No. <input type="checkbox"/>
Name and address <u>Terry A.M. Mumford</u> <u>ICE MILLER LLP</u> <u>One American Square, Suite 2900</u> <u>Indianapolis, IN 46282-0200</u>	CAF No. <u>0300-10182R</u> PTIN _____ Telephone No. <u>317-236-2110</u> Fax No. <u>317-592-4713</u> Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/> Fax No. <input type="checkbox"/>

to represent the taxpayer before the Internal Revenue Service for the following matters:

3 Matters

Description of Matter (Income, Employment, Payroll, Excise, Estate, Gift, Whistleblower, Practitioner Discipline, PLR, FOIA, Civil Penalty, etc.) (see instructions for line 3)	Tax Form Number (1040, 941, 720, etc.) (if applicable)	Year(s) or Period(s) (if applicable) (see instructions for line 3)
<u>Matters relating to Private Letter Ruling</u>	N/A	N/A
<u>request for the City of San Jose regarding</u>		
<u>Internal Revenue Code Section 414(h).</u>		

4 Specific use not recorded on Centralized Authorization File (CAF). If the power of attorney is for a specific use not recorded on CAF, check this box. See the instructions for Line 4, Specific Uses Not Recorded on CAF

5 Acts authorized. Unless otherwise provided below, the representatives generally are authorized to receive and inspect confidential tax information and to perform any and all acts that I can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The representative(s), however, is (are) not authorized to receive or negotiate any amounts paid to the client in connection with this representation (including refunds by either electronic means or paper checks). Additionally, unless the appropriate box(es) below are checked, the representative(s) is (are) not authorized to execute a request for disclosure of tax returns or return information to a third party, substitute another representative or add additional representatives, or sign certain tax returns.

Disclosure to third parties; Substitute or add representative(s); Signing a return;

Other acts authorized: _____

(see instructions for more information)

Exceptions. An unenrolled return preparer cannot sign any document for a taxpayer and may only represent taxpayers in limited situations. An enrolled actuary may only represent taxpayers to the extent provided in section 10.3(d) of Treasury Department Circular No. 230 (Circular 230). An enrolled retirement plan agent may only represent taxpayers to the extent provided in section 10.3(e) of Circular 230. A registered tax return preparer may only represent taxpayers to the extent provided in section 10.3(f) of Circular 230. See the line 5 instructions for restrictions on tax matters partners. In most cases, the student practitioner's (level k) authority is limited (for example, they may only practice under the supervision of another practitioner).

List any specific deletions to the acts otherwise authorized in this power of attorney: _____

6 Retention/revocation of prior power(s) of attorney. The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Internal Revenue Service for the same matters and years or periods covered by this document. If you do not want to revoke a prior power of attorney, check here **YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.**

7 Signature of taxpayer. If a tax matter concerns a year in which a joint return was filed, the husband and wife must each file a separate power of attorney even if the same representative(s) is (are) being appointed. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

▶ IF NOT SIGNED AND DATED, THIS POWER OF ATTORNEY WILL BE RETURNED TO THE TAXPAYER.



 Signature Ed Moran Date 6/7/2012 Title (if applicable) Assistant City Attorney
 Print Name PIN Number City of San Jose
 Print name of taxpayer from line 1 if other than individual

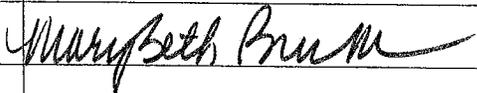
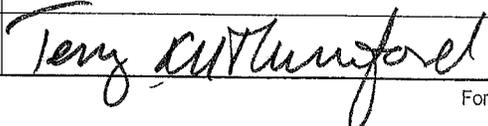
Part II Declaration of Representative

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Circular 230 (31 CFR, Part 10), as amended, concerning practice before the Internal Revenue Service;
- I am authorized to represent the taxpayer identified in Part I for the matter(s) specified there; and
- I am one of the following:
 - a Attorney - a member in good standing of the bar of the highest court of the jurisdiction shown below.
 - b Certified Public Accountant - duly qualified to practice as a certified public accountant in the jurisdiction shown below.
 - c Enrolled Agent - enrolled as an agent under the requirements of Circular 230.
 - d Officer - a bona fide officer of the taxpayer's organization.
 - e Full-Time Employee - a full-time employee of the taxpayer.
 - f Family Member - a member of the taxpayer's immediate family (for example, spouse, parent, child, grandparent, grandchild, step-parent, step-child, brother, or sister).
 - g Enrolled Actuary - enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Internal Revenue Service is limited by section 10.3(d) of Circular 230).
 - h Unenrolled Return Preparer - Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.
 - i Registered Tax Return Preparer—registered as a tax return preparer under the requirements of section 10.4 of Circular 230. Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.
 - k Student Attorney or CPA - receives permission to practice before the IRS by virtue of his/her status as a law, business, or accounting student working in LITC or STCP under section 10.7(d) of Circular 230. See instructions for Part II for additional information and requirements.
 - r Enrolled Retirement Plan Agent - enrolled as a retirement plan agent under the requirements of Circular 230 (the authority to practice before the Internal Revenue Service is limited by section 10.3(e)).

▶ IF THIS DECLARATION OF REPRESENTATIVE IS NOT SIGNED AND DATED, THE POWER OF ATTORNEY WILL BE RETURNED. REPRESENTATIVES MUST SIGN IN THE ORDER LISTED IN LINE 2 ABOVE. See the instructions for Part II.

Note: For designations d-f, enter your title, position, or relationship to the taxpayer in the "Licensing jurisdiction" column. See the instructions for Part II for more information.

Designation - Insert above letter (a-r)	Licensing jurisdiction (state) or other licensing authority (if applicable)	Bar, license, certification, registration, or enrollment number (if applicable). See instructions for Part II for more information	Signature	Date
a	Indiana	3872-49		6/13/2012
a	Indiana	16706-49		
a	Indiana	9381-49		6/13/2012

Tax Information Authorization

- ▶ Do not sign this form unless all applicable lines have been completed.
- ▶ Do not use this form to request a copy or transcript of your tax return. Instead, use Form 4506 or Form 4506-T.

OMB No. 1545-1165
For IRS Use Only

Received by: _____
Name _____
Telephone _____
Function _____
Date _____

1 Taxpayer information. Taxpayer(s) must sign and date this form on line 7.

Taxpayer name(s) and address (type or print) City of San Jose San Jose City Hall, 200 East Santa Clara Street San Jose, CA 95113		Taxpayer identification number 94-6000419
		Daytime telephone number 408-535-3500
		Plan number (if applicable)

2 Appointee. If you wish to name more than one appointee, attach a list to this form.

Name and address Taretta Shine ICE MILLER LLP One American Square, Suite 2900 Indianapolis, IN 46282-0200	CAF No. <u>NONE</u> PTIN _____ Telephone No. <u>480-419-4332</u> Fax No. <u>317-592-5425</u> Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/> Fax No. <input type="checkbox"/>
---	---

3 Tax matters. The appointee is authorized to inspect and/or receive confidential tax information in any office of the IRS for the tax matters listed on this line. Do not use Form 8821 to request copies of tax returns.

(a) Type of Tax (Income, Employment, Excise, etc.) or Civil Penalty	(b) Tax Form Number (1040, 941, 720, etc.)	(c) Year(s) or Period(s) (see the instructions for line 3)	(d) Specific Tax Matters (see instr.)
Matters relating to PLR request for the City of San Jose regarding IRC Section 414(h).	N/A	N/A	N/A

4 Specific use not recorded on Centralized Authorization File (CAF). If the tax information authorization is for a specific use not recorded on CAF, check this box. See the instructions on page 4. If you check this box, skip lines 5 and 6.

- 5 Disclosure of tax information (you must check a box on line 5a or 5b unless the box on line 4 is checked):**
- a If you want copies of tax information, notices, and other written communications sent to the appointee on an ongoing basis, check this box
- Note. Appointees will no longer receive forms, publications and other related materials with the notices.
- b If you do not want any copies of notices or communications sent to your appointee, check this box

6 Retention/revocation of tax information authorizations. This tax information authorization automatically revokes all prior authorizations for the same tax matters you listed on line 3 above unless you checked the box on line 4. If you do not want to revoke a prior tax information authorization, you must attach a copy of any authorizations you want to remain in effect and check this box To revoke this tax information authorization, see the instructions on page 4.

7 Signature of taxpayer(s). If a tax matter applies to a joint return, either husband or wife must sign. If signed by a corporate officer, partner, guardian, executor, receiver, administrator, trustee, or party other than the taxpayer, I certify that I have the authority to execute this form with respect to the tax matters/periods on line 3 above.

▶ IF NOT SIGNED AND DATED, THIS TAX INFORMATION AUTHORIZATION WILL BE RETURNED.

▶ DO NOT SIGN THIS FORM IF IT IS BLANK OR INCOMPLETE.

 _____ Date 6/7/2012 _____
Signature Date Signature Date

Ed Moran Assistant City Attorney
Print Name Title (if applicable) Print Name Title (if applicable)

PIN number for electronic signature PIN number for electronic signature

STATEMENT OF PROPOSED DELETIONS

Pursuant to Revenue Procedure 2012-4, Section 9.02(9), and Section 6110(c) of the Internal Revenue Code of 1986, as amended, we hereby request that all names, addresses, taxpayer identification numbers and other identifying details and confidential information be deleted.

ICE MILLER LLP

Mary Beth Braitman

Mary Beth Braitman

Date: June 13, 2012

CHECKLIST

IS YOUR LETTER RULING REQUEST COMPLETE?

INSTRUCTIONS

The Service will be able to respond more quickly to your letter ruling request if it is carefully prepared and complete. To ensure that your request is in order, use this checklist. Complete the four items of information requested before the checklist. Answer each question by circling "Yes," "No," or "N/A." When a question contains a place for a page number, insert the page number (or numbers) of the request that gives the information called for by a yes answer to a question. **Sign and date the checklist (as taxpayer or authorized representative) and place it on top of your request.**

If you are an authorized representative submitting a request for a taxpayer, you must include a completed checklist with the request, or the request will either be returned to you or substantive consideration of it will be deferred until a completed checklist is submitted. **If you are a taxpayer preparing your own request without professional assistance, an incomplete checklist will not be cause for returning your request or deferring substantive consideration of the request.** However, you should still complete as much of the checklist as possible and submit it with your request.

TAXPAYER'S NAME: City of San Jose

TAXPAYER'S I.D. NO.: EIN: 94-6000419

ATTORNEY/P.O.A: Mary Beth Braitman, Ice Miller LLP, One American Square, Suite 2900, Indianapolis, Indiana 46282-0200; (317) 236-2413. Terry A.M. Mumford, Ice Miller LLP, One American Square, Suite 2900, Indianapolis, Indiana 46282-0200; (317) 236-2110.

PRIMARY CODE SECTION: Internal Revenue Code Section 414(h).

CIRCLE ONE	ITEM
Yes	1. Does your request involve an issue under the jurisdiction of the Commissioner, Tax Exempt and Government Entities Division? See section 5 of Rev. Proc. 2012-4, 2012-1 I.R.B. 125, for issues under the jurisdiction of other offices. (Hereafter, all references are to Rev. Proc. 2012-4 unless otherwise noted.)

CIRCLE ONE	ITEM
Yes	2. If your request involves a matter on which letter rulings are not ordinarily issued, have you given compelling reasons to justify the issuance of a private letter ruling? Before preparing your request, you may want to call the office responsible for substantive interpretations of the principal Internal Revenue Code section on which you are seeking a letter ruling to discuss the likelihood of an exception. The appropriate office to call for this information may be obtained by calling (202) 283-9660 (Employee Plans matters), or (202) 283-0289 (Exempt Organizations matters) (not toll-free calls).
N/A	3. If the request involves an employee plans qualification matter under § 401(a), § 409, or § 4975(e)(7), have you demonstrated that the request satisfies the three criteria in section 6.03 for a headquarters office ruling?
N/A	4. If the request deals with a completed transaction, have you filed the return for the year in which the transaction was completed? See sections 6.01 and 6.02.
No	5. Are you requesting a letter ruling on a hypothetical situation or question? See section 8.03.
No	6. Are you requesting a letter ruling on alternative plans of a proposed transaction? See section 8.03.
No	7. Are you requesting the letter ruling for only part of an integrated transaction? See section 8.04.
No	8. Have you submitted another letter ruling request for the transaction covered by this request?
No	9. Are you requesting the letter ruling for a business, trade, industrial association, or similar group concerning the application of tax law to its members? See section 6.07.
Yes Pages 2-8	10. Have you included a complete statement of all the facts relevant to the transaction? See section 9.02(1).
Yes	11. Have you submitted with the request true copies of all wills, deeds, plan documents, and other documents relevant to the transaction, and labeled and attached them in alphabetical sequence? See section 9.02(2).

CIRCLE ONE	ITEM
Yes Pages 9-18	12. Have you included, rather than merely by reference, all material facts from the documents in the request? Are they accompanied by an analysis of their bearing on the issues that specifies the document provisions that apply? See section 9.02(3).
Yes Page 18	13. Have you included the required statement regarding whether the same issue in the letter ruling request is in an earlier return of the taxpayer or in a return for any year of a related taxpayer? See section 9.02(4).
Yes Page 18	14. Have you included the required statement regarding whether the Service previously ruled on the same or similar issue for the taxpayer, a related taxpayer, or a predecessor? See section 9.02(5).
Yes Page 18	15. Have you included the required statement regarding whether the taxpayer, a related taxpayer, a predecessor, or any representatives previously submitted the same or similar issue but withdrew it before the letter ruling was issued? See section 9.02(5).
Yes Page 19	16. Have you included the required statement regarding whether the law in connection with the request is uncertain and whether the issue is adequately addressed by relevant authorities? See section 9.02(6).
Yes Page 19	17. Have you included the required statement of relevant authorities in support of your views? See section 9.02(6).
N/A	18. Does your request discuss the implications of any legislation, tax treaties, court decisions, regulations, notices, revenue rulings, or revenue procedures you determined to be contrary to the position advanced? See section 9.02(7), which states that taxpayers are encouraged to inform the Service of such authorities.
Yes Page 19	19. If you determined that there are no contrary authorities, have you included a statement to this effect in your request? See section 9.02(7).
Yes Pages 1-2	20. Have you included in your request a statement identifying any pending legislation that may affect the proposed transaction? See section 9.02(8).
Yes Precedes letter	21. Is the request accompanied by the deletions statement required by § 6110? See section 9.02(9).

CIRCLE ONE	ITEM
Yes Page 20	22. Have you (or your authorized representative) signed and dated the request?
Yes	23. If the request is signed by your representative, or if your representative will appear before the Service in connection with the request, is the request accompanied by a properly prepared and signed power of attorney with the signatory's name typed or printed? See section 9.02(12).
Yes Page 21	24. Have you included, signed and dated, the penalties of perjury statement in the form required by section 9.02(13)?
Yes	25. Have you included the correct user fee with the request and made your check or money order payable to the United States Treasury? See section 9.02(14) and Rev. Proc. 2012-8, page 235, this Bulletin, for the correct amount and additional information on user fees.
N/A	26. Are you submitting your request in duplicate if necessary? See section 9.02(15).
N/A	27. If you are requesting separate letter rulings on different issues involving one factual situation, have you included a statement to that effect in each request? See section 9.03(1).
Yes	28. If you do not want a copy of the letter ruling to be sent to any representative, does the power of attorney contain a statement to that effect? See section 9.03(2).
Yes Page A-3	29. If you have more than one representative, have you designated whether the second representative listed on the power of attorney is to receive a copy of the letter ruling? See section 9.03(2).
Yes	30. If you want your letter ruling request to be processed ahead of the regular order or by a specific date, have you requested expedited handling in the form required by section 9.03(3) and stated a compelling need for such action in the request?
Yes Page 19	31. If you want to have a conference on the issues involved in the request, have you included a request for conference in the ruling request? See section 9.03(5).

CIRCLE ONE	ITEM
N/A	32. If your request is covered by any of the guideline revenue procedures or other special requirements listed in section 10 of Rev. Proc. 2012-4, have you complied with all of the requirements of the applicable revenue procedure?
N/A	33. If you are requesting relief under § 7805(b) (regarding retroactive effect), have you complied with all of the requirements in section 13.09?
Yes	34. Have you addressed your request to the appropriate office listed in section 9.04? Improperly addressed requests may be delayed (sometimes for over a week) in reaching the appropriate office for initial processing.

Mary Beth Braitman

Signature

Power of Attorney

Title or Authority

Mary Beth Braitman

Typed or Printed Name of person signing checklist

Date: June 13, 2012

In order to assist EP Technical in processing a ruling request involving government pick-up plans, in addition to the items in Appendix B please check the following list.

	ITEM
Yes Page 4	1. Is the plan qualified under § 401(a) of the Code? (Evidence of qualification or representation that the plan is qualified.)
Yes Page 4	2. Is the organization that established the plan a State or political subdivision thereof, or any agency or instrumentality of the foregoing? An example of this would be a representation that the organization that has established the plan is a political subdivision or municipality of the State.
Yes Pages 4-5	3. Is there specific information regarding who are the eligible participants?

	ITEM
<p>Yes</p> <p>Page 5-7</p>	<p>4. Are the contributions that are the subject of the ruling request mandatory employee contributions? These contributions must be for a specified dollar amount or a specific percentage of the participant's compensation and the dollar amount or percentage of compensation cannot be subject to change.</p>
<p>Yes</p> <p>Pages 5-7</p> <p>See however, the Act to allow certain election for certain existing members.</p>	<p>5. Does the plan provide that the participants do not have the election to opt in and/or out of the plan?</p>
<p>Yes</p> <p>Page A-2</p>	<p>6. Are copies of the enacting legislation providing that the contributions although designated as employee contributions are being paid by the employer in lieu of contributions by the employee included?</p>
<p>Yes</p> <p>Page A-2</p>	<p>7. Are copies of the specific enabling authorization that provides the employee must not have the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the plan included? For example, a resolution, ordinance, plan provision, or collective bargaining agreement could specify this information.</p>