

MEMORANDUM

TO: Providers of Deferred Compensation Services
FROM: Matthew U. Watkins, Director
Division of Local Government Services

RE: Deferred Compensation Plans and Recent Amendments to Regulations of the Internal Revenue Service under U.S.C.A. §401(a)(9) of the Internal Revenue Code

DATE: 3 April 2003

The provisions of N.J.S.A. 43:15B-1 et seq. that authorize the establishment and govern the administration and implementation of deferred compensation plans for municipal, county and local authority employees provide that such plans shall be established and administered in accordance with the requirements of the federal Internal Revenue Code. More specifically, N.J.S.A. 43:15B-10 requires that no agreement between an employer and an employee for the deferral of compensation pursuant to that statute may be executed until the named fiduciary for the plan shall have determined that the plan and any related implementing rules and regulations are consistent with the requirements of the United States Internal Revenue Service. Similarly, N.J.S.A. 43:15B-3(f) requires that the named fiduciary for each such plan shall provide for the distribution of any investment earnings, gains or losses in a manner consistent with the requirements of the federal Internal Revenue Code.

On April 17, 2002, notice was published in the Federal Register at 74 FR 18987 of the final adoption of amendments to the regulations promulgated by the Internal Revenue Service pursuant to U.S.C.A. §401(a)(9) of the Internal Revenue Code. These regulations affect deferred compensation plans established by municipalities, counties and local authorities pursuant to N.J.S.A. 43:15B-1 et seq. The changes made to the Federal regulations as a result of the amendments adopted on April 17, 2002 may require modifications of existing municipal deferred compensation plans that have previously been approved by the Director of the Division of Local Government Services pursuant to N.J.S.A. 43:15B-1 et seq. and N.J.A.C. 5:37-1 et seq. In addition, plan documents being provided to local units that are establishing deferred compensation programs for their employees pursuant to N.J.S.A. 43:15B-1 et seq. and N.J.A.C. 5:37-1 et seq. for the first time may have to be revised.

CONTRACTOR PLAN DOCUMENTS

The Division's Deferred Compensation Rules, and more specifically N.J.A.C. 5:37-2.1(a), require approval by the Director of "any deferred compensation plan or service agreement or amendment thereto prior to its implementation by an employer." Further, the Division's Deferred Compensation Rules, and more specifically N.J.A.C. 5:37-3.1(a), require approval by the Director of "... a prototypical plan or service agreement and any amendment thereto to be made available to employers."

In light of the recent revisions adopted by the Internal Revenue Service to its regulations with regard to deferred compensation plans, contractors which have previously secured approval from the Director of prototypical deferred compensation plans pursuant to N.J.S.A. 43:15B-1 et seq. and N.J.A.C. 5:37-1 et seq. must provide the Director with a copy of any revisions that have been made to their previously approved plan documents for local employers with which they have existing service agreements as a result of the rule amendments recently adopted by the Internal Revenue Service. Additionally, if the deferred compensation plan documents that will be offered to new client local employers are different from the plan documents previously approved by the Director as a result of the recent amendment of the Internal Revenue Service's regulations, a copy of the deferred compensation plan documents that will be offered to new client local employers must also be submitted to the Director for approval.

LOCAL EMPLOYER ACTION REQUIREMENTS

For local employers that have previously established deferred compensation plans for their employees, the recent revisions adopted by the Internal Revenue Service to its regulations with regard to deferred compensation plans may require the amendment of their deferred compensation plans. The Division's Deferred Compensation Rules, and more specifically N.J.A.C. 5:37-4.3, require that local employers must adopt amendments to existing deferred compensation plans by resolution and further that the amendments and the resolution must be forwarded to the Director for review and approval.

The Division has prepared a sample resolution for use in adopting amendments to previously established deferred compensation plans in light of the recent revisions adopted by the Internal Revenue Service to its regulations. A copy of the resolution and explanatory narrative is attached and will be posted at the Division's web site: www.nj.gov/dca/lgs

For local employers establishing deferred compensation plans for the first time, the "Compliance with the Internal Revenue Service" element of the standard form of resolution, should be revised through the addition of the highlighted language as follows:

The [identify local governmental unit] is adopting a deferred compensation plan substantially similar to one on which a favorable Private Letter Ruling has been previously obtained from the federal Internal Revenue Service except for provisions added by reason of the Small Business Job Protection Act of 1996 (United States Public Law No. 104-188); the Economic Growth and Tax Relief Reconciliation Act of 2001 (United States Public Law No. 107-16); and §401(a)(9) of the Internal Revenue Code and all such provisions are stated in the plan in terms substantially similar to the text of those provisions in the Internal Revenue Code Section 457. The use of the Ruling is for guidance only and acknowledges that for Internal Revenue Service purposes, the Ruling of another employer is not to be considered precedent.

QUESTIONS

Should you have any questions, please contact Colleen Kelly at 609-292-0827 or by e-mail at ckelly@dca.state.nj.us.