MEMORANDUM

TO: George Pernsteiner
    Chancellor
    Oregon University System

FROM: Everett Moreland

DATE: February 12, 2013

RE: Shared Services for Retirement Plans

Legislative proposal. The legislature is considering reorganizing OUS by creating separate institutional boards for PSU, OSU, and UO.

The subject of the memo. This memo discusses some of the effects of such a reorganization of OUS on the retirement plans described in the Table of Plans at the end of this memo. The discussion includes structural features of such a reorganized OUS that would more likely result in benefits from shared services for retirement plans and more likely allow the institutions resulting from such a reorganized OUS to share retirement plans.

The ease of adapting the retirement plans to such a reorganized OUS will be increased if the institutions are a single common law employer or all under common control. The ease of adapting the retirement plans described in the Table of Plans at the end of this memo to such a reorganized OUS while meeting the requirements of the Internal Revenue Code (Code) and securities laws for retirement plans depends on whether the reorganized OUS (plus PSU, OSU, and UO):

1. Is a single common law employer, or includes multiple common law employers all under common control within the meaning of Code Section 414(c) (this is the easier alternative to adapt to and the one that could result in more benefits of shared services); or

2. Includes multiple common law employers not all under such common control (this is the more difficult alternative to adapt to and the one that would result in fewer benefits of shared services).

Structures that are more likely to cause the institutions to be a single common law employer or all under such common control.

1. A single common law employer. A reorganized OUS (plus PSU, OSU, and UO) is more likely to be a single common law employer if it is a single legal entity. For example, if
PSU, OSU, and UO become separate public corporations, multiple legal entities would result and so multiple common law employers would result.

2. Multiple common law employers all under such common control. If multiple common law employers result, the institutions included in a reorganized OUS (plus PSU, OSU, and UO) are more likely to be all under such common control if the OSBHE has some control over the separate governing boards of PSU, OSU, and UO and sets or reviews the budgets of each OUS institution and of PSU, OSU, and UO. Setting or reviewing an institution’s budget must consist of more than mere approval of a previously developed budget.

A structure that would be difficult to adapt to—a nongovernmental entity. The employees of an entity resulting from such a reorganized OUS that is not a governmental entity for purposes of the Code’s rules for retirement plans could not participate in future contributions to any of the retirement plans listed in the Table of Plans at the end of this memo. This is because all those plans are designed for only an employer that is such a governmental entity. This memo assumes that all entities resulting from a reorganized OUS will be governmental entities for purposes of the Code’s rules for retirement plans. For example, this memo assumes that PSU, OSU, and UO, even if they become public corporations, would be such governmental entities. The IRS has proposed regulations on whether an entity is a governmental entity for purposes of the Code’s rules for retirement plans. See Proposed Treasury Regulation Section 1.414(d)-1, 76 Federal Register 69172 (November 8, 2011). The application of those proposed regulations, and the application of prior IRS guidance on whether an entity is a governmental entity for purposes of the Code’s rules for retirement plans, is beyond the scope of this memo.

1. A nongovernmental entity could still establish retirement plans. An entity that is not such a governmental entity could still establish retirement plans for its employees.

   a. **401(a) plan.** The entity could establish a pension plan under Code Section 401(a) similar to the OUS Optional Retirement Plan, but the plan would need to satisfy the requirements of ERISA and also the Code’s requirements for a nongovernmental 401(a) plan.

   b. **457(b) plan.** If the entity qualifies for tax exemption under Code Section 501(c), it could establish a plan subject to Code Section 457(b), but only for a select group of management or highly compensated employees, and the plan could not be funded (i.e. employees’ 457(b) contributions could not be protected from the entity’s creditors).

   c. **403(b) plan.** If the entity qualifies for tax exemption under Code Section 501(c)(3), it could establish a plan subject to Code Section 403(b), but the plan would need to satisfy the requirements of ERISA and also the Code’s requirements for a nongovernmental 403(b) plan.
2. **The costs of uncertainty.** A structure for a separate entity, such as for PSU, OSU, or UO, that results in uncertainty about whether the entity is a governmental entity for purposes of the Code’s rules for retirement plans could result in substantial costs to resolve the uncertainty or to protect the entity and its employees from the uncertainty and could result in substantial delay in allowing 403(b) and 457(b) contributions by its employees.

Application to the retirement plans.

1. **If a reorganized OUS (plus PSU, OSU, and UO) is a single common law employer or includes multiple common law employers all under such common control.** If a reorganized OUS (plus PSU, OSU, and UO) is a single common law employer or includes multiple common law employers all under such common control, the Code will present no substantial difficulty in adapting the retirement plans to such a reorganized OUS (plus PSU, OSU, and UO), but attention will be needed to adapt the retirement plans to the requirements of the Code and the structure of the reorganized OUS (plus PSU, OSU, and UO). More specifically:

   a. **401(a) plans.** The OUS Optional Retirement Plan could continue to be available to the administrative and academic employees of all the current OUS institutions, including PSU, OSU, and UO. The OUS Supplemental Retirement Plan could, if desired, be expanded to cover presidents of institutions in addition to PSU, OSU, UO, and SOU.

   b. **457(b) plan.** For a retirement plan subject to Code Section 457(b) (see the Table of Plans at the end of this memo), the benefits of centralized administration and reduced fees of investment providers and of third parties administering the plan could best be realized by continuing to deposit all 457(b) contributions of OUS, PSU, OSU, and UO employees in the Oregon Savings Growth Plan.

   c. **403(b) plan.** For a retirement plan subject to Code Section 403(b) (see the Table of Plans at the end of this memo), the benefits of centralized administration and reduced fees of investment providers and of third parties administering the plan could best be realized by continuing to deposit all 403(b) contributions of OUS, PSU, OSU, and UO employees in the OUS Tax-Deferred Investment 403(b) Plan. If shared services are provided by a separate legal entity resulting from such a reorganized OUS, it would need to be determined whether 403(b) contributions could be made by the employees of that entity. *Compare* IRS Revenue Ruling 73-607, 1973-2 Cumulative Bulletin 145 (403(b) contributions may be made by employees of a state department of education), *with* IRS Revenue Ruling 80-139, 1980-1 Cumulative Bulletin 88 (403(b) contributions may not be made by employees of a state teachers’ retirement system). If, for example, shared services are provided by OSU as a separate legal entity, the OSU employees in its shared services department could make 403(b) contributions.
2. If a reorganized OUS (plus PSU, OSU, and UO) includes multiple employers not all under such common control. If a reorganized OUS (plus PSU, OSU, and UO) includes multiple employers not all under such common control, more attention will be needed to adapt the retirement plans to the requirements of the Code, to whether and how the Code’s requirements for 403(b) plans could be met, and to whether a 403(b) plan for multiple employers not under such common control must be registered under securities laws. More specifically:

a. 401(a) plans.

i. OUS Optional Retirement Plan. The OUS Optional Retirement Plan could continue to be available to the administrative and academic employees of all the current OUS institutions, even if one or more of PSU, OSU, or UO is not under such common control with OUS. If one or more of PSU, OSU, or UO is not under common control with OUS, attention would be needed to adapt the OUS Optional Retirement Plan to the rules under Code Section 413(c) for a multiple employer plan.

ii. OUS Supplemental Retirement Plan. The OUS Supplemental Retirement Plan would need to be changed if it would provide benefits for the presidents of institutions that are multiple employers not all under such common control. This is because each institution whose president is covered by the Plan and which is a separate employer from, and is not under such common control with, another institution whose president is covered by the Plan would need to separately satisfy the Code’s requirement that the Plan be intended to be permanent. For example, if OSU becomes a separate legal entity that is not under such common control with any other institution whose president is covered by the Plan, and OSU’s board wants to provide future benefits for the OSU president through the Plan, the Plan could satisfy the permanence requirement with respect to OSU by providing whoever is the OSU president with a minimum ongoing benefit accrual in the Plan, such as $10,000 annually, and also providing any ad hoc additional benefit accruals in the Plan that the OSU board approves for a specific OSU president (e.g., another $100,000 for a designated one-year period for whoever is the OSU president on July 1, 2014).

b. 457(b) plan. For a retirement plan subject to Code Section 457(b), the benefits of centralized administration and reduced fees of investment providers and of third parties administering the plan could best be realized by continuing to deposit all 457(b) contributions of OUS, PSU, OSU, and UO employees in the Oregon Savings Growth Plan.

c. 403(b) plan. For a retirement plan subject to Code Section 403(b), legal analysis and research would be needed to determine whether and how the Code’s
requirements for 403(b) plans could be met by a 403(b) plan that covers employees of multiple employers not all under such common control. Also, securities law counsel would need to be engaged to determine whether such a 403(b) plan must be registered under securities laws.

**TABLE OF PLANS OF OUS**

<table>
<thead>
<tr>
<th>Plan name or description</th>
<th>Participating institutions</th>
<th>Type of plan under the Code</th>
<th>Code section to which subject</th>
<th>Additional important information about the plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>OUS Supplemental Retirement Plan</td>
<td>PSU, OSU, UO, and SOU</td>
<td>Cash balance defined benefit</td>
<td>401(a)</td>
<td>Provides benefits on an ad hoc basis (i.e. not under a continuing benefit formula) for the current presidents of PSU, OSU, UO, and SOU</td>
</tr>
<tr>
<td>OUS Optional Retirement Plan (OUS ORP)</td>
<td>All OUS institutions</td>
<td>Defined contribution pension</td>
<td>401(a)</td>
<td>Restricted to administrative and academic employees hired after May 17, 1996, who irrevocably elect the OUS ORP in lieu of PERS during their first six months of employment</td>
</tr>
<tr>
<td>OSBHE Defined Contribution Retirement Plan</td>
<td>All OUS institutions and OHSU</td>
<td>Defined contribution pension</td>
<td>401(a)</td>
<td>Established in 1989 to succeed the following 403(b) plan; closed to new contributions for OHSU employees after 1995; closed to participation by OUS employees hired after September 8, 1995</td>
</tr>
<tr>
<td>OSBHE TIAA-CREF Retirement Plan</td>
<td>All OUS institutions and OHSU</td>
<td>Defined contribution</td>
<td>403(b)</td>
<td>Closed to new contributions in 1989; predecessor of the above 401(a) plan</td>
</tr>
<tr>
<td>OUS Tax-Deferred Investment 403(b) Plan</td>
<td>All OUS institutions</td>
<td>Defined contribution</td>
<td>403(b)</td>
<td></td>
</tr>
<tr>
<td>Oregon Savings Growth Plan (OSGP)</td>
<td>All OUS institutions</td>
<td>Defined contribution</td>
<td>457(b)</td>
<td>ORS 351.094(3) requires OUS to offer employees either the OSGP or a separate OUS 457(b) plan</td>
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</table>

ORS 351.094(3) requires OUS to offer employees either the OSGP or a separate OUS 457(b) plan.