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April 22, 2008

**VIA EMAIL AND MAIL**

Ms. Joyce I. Kahn  
Internal Revenue Service  
1750 Pennsylvania Ave., N.W.  
Washington, D.C. 20224

Re: **The Time is Now** to Remedy the Inequity Applied to American Small  
Businesses Respecting the Late Filing of IRS Form 5500-EZ

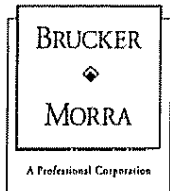
An Open Letter to the Internal Revenue Service

Dear Joyce:

It was a pleasure participating in the EPCRS panel at the Enrolled Actuaries Meeting earlier this month. Your dedicated leadership of the EPCRS program over the past several years and your professionalism are greatly appreciated by all who have participated in the program. I am sure that all employee benefits practitioners look forward to the soon to be released expanded, improved and updated EPCRS procedure.

I was more surprised and pleased with your being recently assigned a most important project that will ensure the Internal Revenue Service (the "Service") appreciation from America's small businesses. I refer to your reevaluation of the voluntary delinquent filer penalty relief for the voluntary late filing of IRS Form 5500-EZ, Annual Return of One Participant (Owners and Their Spouses) Retirement Plan ("Form 5500-EZ").

As I expressed to you, I raised the inequities of the Service's application of late filing penalties to small businesses with Monika Templeman earlier this year at the Los Angeles Benefits Conference.



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As a member of the Board of Directors of the Small Business Council of America and an active member of the American Society of Pension Professionals and Actuaries, I assure you that your endeavors to remedy these inequities will be met with great anticipation and appreciation.

My comments to Monika Templeman and this Position Paper are based on our Firm's experiences with clients who untimely file Form 5500-EZ and have to pay substantial legal fees to request abatement of late filing penalties for reasonable cause, when employer sponsors who file Form 5500 pursuant to the Department of Labor's Delinquent Filer Voluntary Compliance (DFVC) Program pay a reasonable late filing fee to the DOL and receive a waiver of all potential penalties from the Service.

Recently we have been engaged by several clients who discovered that they had not filed Form 5500-EZs for many years and their particular facts and circumstances, while not reflecting any intentional disregard, might fall short of constituting reasonable cause based on the Service's current penalty abatement policies. The threat of penalties in the amount of \$15,000 for each annual report per sponsored plan does not inspire voluntary correction or compliance, particularly when there are potentially several years of late filings.

This Position Paper is intended to express my continued belief in our self assessment tax system and in ensuring that America's small business will be placed on a level playing field with other businesses. This Position Paper sets forth what I believe would be a most reasonable and equitable remedy to the application of late filing penalties to employer-sponsors for the failure to timely prepare and file IRS Form 5500-EZ, which as shown below, is supported by and consistent with legislated Congressional policy of easing the governmental burdens on America's small businesses.

### **Our Proposals for a Level Playing Field**

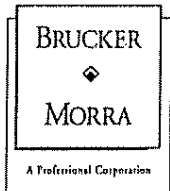
1. The voluntary late filing by an employer-sponsor of Form 5500-EZ prior to notice from the Internal Revenue Service should be subject to the same late penalty structure as set forth under the DFVC Program as amended
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by the PWBA's notice dated March 28, 2002 and consented to in the Service's Notice 2002-23.

2. If the Service notifies an employer-sponsor of a failure to file Form 5500-EZ, the employer-sponsor should be granted the opportunity to file the missing return, as well as any returns for years not filed and not noticed. If the employer-sponsor responds to the Service and files the Form 5500-EZ within a reasonable period, it should be entitled to the same penalty treatment as if it filed voluntarily. This would be similar to the treatment afforded Form 5500 filers who, upon receipt of an IRS notice of a missed filing, are told by the IRS that they can have penalties abated by filing under the DOL DFVC Program. (See the language from the standard IRS delinquency letter quoted on page 5. Also see, IRS SEP Frequently Asked Questions online, regarding CP 403 and 406 delinquency notices.)
  3. If the Service notifies an employer-sponsor of the receipt of a voluntarily late filed Form 5500-EZ, the employer-sponsor should be eligible for the same penalty relief as if they had filed under the DFVC Program. After all, they are a voluntary filer.
  4. With respect to the treatment afforded a voluntary filer under each of the above, it is sometimes difficult to determine the number of years that Form 5500-EZ returns have not been filed. This happens in the case of sole proprietorships or sole-shareholder corporations that established qualified plans many years ago at various brokerage and financial institutions. Accordingly, we recommend that the employer-sponsor be deemed to satisfy all past due reports by filing no more than 7 years' returns.
  5. We recommend that the proposed program be effective retroactively so that it will provide relief to Form 5500-EZ filers who are already delinquent and would apply to filers who previously voluntarily filed late Form 5500-EZs and paid late penalties because they could not demonstrate reasonable cause. Our recommendation is that the extension of the DFVC Program penalty treatment to 5500-EZ filers be made retroactively effective to March 28, 2002, the effective date of the modified DFVC Program, and that affected employer-sponsors be given an opportunity (3
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months) to claim a refund of payments paid to the Service in excess of the equivalent DFVC penalty.

**Our Proposal is supported by Stated Congressional Policy and Federal Law Easing Burdens on Small Businesses**

The Regulatory Flexibility Act of 1980 (Public Law 96-354) requires a regulatory flexibility analysis when a proposed rule is considered to have a significant economic impact on a substantial number of small entities. The following statements are included in the Act as part of the Congressional findings and declaration of purpose.

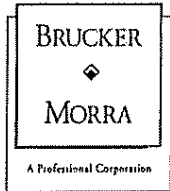
“(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

“(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

“(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

“(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

“(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases,



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to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

“(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;”

### **Background**

#### *DFVC Program:*

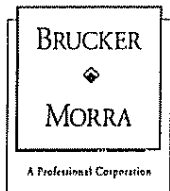
In 1995, the Department of Labor implemented the DFVC Program. The program allows plan sponsors who have not timely filed an annual report (Form 5500 series) to voluntarily file a late annual report and pay a substantially reduced late filing penalty. (See PWBA Notice dated April 27, 1995, announcing the implementation of the DFVC Program.)

In 2002, the Department of Labor amended the DFVC Program. To encourage compliance by employer-sponsors, the amended DFVC Program set forth new limitations on the amount of late filing penalties for both small and large employer-sponsored plans. (See PWBA Notice dated March 28, 2002, modifying the DFVC Program.)

The amended program reduced the DFVC filing penalty from \$50 per day to \$10 per day. For small plans (generally, those with less than 100 participants at the beginning of the plan year), the amended DFVC penalty was capped at \$750 per annual report. Where a small plan had missed annual report filings for multiple years, the DFVC penalty was capped at \$1,500 per plan. For large plans, the DFVC penalty was capped at \$2,000 per annual report and \$4,000 per plan. (See PWBA 3/28/02 notice.)

However, the DFVC Program is only available to employer-sponsors of plans that are covered by Title I of ERISA. Forms 5500-EZ are not covered under Title I of ERISA, and are not eligible for the late filing penalty relief.

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*IRC Form 5500 Late Filing Penalty:*

IRC Section 6652(e) provides for a penalty for the late filing of Form 5500 of \$25 per day, up to a maximum of \$15,000. Regulation Section 301.6652-3 provides that the penalty under IRC Section 6652 will not apply if it is established that the failure is due to reasonable cause.

*Notice 2002-23:*

The Service announced in Notice 2002-23 that it would not impose penalties under Code Section 6652 or 6692 on plan sponsors who were eligible for and satisfied the requirements of the DFVC Program, that is, employer-sponsored plans covered under Title I of ERISA. However Notice 2002-23 makes it clear that this relief is not available to Form 5500-EZ filers. The penalty for late filing of a Form 5500-EZ thus remained at \$25 per day, up to a maximum of \$15,000 per plan per year.

*Form 5500-EZ Filing:*

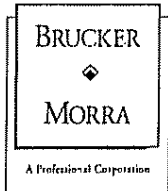
Form 5500-EZ filers include one-participant plans exempt from Title I of ERISA under 29 CFR 2510.3-3(b) and (c).

The exemption applies to plans which cover only

- a sole owner
- a sole owner and a spouse
- a husband and wife who are the sole owners of a business, or
- partners and their spouses.

Plan sponsors that would otherwise be required to file Form 5500-EZ may be totally exempt from filing for any plan year beginning on or after January 1, 2007 if total plan assets at the end of the year did not exceed \$250,000 (\$100,000 for plan years beginning before January 1, 2007.)

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**No Public Policy or Tax Policy is Promoted by this Inequity**

We can not find any justification or public tax policy that would support the difference in treatment between small business filers and larger business filers of Form 5500. The Department of Labor only has jurisdiction to make policy affecting employee benefit plans subject to Title I of ERISA. While the Service was most accommodating in following the Department of Labor's initiative, we see no reason why the Service limited its relief solely to Title I covered plans. As explained below, we believe that the singling out of Form 5500-EZ filers is unjustified and creates an unnecessary and disproportionate burden on American small business.

**"Reasonable Cause" Excuse Deemed Satisfied under the DFVC Program and Notice 2002-23**

Prior to the Service's issuance of Notice 2002-23, all Form 5500 late filers had to demonstrate the existence of "reasonable cause" to secure the abatement of penalties for late filing. With the issuance of Notice 2002-23, "reasonable cause" was deemed automatically satisfied by the voluntary filing of Form 5500 no matter how many years late (i.e., 5, 10, 20 years). Furthermore, Service notices to potential late Form 5500 filers impresses on them that, if available, filing the late returns under the Department of Labor's DFVC Program and paying the substantially reduced late penalty, would be sufficient to demonstrate that the filings in question were timely and no further Service-imposed penalty would be assessed.

To quote the IRS standard letter:

"The IRS will not asses penalties on delinquent filers who satisfy the requirements of the Department of Labor's (DOL) Delinquent Filer Voluntary Compliance (DFVC) program.... The DFVC is not available to Form 5500-EZ filers."

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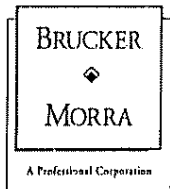
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### **Need for an Equitable Playing Field and Relief for America's Small Businesses**

1. One-participant plans are maintained by small employers who often are delinquent filers because they cannot afford professional services and do not have internal staffing necessary to insure compliance with filing requirements. Frequently, these plans are set up at brokerage firms which do not inform the employer of the annual report filing requirements.
2. The potential \$15,000 penalty is more burdensome for small than large employers, especially when more than one plan and more than one plan year are involved.
3. For a one-participant plan which has been exempt from Form 5500-EZ filings because plan assets are below the \$250,000 threshold, it is easy to inadvertently miss a filing when plan assets increase above the \$250,000 threshold.
4. It is inequitable to treat Form 5500-EZ filers differently from other small employers. There is no justification for denying the DFVC Program to a plan covering an owner and spouse while allowing the program to be used by a plan covering an owner and a non-spouse employee.
5. Unless a 5500-EZ filer can show reasonable cause for the late filing, the filer has no avenue to obtain relief. Even when a filer believes reasonable cause exists, the legal fees associated with preparing a reasonable cause statement and requesting abatement sometimes exceed the penalties under the DFVC Program.
6. Extending the DFVC Program to Form 5500-EZ filers will encourage voluntary compliance, a goal of the Internal Revenue Service and Department of Labor.

In summary, we strongly believe that the above proposals are reasonable and necessary to correct the inequities that apply to the existing treatment of late Form 5500-EZ filers. We firmly believe that an expansion of

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the late filing penalty procedures as set forth in the DFVC Program, as amended, is in the best interests of the Service and America's small businesses. We further believe that the above proposals are fully supported by the stated Congressional intent under the Regulatory Flexibility Act to minimize undue regulatory impact on small businesses.

Accordingly, we strongly urge the Service to adopt the above proposals as soon as possible. In the interim, while you are considering our proposals, we also urge the Service to place a moratorium on the imposition of late filing penalties for Form 5500-EZ filers until the Service's new and fair policy is announced.

Very truly yours,

A handwritten signature in black ink, appearing to read "Alex M. Brucker".

Alex M. Brucker

cc: Steven T. Miller, Commissioner, Tax Exempt and Governmental  
Entities Division  
Joseph H. Grant, Deputy Commissioner, Tax Exempt and  
Governmental Entities  
Michael D. Julianelle, Director, Employee Plans  
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