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August 29, 2003

BY US EXPRESS MAIL

CC:PA:RU (Announcement 2003-32), Room 5226
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Comments Regarding the Internal Revenue Service Proposal on
the Future of the Employee Plans Determination Letter Program

Ladies and Gentlemen:

On behalf of the Employee Benefits Committee of the Chicago Bar Association, I am enclosing in duplicate comments regarding Announcement 2003-32, 2003-20 I.R.B. 933 and the second white paper released on May 1, 2003 on the Employee Plans determination letter program (the "Second White Paper"). The comments reflect the views of the individuals who prepared them and do not represent the views of the Chicago Bar Association.

If you wish to discuss the comments further, you should contact Daniel Ashley at (312) 494-5361.

Sincerely,

/s/ Lisa Burman

Lisa Burman
Chair, Employee Benefits Committee

LMB:cab

Enclosures:

2 copies Comments Regarding Second White Paper

cc: Mr. Paul T. Shultz III
Mr. James Flannery

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COMMENTS REGARDING THE INTERNAL REVENUE SERVICE PROPOSAL ON THE FUTURE OF THE EMPLOYEE PLANS DETERMINATION LETTER PROGRAM

Introduction

In Announcement 2003-32, 2003-20 I.R.B. 933, the Internal Revenue Service requested public comment on the ideas presented in its white paper entitled “The Future of the Employee Plans Determination Letter Program – Evaluation of Public Comments and Additional Explanation of Staggered Remedial Amendment Period Option.” The following comments are in response to the request.

These comments were principally drafted by the Internal Revenue Service Determination Letter Subcommittee of the Chicago Bar Association’s Employee Benefits Committee (the “Subcommittee”) and reflect the individual views of the Subcommittee. The members of the Subcommittee are Daniel Ashley (Chair), Anthony Antognoli, Barry Kozak, Gabriel Minc, David O’Leary. The comments do not necessarily represent the opinion of the Chicago Bar Association.

No member of the Subcommittee (or the firm or organization to which such member belongs) has been engaged by any client to make a government submission with respect to, or otherwise to influence the development or outcome of, the employee plans determination letter program.

Diversity of Opinions

The Committee does not have one uniform opinion about the proposals. The response to the proposals reflects the diversity of attorneys comprising the Subcommittee. Thus, for example, attorneys representing smaller employers, for which the determination letter process is more expensive on a dollars-per-participant basis, may have different views than attorneys representing larger employers for which costs are spread over a larger number of participants. Similarly, sponsors of M&P plans may have different views than sponsors of individually designed plans.

Discussion of Options

The Internal Revenue Service has requested that comments on the Second White Paper focus on the following four questions:

1. Do you recommend adoption of a staggered remedial amendment period system or maintenance of the status quo?
2. If the status quo is maintained, do you support adoption of an annual plan update requirement?
3. If a staggered remedial amendment period system is adopted, do you support adoption of an annual plan update requirement?

4. Do you recommend adoption of the alternative 5-year rule for M&P and volume submitter plans described above rather than a requirement that these plans be amended and submitted annually?

I. Adoption of a Staggered Remedial Amendment Period

A. Advantages of a Staggered Remedial Amendment Period

The Subcommittee favors adoption of a five-year staggered remedial amendment period. A staggered remedial amendment period offers a variety of benefits. Plan sponsors would, in general, be better served under such an approach, as they would have a standard, regular filing schedule. This would allow all plan sponsors to anticipate plan amendment and restatement costs, as well as any costs associated with the determination letter process. The current system imposes irregular remedial amendment periods. This irregularity makes it difficult to anticipate the costs and administrative burdens associated with obtaining approval from the Internal Revenue Service, especially where remedial amendment period expiration dates are continually revised.

The creation of a staggered five-year cycle would also benefit plan sponsors by providing more certainty with respect to the amendments that are required to be incorporated into a plan. For example, the initial remedial amendment period for individually designed plans with respect to the Uruguay Round Agreements Act, the Uniform Services Employment and Reemployment Rights Act of 1994, and the Small Business Job Protection Act of 1996 was set to expire on the last day of the first plan year beginning on or after January 1, 1999.¹ By the end of the remedial amendment period for these three Acts, however, the initial deadline was delayed four times, and three new statutes were added along the way.² Many plans were restated and filed prior to the enactment of the Community Renewal Tax Relief Act of 2000, an Act which was required to be incorporated into “GUST” filings. If the Internal Revenue Service were to adopt a staggered remedial amendment period cycle, such uncertainty could be largely averted.

A remedial amendment period that expires every five years would also allow plan sponsors to receive Internal Revenue Service approval for their plans on a more regular basis. The Subcommittee anticipates that plan sponsors would become accustomed to filing every fifth year. This regular schedule for obtaining Internal Revenue Service approval would likely encourage plan sponsors to keep their plans current and, presumably, would help improve operational compliance as well. The staggered remedial amendment cycles may also help prevent plans from experiencing qualification errors that have been in place for more than five years.

For plan sponsors who choose to file a determination letter before the expiration of their five-year cycle (for example, following a major plan design change or pursuant to a pending

¹ See Rev. Proc. 97-41, 1997-2 C.B. 489.

² See Rev. Proc. 99-23, 1999-1 C.B. 920; see also Rev. Proc. 2000-27, 2000-1 C.B. 1272; Rev. Proc. 2001-55, 2001-2 C.B. 552.

merger or acquisition), the determination letter could cover any guidance issued from the end of their last five-year remedial amendment period. The Subcommittee contends that the determination letter issued under such circumstances should also allow the plan sponsor to rely on the new letter until the end of the current five-year remedial amendment period.

In addition to the benefits that a five-year remedial amendment period would confer upon plan sponsors, the Subcommittee believes that employee benefits practitioners would also be better served under such a program. Under the current system, some practitioners tend to go through boom and bust cycles that correspond with the expiration of remedial amendment periods. When, as under the current system, all plans must be amended or restated and filed by the end of a single remedial amendment period, practitioners may be responsible for preparing a large number of filings, followed by prolonged periods without any filings. Spreading this burden over a five-year cycle would create a more steady work flow for most employee benefits practitioners.

Finally, the Internal Revenue Service would likely be better served upon the adoption of a five-year cycle as a result of the anticipated reduction in their workload during peak periods. For the recent GUST remedial amendment period, the Internal Revenue Service received approximately 150,000 applications for determination letters.³ This surge of filings that occurs at the end of each remedial amendment period would be eliminated upon the adoption of a staggered cycle for all plans, allowing the Internal Revenue Service to allocate its resources more efficiently.

B. Disadvantages of a Staggered Remedial Amendment Period

The Subcommittee recognizes that the staggered five-year remedial amendment period may pose some difficulties as well, but submits that these difficulties can be adequately addressed by the Internal Revenue Service. The Subcommittee is concerned that certain plan sponsors, especially small employers, may not be immediately aware of their own remedial amendment cycle after implementation of the change. Such plan sponsors may not be diligent with respect to knowing when their cycle ends, and the obligation of tracking these deadlines may fall primarily on employee benefits practitioners. The Subcommittee suggests that the Internal Revenue Service consider providing public guidance on the issues associated with a change in the remedial amendment period process. Such guidance would assist plan sponsors in understanding the new process and raise awareness of the obligation to file for a determination letter every five years.

The Subcommittee recommends that, for purposes of educating the plan sponsors to the changes to the determination letter process, a section be added to the Form 5500. This proposed section could reference the plan sponsor's Employer Identification Number ("EIN") with a chart that indicates a clear and affirmative statement as to whether the plan has been amended in a timely fashion. This chart would specify the plan sponsor's cycle, and should provide enough notice so that the plan sponsor will realize when its EIN is scheduled for a determination letter filing. For example, if a plan sponsor whose EIN ends in "5" is scheduled to file for a

³ See EP Connections: Interview with Paul Shultz, <<http://apps.irs.gov/retirement/article/0,,id=101320,00.html>>.

determination letter in 2005, the 2004 Form 5500 should indicate to that plan sponsor that such a filing is required in order to secure Internal Revenue Service approval. Alternatively, the Internal Revenue Service may consider a new program where a letter generated by EIN is distributed to all affected plan sponsors, informing them of their filing requirement. Regardless of the method, the Subcommittee recommends that the Internal Revenue Service develop a comprehensive educational program informing plan sponsors of their remedial amendment period cycle and the five-year schedule if the staggered cycle proposal is adopted.

Another concern with the staggered remedial amendment period process is that plan document failures may only be corrected once every five years, due to the five-year cycle. Thus, plan sponsors who do not regularly review the compliance of their plans may have plan document failures that continue for up to five years. The Subcommittee is concerned that this may not allow for the correction of associated operational failures. Under such a circumstance, the Subcommittee recommends that the Internal Revenue Service provide guidance as to whether the operational failures associated with these potential plan document failures would continue to be subject to disqualification. Further, the Employee Plans Compliance Resolution System could be revised to allow for self-correction of these changes. The Subcommittee recommends that there be some form of relief in the event these operational failures arise.

C. Timing of Determination Letter Applications Under a Staggered Remedial Amendment Period

The Subcommittee believes that the timing of the determination letter application process associated with each remedial amendment period cycle can be improved. Although the period for which an amendment is required would begin on January 1 of the first year of the cycle and end on December 31 of the fifth year, the Subcommittee suggests that the actual amendment or restatement may be adopted and the application for a determination letter be submitted by the following June 30, regardless of when the plan year ends. This will allow for all of the statutes enacted and all of the regulations and other guidance published within the last few months of the fifth year to be analyzed, understood, and properly incorporated into the restatement.

In the alternative, if the amendment or restatement and determination letter application are due on December 31 of the fifth year, the Subcommittee suggests the statutes and regulations that are required to be incorporated into the restatement should be limited to those that became effective from the July 1 preceding the first year of the cycle through the June 30 of the final year of the cycle.

Revising the timing of the restatement and application process would allow plan sponsors to incorporate all of the changes through the end of a given year into their restatement. For example, if the filing deadline is June 30, plans that are scheduled to file for a determination letter by June 30, 2007 would be able to incorporate all statutes, regulations and other guidance issued from January 1, 2002 through December 31, 2006. The Subcommittee believes that this would simplify the amendment process, especially if the Internal Revenue Service issues annual guidance discussing the changes for a given year. (See section III below.)

II. Maintenance of Status Quo

The Subcommittee recognizes that maintaining the status quo offers several advantages. For example, as practitioners, the members of Subcommittee are currently able to file for each of their clients in accordance with the expiration of a single remedial amendment period cycle. The Subcommittee recognizes that it may be burdensome to have a different group of clients requiring changes each year. Identifying those clients that would need amendments for a given year may prove to be difficult. The Subcommittee believes, however, that the administrative burdens associated with abandoning the status quo are outweighed by the numerous benefits of adopting a staggered remedial amendment period.

In the event that the Internal Revenue Service decides to maintain the status quo, the Subcommittee supports adoption of an annual plan update requirement, as discussed under section III below.

III. Annual Plan Updates Under the Staggered Remedial Amendment Period System

A. Review of Annual Plan Updates

The Subcommittee believes that an annual update procedure would benefit plan sponsors. By annually updating their plans, the Subcommittee believes that plan sponsors will be more likely to keep their plans in compliance on a year-to-year basis because of the more frequent opportunities for guidance about changes in the law. Combining an annual update with a five-year filing cycle would help ensure regular, systematic review of all qualified plans and would put plan sponsors into the habit of keeping their plans in compliance. Additionally, the cumulative burden on plan sponsors, such as that at the end of a remedial amendment period under the current system, would be greatly reduced. The Subcommittee contends that is much easier to maintain a qualified plan on a regular, ongoing basis as opposed to amending it all at once. If the annual update requirement is adopted, the Subcommittee suggests that the Form 5500 be amended to include a question on whether the required annual amendments have been timely adopted.

In applying a new annual update requirement, the Subcommittee recommends that plan sponsors have at least six months to incorporate any new guidance. For example, if guidance is issued on December 20 of a given year and it must be adopted for cycles ending on December 31 of the same year, such a requirement may impose an undue burden on plan sponsors. The Subcommittee's recommendation of a June 30 remedial amendment period expiration date, discussed above, would help alleviate these concerns.

The Subcommittee also believes that the Internal Revenue Service should attempt to ensure that the cost of annual amendments does not exceed the benefits associated with annual compliance. The annual amendment period may create new problems for small employers that fail to make their annual amendment, and then attempt to incorporate the delinquent amendments into their plans by the end of their remedial amendment periods. An annual update requirement could result in an increase in qualification failures where the annual amendments are not

completed. To address these concerns, the Internal Revenue Service should consider offering some measure of voluntary compliance for plan sponsors who fail to complete regular annual updates.

B. Annual Guidance Provided by the Internal Revenue Service

The Subcommittee is in favor of annual guidance being issued by the Internal Revenue Service, as such guidance could provide a comprehensive list of any required changes to be incorporated into a plan for a given year. The Subcommittee recommends that the Internal Revenue Service receive comments or other input from other governmental agencies when preparing guidance regarding the annual changes to be incorporated into qualified plans. The list of annual changes could be a joint endeavor of the Internal Revenue Service, the U.S. Department of Labor, the Pension Benefit Guaranty Corporation, the Equal Employment Opportunity Commission, and any other applicable governmental agencies, and would consolidate all of the required updates into a single release. The Subcommittee also requests that the Internal Revenue Service commit to incorporating all of its guidance into the annual update, including guidance that does not rise to the level of a statutory change, regulation, or ruling (*e.g.*, Internal Revenue Service speeches, presentations, etc.)

The initial guidance issued each year can be limited and then expanded in subsequent years. For example, if new legislation affects the Internal Revenue Code and an extensive lag time ensues prior to the release of Treasury Regulations, the annual guidance could provide a simple model amendment to reflect the change, and when more comprehensive guidance is eventually issued, more extensive plan amendments could be required.

An example of addressing a single change in multiple releases may be found by reviewing the catch-up contribution rules. In 2001, when catch-up contributions were first introduced, the Internal Revenue Service issued a model amendment allowing plan sponsors to incorporate catch-up contributions by reference to section 414(v) of the Code.⁴ With the issuance of final regulations on July 8, 2003, plan sponsors were given more comprehensive guidance, and were able to revise the model amendment in accordance with the final regulations. If the Internal Revenue Service were to issue an annual guidance statement, the 2001 and 2003 guidance could both address the catch-up contribution rules.

The Subcommittee supports the proposition that, if the staggered remedial amendment period is adopted, compliance with the annual plan update requirements would be a condition precedent for the remedial amendment period and for continued reliance on determination letter prior to its operative expiration date. The Subcommittee also suggests that in the event the Internal Revenue Service fails to include applicable guidance in an annual release, failing to address the omitted guidance in the plan document should not subject the plan to disqualification for that year.

⁴ See IRS Notice 2001-57, 2001-2 C.B. 279.

IV. Recommendation of Coordination of the Remedial Amendment Period With M&P Plan Sponsors and Volume Submitter Practitioners

The Internal Revenue Service has proposed two alternatives for sponsors of M&P or volume submitter plans with respect to staggered remedial amendment periods. Under the first alternative, M&P or volume submitter plans would be updated and submitted annually. Under the second alternative, these plans would be updated and submitted every five years, and the cycles of the adopting employers for such plans would be based on the cycle of the M&P plan sponsor or volume submitter practitioner.

A. Keeping Five-Year Remedial Amendment Period for M&P Plan Sponsors and Volume Submitter Practitioners

The Subcommittee favors keeping M&P plan sponsors and volume submitter practitioners on a five-year remedial amendment period cycle, but requiring annual plan updates for such sponsors and practitioners.

The Subcommittee believes that basing the remedial amendment period of adopting employers on the cycle of their M&P plan sponsors or volume submitter practitioners may be difficult to administer when the adopting employers switch plan sponsors or practitioners. The Subcommittee contends that adopting employers who wish to switch M&P or volume submitter plans could potentially be subject to either very long or very short remedial amendment periods. For example, suppose an employer adopts a volume submitter plan with a remedial amendment period cycle ending June 30, 2005. On May 1, 2005, the adopting employer changes plans to a volume submitter practitioner whose cycle ends June 30, 2009. Thus, the adopting employer would not have received a determination letter for its plan for more than five years. Continued changes in volume submitter practitioners could allow some adopting employers to avoid a determination letter application altogether while having an indefinitely extended remedial amendment period.

Further, under the Internal Revenue Service's proposal, plan sponsors who have individually designed plans (and therefore are on their own remedial amendment period cycle) and M&P plans (and therefore are on the M&P plan sponsor's cycle) would have to comply with two different cycles. This would create an unnecessary administrative burden on such plan sponsors. Thus, the Subcommittee favors using the plan sponsor's remedial amendment period cycle when applying for a determination letter, rather than the M&P sponsor or volume submitter practitioner's cycle.

The Subcommittee favors allowing adopters of M&P and volume submitter plans to continue to rely on opinion and advisory letters without having to request determination letters to the extent now provided. The Subcommittee also favors the current process of having volume submitter practitioners on the same remedial amendment period cycle as individually designed plans. The Subcommittee opposes a change where plan sponsors who do not currently file (such as M&P plan sponsors) would be required to file, even on a five-year cycle. If the sponsor is currently exempt from filing, that exemption should carry over to the new system. Finally, plan

sponsors should still have the opportunity to file a Form 5307 or a Form 6406 to obtain approval for amendments only, rather than full restatements.

B. Annual Plan Update Requirement for M&P Plan Sponsors and Volume Submitter Practitioners

The Subcommittee is in favor of annual updates for M&P plan sponsors and volume submitter practitioners, as such a requirement would likely simplify the required revisions of M&P or volume submitter plans. M&P plan sponsors and volume submitter practitioners would be required to update their plans on an annual basis if determination letter applications are based on the adopting employer's EIN, so the annual update requirement should not pose any additional burden.

In practice, the proposal to require annual updates for M&P plan sponsors and volume submitter practitioners would allow an adopting employer whose remedial amendment period ends in a particular year to update its plan by using the M&P plan or volume submitter plan that was most recently approved for the year prior to the calendar year in which the employer's remedial amendment period ends. The Subcommittee suggests that this lag period be written into the determination letter. For example, if a volume submitter practitioner receives approval for its plan on October 30, 2004 and one of its adopting employer's remedial amendment period ends on June 30, 2005, the adopting employer's determination letter would be effective only through the date of the volume submitter practitioner's approval, and an eight-month lag period would result. Inasmuch as the lag period under such a scenario would never exceed one year, the documents will never be more than one year behind a fully updated plan.

The Subcommittee recommends that M&P plan sponsors be permitted to adopt the annual amendments at the M&P plan sponsor level and then inform adopting employers of the annual changes. We recommend, however, that volume submitter practitioners not be permitted to adopt the required annual changes on behalf of their adopting employers, even those changes that are mandatory. Employers who adopt volume submitter plans should be encouraged to review their plans with their practitioners every year. The Subcommittee believes that this procedure would not be overly burdensome, inasmuch as there would only be annual updates. Accordingly, adopting employers would have to correspond with their volume submitter practitioner to complete the updates and adopt the amendment to the plan annually. If the adopting employer is required to adopt the annual amendment, it would be participating in the regular, annual review of their plans.

Another advantage to requiring annual plan updates is that such a requirement would alleviate the concern associated with volume submitter practitioners that stop amending their plans. Requiring annual amendments for volume submitter practitioners may facilitate compliance when these practitioners no longer prepare plans (due to dissolution, merger, bankruptcy, death, etc.). In this case, a practitioner who goes out of business in year four of the remedial amendment period cycle will have his or her plans updated through four years, rather than forcing his or her clients to update the plans for the full cycle because they had not been updated within those four years. The same principle applies to financial institutions and other entities that sponsor M&P plans.

C. Fees Associated with Annual Approval

The Subcommittee is strongly committed to the idea that the annual update requirements of M&P plan sponsors and volume submitter plans not be cost prohibitive. The Subcommittee does not favor increasing the costs of obtaining the annual approval of volume submitter plans. If volume submitter practitioners will be required to obtain annual approval for their plans, the Internal Revenue Service should consider greatly reducing or eliminating the costs of obtaining such approval.

Due to the cost considerations associated with obtaining approval, the Subcommittee suggests that once a volume submitter practitioner submits a plan document to the Internal Revenue Service, the annual reapproval process should be streamlined from the current system. For example, high submission fees should be eliminated. Otherwise, many practitioners may abandon their plans as a result of a costly resubmission process. The Subcommittee recommends that the Internal Revenue Service institute a modest filing fee for the volume submitter practitioners. Under such a program, volume submitter practitioners would pay an annual update fee (e.g., \$25 per year) to keep their plans up to date, in which case they would be permanently exempted from a \$2,000-\$3,000 approval fee.