Advisory Committee on Tax Exempt and Government Entities (ACT)

Report of Recommendations

Public Meeting
Washington, DC
June 13, 2007

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Advisory Committee on Tax Exempt and Government Entities (ACT)
Public Meeting
1111 Constitution Ave., NW.
Room 3313
Washington, D.C., 20224

June 13, 2007

Meeting Begins at 9:00 a.m.

AGENDA

Meet and Greet (8:30 a.m. – 9:00 a.m.)

Welcome and Opening Remarks

- Kevin M. Brown, Acting Commissioner, Internal Revenue Service
- Steven T. Miller, Commissioner, Tax Exempt and Government Entities
- Steven J. Pyrek, Designated Federal Official of the ACT
- Charles F. Plenge, Chair of the ACT

Review of Voluntary Self-Compliance Program for Indian Tribal Governments
Lenor A. Scheffler

A Proposal for an Exempt Organizations Voluntary Compliance Program
Sean Delany

After the Bonds Are Issued: What Then?
Maxwell D. Solet

Improving Compliance for Adopters of Pre-Approved Plans
Charles M. Lax

A Prototype for Public Sector Defined Contribution Plans
Julian Regan

Public Employers' Withholding and Reporting for Non-Resident Aliens
Steven W. Hoffman

Closeout

ADVISORY COMMITTEE
ON TAX EXEMPT AND GOVERNMENT ENTITIES

2006-2007

Member Biographies

EMPLOYEE PLANS

- **Susan D. Diehl,** Horsham, PA

  Ms. Diehl is the president of PenServ Inc., a nationally recognized pension consulting firm providing services to more than 800 financial organizations on sponsoring retirement plans. A major part of her activities and products involves educating individuals and practitioners on the whole range of retirement plans — including IRAs, Qualified Plans, 403(b) and 457 plans, and Nonqualified Deferred Compensation Plans. Ms. Diehl has a Bachelor of Arts in mathematics from Arcadia University in Pennsylvania.

- **Dodi Walker Gross**, Pittsburgh, PA

  Ms. Gross is an employee benefits lawyer and partner with Reed Smith LLP, one of the 10 largest law firms in the United States. In this capacity, she represents local, national and multinational corporations with operations in the United States, Puerto Rico, Canada, Germany, United Kingdom and other countries. Her work encompasses the full range of employee benefits matters with respect to retirement, savings and welfare plans. It also involves executive compensation — including design, administration, compliance, dispute resolution, government audits, and corporate and employment transactions. Ms. Gross has a Juris Doctor from Duquesne University School of Law.

- **Charles M. Lax,** Southfield, MI

  Mr. Lax is a partner and chairman of the Employee Benefits Group at his law firm, Maddin, Hauser, Wartell, Roth & Heller, P.C. His responsibility includes the representation of approximately 350 qualified retirement plans of all types and sizes. He authored numerous articles appearing in legal and public accounting journals and lectured extensively on qualified retirement plans and other tax topics. Mr. Lax received his Juris Doctor from the University of Michigan. He presently serves as the Chairman of the Tax Section of the State Bar of Michigan.

- **Charles F. Plenge,** Dallas, TX

  Mr. Plenge is a partner in Hayes and Boone, LLP and is Chair of its Employee Benefits/Executive Compensation Practice Group. His practice primarily involves a broad range of employee benefits and executive compensation matters on behalf of employers. Mr. Plenge is a Charter Fellow of the American College of Employee Benefits Counsel and holds his Juris Doctor in Law from Southern Methodist University Dedman School of Law.

- **Daniel J. Schwartz,** St. Louis, MO

  Mr. Schwartz is a shareholder in the St. Louis law firm of Greensfelder, Hemker & Gale, P.C. His practice encompasses all aspects of employee benefits and executive compensation law, with a special emphasis on employee benefits issues for tax-exempt organizations. Mr. Schwartz is a Charter Fellow of the American College of Employee Benefits Counsel. He received his JD from the University of Missouri-Kansas City.

- **Michael S. Sirkin,** New York, NY

  Mr. Sirkin is a senior partner in the Employee Benefits and Executive Compensation Group in his firm, Proskauer Rose LLP. He has practiced in the employee benefits area since 1972 and has been heavily involved with all aspects of employee benefits, including extensive experience in qualified plans, 403(b) plans and nonqualified plans. Mr. Sirkin is a graduate of Columbia Law School.

EXEMPT ORGANIZATIONS

- **Betsy Buchalter Adler,** San Francisco, CA

  Ms. Adler is a member of the law firm of Silk, Adler and Colvin, which specializes in the law of nonprofit and tax-exempt organizations. In that capacity she provides legal advice and counsel to grant-making charities, operating charities, educational and religious institutions, trade associations, and individual and corporate philanthropists. She is the immediate past chair of the Exempt Organizations Committee of the Tax Section of the American Bar Association and a well-known author and lecturer in the tax-exempt field. She received her B.A. from the University of California at Santa Cruz and her J.D. from Boalt Hall School of Law, University of California at Berkeley.

- **Bonnie Brier,** Philadelphia, PA

  Ms. Brier is the general counsel of The Children's Hospital of Philadelphia. In her 25 years of practice in the field of exempt organizations, she has specialized in the area of health care, compensation and benefits, and charitable giving. Ms. Brier has a Juris Doctor from Stanford University

- **Sean Delany,** New York, NY

  Mr. Delany is the Executive Director of Lawyers Alliance for New York, Inc., an organization that provides non-litigation legal assistance to nonprofits and community development organizations in New York City. His organization provides services dedicated to improving the accountability and efficiency of small tax-exempt organizations, and includes counseling on their ongoing compliance with federal and state regulatory obligations. He has also served as Assistant Attorney General in Charge of the Charities Bureau in the New York Attorney General's office.

- **Julie L. Floch,** New York, NY

  Ms. Floch is the Director of Not-for-Profit Services at Eisner LLP, and is the partner responsible for coordinating the planning and administration of engagements in the firm's not-for-profit practice. She is an adjunct professor of auditing at Baruch College/CUNY and teaches not-for-profit management at the New School University. A graduate of the State University of New York at Binghamton, with graduate studies at Baruch College/CUNY, Ms. Floch serves on the influential Not-for-Profit Organizations Expert Panel of the American Institute of CPAs and is currently a member of the New York State Society of CPAs' committee on not-for-profit organizations (which she formerly chaired) and its committee on tax-exempt entities.

- **Suzanne Ross McDowell,** Washington, DC

  Ms. McDowell is a partner at the law firm of Steptoe & Johnson LLP, where her practice focuses primarily on tax-exempt organizations. She has over 20 years experience working with nonprofit organizations. Prior to joining Steptoe & Johnson in September 2002, she was Senior Vice President and Deputy General Counsel at the National Geographic Society, Washington, DC. She also served as Associate Tax Legislative Counsel at the U.S. Department of the Treasury in the mid-1980s, and has prior private practice experience. She is active in the Tax Section of the D.C. Bar, the American Bar Association, and the American Society of Association Executives. She received her A.B. from Smith College and her J.D., *magna cum laude*, from the George Washington University National Law Center.

- **Ana Thompson,** San Mateo, CA

  Ms. Thompson is the managing director of finance and administration for the Charles and Helen Schwab Foundation, where she is responsible for leadership of the foundation, grant-making, oversight of short- and long-term financial planning, and regulatory compliance. Ms. Thompson has a Masters of Business Administration from the Stanford Graduate School of Business.

GOVERNMENT ENTITIES: FEDERAL, STATE AND LOCAL GOVERNMENTS

- **Steven W. Hoffman,** Columbus, OH

  Mr. Hoffman is the tax manager for The Ohio State University, where he is responsible for issues concerning taxation in state and local governments and tax-exempt entities. His background includes 15 years with the IRS and with OSU's tax-exempt bond activity. Hoffman, an enrolled agent and a certified financial planner, has a Master of Science in Taxation from Capital University in Ohio.

- **Nicholas C. Merrill, Jr.,** Springfield, IL

  Mr. Merrill is the manager of the accounting division for the State Employees' Retirement System of Illinois, a large statewide Public Employees' Retirement System. He is a certified public accountant and previously worked for a national public accounting firm where he specialized in governmental audits. He has served as President of the National Conference of State Social Security Administrators (NCSSSA), as well as in other roles within that organization. He is also active in the Government Finance Officers Association.

- **Julian Regan,** Marlborough, MA

  Until April 2006, Mr. Regan was Executive Director of the New York State Deferred Compensation Board, which oversees the State's 159,000-member, $7.1 billion Deferred Compensation Plan and performs State regulatory duties that relate to 250 independently operated section 457 plans. He served for a number of years in the financial operations arena of the Massachusetts Bay Transportation Authority as well as in operations and audit capacities for private sector firms that specialize in delivering services to large Tax-Exempt Entities. He is a member of the New York State Government Finance Officers Association (NYSGFOA). Mr. Regan is now a Vice President for Fidelity Employer Services Company, where he works primarily with institutional retirement and employee benefits business units.

GOVERNMENT ENTITIES: INDIAN TRIBAL GOVERNMENTS

- **Lenor A. Scheffler,** Minneapolis, MN

  Ms. Scheffler, a partner with Best & Flanagan, heads the firm's Native American Law Practice Group which represents a number of Indian tribes on tax, finance, business, and government matters. She has previously served as General Counsel and as Vice President of Corporate and Legal Affairs for tribes in Minnesota. She is currently the Chief Judge of the Upper Sioux Community Tribal Court. Ms. Scheffler received her Juris Doctor from the William Mitchell College of Law.

- **Sandra Starnes,** Kingston, WA

  Ms. Starnes is a certified public accountant who works as the cash management officer for the Port Gamble S'Klallam Tribe in the state of Washington. Her experience includes working with non-profit organizations. Ms. Starnes has a Bachelor of Arts in accounting and business administration.

- **Mary J. Streitz**, Minneapolis, MN

  Ms. Streitz is a partner in the law firm of Dorsey & Whitney LLP, with wide experience in a wide variety of tax issues affecting Indian tribal governments and other tribal entities. She has represented tribes in all regions of the country. She also heads up her firm's national Indian tax practice. Ms. Streitz has a Juris Doctor from the New York University School of Law.

GOVERNMENT ENTITIES: TAX EXEMPT BONDS

- **Joan M. DiMarco,** Philadelphia, PA

  Ms. DiMarco is the managing partner of the Philadelphia office of BondResources Partners LP. Her background includes a wide range of experience in consulting to investment bankers, law firms, issuers and governmental agencies. She has more than 30 years of experience in municipal bonds and structured finance. Ms. DiMarco is a certified public accountant and has a Bachelor of Science in business administration from Drexel University.

- **Robert E. Donovan,** Providence, RI

  Mr. Donovan is Executive Director of the Rhode Island Health and Educational Building Corporation. He is responsible for the operation of the state designated issuer of tax-exempt bond debt on behalf of private non-profit health care and educational institutions. He also serves on a number of boards and committees relating to tax-exempt bonds. Mr. Donovan holds a Certificate of Advance Graduate Studies in Finance, as well as an MBA from Bryant College.

- **Maxwell D. Solet**, Boston, MA

  Mr. Solet is a member of the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., where he has principal tax responsibility in connection with the firm's role as bond counsel, underwriter's counsel and purchaser's counsel on state or local bond issues. These include bonds of large general obligation issuers, specialized revenue bond issuers, housing finance agencies, student loan agencies, and conduit issuers of bonds to finance healthcare and education facilities and solid waste disposal facilities. He is a former chair of the Tax Section of the Boston Bar Association and is a member of the steering committee of the annual Bond Attorneys Workshop. Mr. Solet received a Bachelor's degree from Harvard College and a Juris Doctor degree from Harvard Law School.

GENERAL REPORT
OF THE
ADVISORY COMMITTEE ON TAX EXEMPT AND GOVERNMENT ENTITIES

This is the sixth public meeting of the Advisory Committee on Tax Exempt and Government Entities (the "ACT"). The ACT members appreciate the opportunity to report to the Internal Revenue Service and the public regarding the interaction of the Tax Exempt and Government Entities Division of the Internal Revenue Service ("TE/GE") and its stakeholders, including employee retirement plans, charities and other tax exempt organizations, tax-exempt bond issuers, and federal, state, local and Indian tribal government entities. This year several of the reports address the issue of voluntary compliance, which is designed to enable stakeholders to address and correct non-compliance, and other reports address the need for additional outreach and resources to enable stakeholders to comply with the often-times complex requirements associated with the maintenance of their tax-exempt status. As former Commissioner Everson and Acting Commissioner Brown have noted repeatedly, enforcement of the relevant tax laws cannot be achieved through the audit function alone. The ACT hopes its recommendations in this year's reports will assist the IRS in furthering the achievement of proper compliance.

The six reports the ACT is presenting this year are as follows:

Indian Tribal Governments: Review of Voluntary Self-Compliance Program for Indian Tribal Governments

In December 2005, the IRS Office of Indian Tribal Governments ("ITG") established a voluntary self-compliance program which affords Tribal Governments the opportunity to perform their own IRS compliance checks. The program has not received much interest by Tribal Governments, and ITG asked the ACT to evaluate the reasons for the lack of Tribal participation in the Program and to make recommendations for increasing participation. This ACT report includes, among others, recommendations to improve communication, enhance promotion of the internal use of the self-compliance form, compartmentalize the Program by tax issues, and create Compliance Check Toolkits.

Exempt Organizations: Proposal for an Exempt Organizations Voluntary Compliance Program

In the U.S. there are some 1.6 million exempt organizations which control more than $2.4 trillion in assets. Exempt organizations, like taxable enterprises, sometimes discover that they are out of compliance with the tax law and wish to correct the problem themselves, rather than waiting for enforcement attention from the IRS. However, exempt organizations currently have no formal self-correction program of

general applicability. This ACT report recommends the creation of a broad-based, formal, and continuing voluntary compliance program similar, where appropriate, to the voluntary correction programs established by other Divisions of TE/GE.

Tax-Exempt Bonds: After the Bonds Are Issued: Then What?

Many governmental issuers of tax-exempt bonds and private, nongovernmental conduit borrowers are not adequately prepared to monitor ongoing compliance with federal law affecting those bonds. There is particular concern for newly-elected or appointed officials who might have little prior experience with tax-exempt debt. This ACT report presents an informational paper on post-issuance compliance in a format appropriate for inclusion in the "Information for the Tax Exempt Bond Community" section of the IRS Web site. The informational paper presented in this report is designed to be at a level of generality suitable for elected or appointed officials, and to identify areas requiring compliance procedures without attempting to ask and answer all possible questions.

Employee Plans: Improving Compliance for Adopters of Pre-approved Plans

Currently, the IRS estimates that at least 94% of all qualified retirement plans are Master and Prototype plans and Volume Submitter plans. This report arose from the ACT's belief that there is a need to provide compliance assistance to employers who have adopted these plans, since many of those employers are neither equipped to comply nor willing to pay for compliance with the complex requirements for tax-qualified retirement plans. This ACT report contains a series of recommendations designed to provide employers adopting these plans with material designed to inform them of the legal requirements associated with maintaining these plans. These recommendations include, among others, the distribution of a form which advises adopting employers of the responsibilities associated with these plans and includes a list of the parties responsible for performing various administrative functions on behalf of the plan; and the provision of additional education, outreach and guidance to these employers regarding the compliance requirements for these plans.

Federal, State and Local Governments: A Prototype for Public Sector Defined Contribution Plans

The ACT perceives a need to further improve operational and plan document compliance for Code Section 401(a) defined contribution plans adopted by government entities. This project will span two years, with the final report being delivered in June 2008. This year's Act report will provide anecdotal evidence of compliance challenges, along with preliminary findings and a plan for possible recommendations, which might include the adoption of a prototype system for government 401(a) plans similar to the system currently available to corporate 401(k) plans, and recommended educational content tailored to the needs of government 401(a) plan practitioners and sponsors. The educational information could be included or referenced in the Federal, State and Local Government (FSLG) Toolkit that is included in the FSLG section of the Government Entity Division's web site.

Federal, State and Local Governments: Public Employers' Withholding and Reporting for Non-Resident Alien Taxation

The US Census Bureau reported in March, 2002 that there were 87,525 state and local government employers, employing 18,349,000 workers, with payrolls amounting to 525,235 million dollars. It has been estimated that 20% of the American workforce is now employed by federal, state, or local government entities. Prior ACT reports have noted that public employers have long promoted voluntary compliance as the key to effective and efficient tax administration. Voluntary compliance by public employers requires not only executing specific withholding and reporting functions, but also identifying and eliminating barriers which prevent voluntary compliance. This ACT report contains recommendations to enhance the "Toolkit" on the IRS website to assist government payroll officers in determining the correct amount of withholding and the reporting requirements for non-resident aliens, and to increase contact with the public sector employment community through informational seminars and targeted mailings.

Having completed its fifth year June 2007, the ACT this year undertook with the TE/GE leadership an evaluation of its mission and its current advisory role in an effort to determine whether its activities and reports were consistent with the underlying purpose for its establishment – namely to provide an organized public forum for discussion of relevant issues between officials within TE/GE and representatives of the appropriate stakeholder communities; and to enable the IRS to receive regular input with respect to the development and implementation of tax administration issues affecting those communities. As part of this evaluation, separate meetings were held between the appropriate TE/GE officials and the various stakeholder groups represented by the ACT membership. The ACT and the TE/GE leadership concluded after this evaluation that the ACT's mission as originally envisioned was still appropriate, and that the ACT and TE/GE would continue to engage in the introspective dialogue established this year in order to ensure that both groups were engaged in the sort of interaction envisioned when the ACT was established.

Since service on the ACT carries a maximum term of three years, the following members are completing their term this year:

- Robert E. Donovan, Rhode Island Health and Educational Building Corp., Providence, RI
- Julie Floch, Eisner LLP, New York, NY
- Charles M. Lax, Maddin, Hauser, Wartell, Roth & Heller, P.C., Southfield, MI
- Suzanne Ross McDowell, Steptoe & Johnson LLP, Washington, DC
- Charles F. Plenge, Haynes and Boone, LLP, Dallas, TX
- Lenor A. Scheffler, Best and Flanagan LLP, Minneapolis, MN

The ACT thanks them for their service and dedication throughout their term.

The ACT also would like to express its sincere appreciation and thanks to the TE/GE personnel with whom it has worked this year. In particular, we would like to thank former Commissioner Mark W. Everson and Acting Commissioner Kevin M. Brown for their interest in the ACT and its activities. We also would like to thank TE/GE Commissioner Steven T. Miller, Deputy Commissioner Christopher Wagner and the current directors, Joseph Grant, Michael Julianelle and Lois Lerner, as well as Christie Jacobs, Cliff Gannett, Sunita Lough and the other IRS staff and former staff for their valuable time and responsiveness as we undertook our evaluations and the preparation of our reports.

The ACT would especially like to thank Steven Pyrek, the ACT's Designated Federal Official, without whom none of us could have functioned as effortlessly and efficiently during and between our meetings in Washington, D.C. His management and organizational skills are only surpassed by his willingness to provide whatever assistance we needed.

The ACT's success depends not only on the hard work and dedication of its members, but on the cooperation and willingness of the TE/GE personnel to provide the time and information the ACT requests. The friendliness and professionalism shown by all of the TE/GE personnel is appreciated by the ACT, and is the main reason for the ACT's continued ability to fulfill its mission.

Charles F. Plenge
Chairman

Please note:

The portions of this 189-page document that do not pertain to the report entitled "Employee Plans: Improving Compliance for Adopters of Pre-approved Plans" have been deleted from this version by BenefitsLink.com, in order to provide a shorter downloadable document for public distribution to the retirement plan practitioner community.

The complete 189-page report of the Advisory Committee on Tax Exempt and Government Entities dated June 13, 2007 is available on the IRS web site at <http://www.irs.gov/taxexemptbond/article/0,,id=134438,00.html>.

--Dave Baker
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ADVISORY COMMITTEE
ON TAX EXEMPT and GOVERNMENT ENTITIES
(ACT)

IMPROVING COMPLIANCE FOR ADOPTERS OF PRE-APPROVED PLANS

Charles M. Lax, Project Leader
Susan Diehl
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June 13, 2007

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I.

EXECUTIVE SUMMARY

Reason for Report

During the past 20 years, the use of Master and Prototype plans ("M&P plans") and Volume Submitter plans ("VS plans" and together with M&P plans referred to hereinafter as "PAPs") has increased dramatically. Currently, the Internal Revenue Service ("IRS") estimates that at least 94% of all qualified retirement plans are PAPs. Current and past ACT members have identified compliance issues with regard to many of these plans. While in many instances non-compliance is unintentional, the ACT believes it results from the nature and structure of the PAP program. This project arises from a need to provide assistance to employers who have adopted M&P plans and VS plans in complying with the requirements applicable to tax-qualified retirement plans.

Objective

The ACT's objective for this project was to develop a series of recommendations that will enhance document and operational compliance. In accomplishing this objective, the ACT was guided by these principles:

- The current character of the PAP program should remain intact.
- The ACT would engage each of the constituencies (the IRS, employers adopting PAPs ("Adopting Employers"), and M&P plan sponsors and VS Practitioners (collectively referred to as "Sponsoring Organizations") involved with the PAP program and solicit their views.
- The recommendations should be realistic and workable and not impose a significant burden on any constituency.
- The emphasis should be on recommendations that are particularly suited for enhancing compliance by small employers.

Recommendations

Increased Responsibilities for Sponsoring Organization

1. Each M&P plan Sponsoring Organization should include a form which becomes part of the Adoption Agreement (i) advising Adopting Employers of the responsibilities of adoption of a PAP and (ii) including a list of the parties

responsible for performing various administrative functions on behalf of the plan.

2. Each M&P plan Sponsoring Organization should be required to offer a simplified version of their plan with few or no options.
3. Each M&P plan Sponsoring Organization should be required to retain and make available copies of their own plan documents, amendments and opinion letters for an indefinite period of time.

IRS Education and Outreach for Adopting Employers

1. Subscriptions to the IRS' quarterly publication entitled "*Retirement News for Employers*" should be increased by requiring Sponsoring Organizations to enroll new Adopting Employers whenever possible.
2. The IRS should develop a new publication for Adopting Employers which assists them in implementing a PAP, completing an Adoption Agreement, obtaining a determination letter and updating and amending plans for new legislation and guidance.
3. The IRS should develop a new, "self-audit" checklist for Adopting Employers similar to the checklists developed for 401(k) plans, SEPs and 403(b) plans.
4. The IRS should develop a new web site for small Adopting Employers similar to the web site it has created for small tax-exempt organizations.

IRS Audit and Guidance Functions

1. The IRS should implement a permanent audit program for Sponsoring Organizations to determine levels of compliance with IRS requirements for organizations maintaining a PAP.
2. The IRS should modify and expand Rev. Proc. 2005-16 to permit non-commonly controlled, multiple employer groups to adopt M&P plans.
3. The IRS should publish additional guidance to better clarify responsibilities of Sponsoring Organizations where: (a) Adopting Employers do not respond to amendments or other information requests of the Sponsoring Organization, or (b) where the Sponsoring Organization has a reasonable belief that a document or operational failure occurred.

II.

INTRODUCTION

A. Reason for Report

The retirement policy of the United States is designed to extend tax-qualified retirement plans to a wide array of employers, so as to make them available to as many employees as possible. Unfortunately, there are many employers who are neither equipped to comply, nor willing to pay for compliance with the complex requirements of the Internal Revenue Code of 1986, as amended ("Code"). In addition there are many employers who do not recognize the need for continuing administration of these plans. The result has created an environment of non-compliance. The ACT believes that in most instances the lack of compliance is not intentional, but is a result of the complex legal requirements for maintaining a tax-qualified retirement plan and an assumption that other persons are responsible for compliance.

This project arises from a need to provide assistance to employers who have adopted M&P plans and VS plans in complying with the requirements applicable to tax-qualified retirement plans. The ACT has focused on these plans due to their dramatic proliferation during the past 20 years. Based on the IRS' estimates, at least 94%[1] of all tax qualified retirement plans are PAPs. Non-compliance can take the form of plan document failures or operational failures. While there is no conclusive evidence that non-compliance is more likely to occur in PAPs, there is anecdotal evidence that some failures are more likely to occur in PAPs.

The need for this project has also been recognized by the current leadership of TE/GE. In a speech delivered at the Benefits Conference of the South on March 20, 2006, TE/GE Commissioner, Steven T. Miller, stated:

> . . .
>
> In light of their increasingly central nature and importance in retirement, should we begin to focus more on ensuring that defined

[1] There are no definitive statistics for this percentage. This estimate by the EP Division results from an assumed universe of approximately one million qualified retirement plans and approximately 60,000 individually designed plans that filed for a determination letter during the GUST restatement period. It is also noted that this percentage may even be larger than 94% today, based upon the number of individually designed plans that were submitted for determination letters during the recently completed Cycle A. The above 94% is based on the number of plans; however, the ACT has no statistics on what percentage of the universe of plan assets and employees covered by retirement plans are represented by the PAPs.

> contribution plans cover all who they must cover and that the rights and assets of participants remain protected?
>
> . . .
>
> Are participants including retirees getting the service they should from plan administrators? Also, as we see more and more adoption of mass marketed plans, how do we best police follow up compliance in such plans?
>
> . . .
>
> The EPCU is staffed with Senior EP Agents, Analysts, Statisticians and Economists. Since June 2005, when the EPCU stood up, it has performed more than 1,500 compliance checks. In the long term, the unit is going to conduct correspondence examinations and support our efforts to attack abusive tax schemes.
>
> . . .
>
> I have also asked them to work on a compliance project to see how mass marketed plans are doing post-adoption. The EPCU will allow us the flexibility to design and execute compliance projects to accommodate a shift of mission. I promise that things will get even more interesting.
>
> . . .

Additionally, prior ACT Reports have commented on the M&P plan program and made suggestions for improvement. For example, in the June 21, 2002 First ACT Report entitled "Employee Plans Small Business Access and Compliance Project," ACT members recommended that the IRS obtain lists of PAPs for use in a focused audit program, as well as require Sponsoring Organizations to provide Adopting Employers with operational manuals. Furthermore, in the June 9, 2006 Fifth ACT Report entitled "Document Compliance Program for 403(b) Arrangements," ACT members noted "Current members of the ACT continue to express their concerns over many plan document preparation and plan operation/administration failures that appear to accompany the marketing and use of pre-approved plans by some vendors and practitioners in this market."

B. ACT's Objective and Guiding Principles

In approaching this project, the ACT established as its principal objective the development of a series of recommendations that will enhance document and operational compliance among Adopting Employers. To this end, the ACT was guided by these principles:

- The current character of the PAP program should remain intact.
- The ACT would engage each of the constituencies that are involved with the PAP program and solicit their views to assure each constituent that their group has been recognized and considered.
- The non-compliance is not the "fault" of any one of the constituencies, but is inherent in the system.
- The recommendations should address the most common plan failures.
- The recommendations should be realistic and workable, and not add unnecessary burdens on any constituency, thereby increasing the likelihood that each of the affected constituencies would be receptive to their implementation.
- A broad range of recommendations that affects no single constituency disproportionately should be provided.
- The emphasis should be placed on recommendations that are particularly suited for enhancing compliance by the smallest of Adopting Employers; it appearing to the ACT that the maintenance of a qualified plan, albeit a PAP, is most challenging for this type of employer.
- The report and recommendations should not address the determination letter process, the staggered remedial amendment rules, or the proliferation of "interim amendments," it being the ACT's opinion that any critical analysis of these matters would not be timely until the first cycle of plan restatements and amendments has been completed.[2]

[2] The first cycle of restatements and amendments for PAPs under the new staggered remedial amendment scheme is scheduled to end on January 31, 2011.

C. Constituencies under the PAP Program

1. Sponsoring Organizations

Generally the Sponsoring Organization is the entity which "sponsors" the plan by writing and submitting the plan to the IRS and assures the "qualified" status of the plan for the Adopting Employer. This term includes the following entities: M&P Sponsoring Organizations, M&P Mass Submitters, National Sponsoring Organizations, VS Practitioners, and VS Mass Submitters. Each of these entities is described below.

(a) M&P Sponsoring Organizations

Commencing with the GUST[3] plan submissions, the IRS no longer limited the types of organizations that were eligible to sponsor M&P Plans. Prior to 2000, Sponsoring Organizations were limited to:

- Banks
- Credit unions
- Insurance companies
- Regulated investment companies (mutual funds)
- Investment advisors that have an advisory contract with one or more regulated investment companies
- Principal underwriters that have a principal underwriting contract with one or more regulated investment companies
- IRS-approved non-bank trustees
- Trade or professional organizations

Effective with the GUST plan restatements, a Sponsoring Organization may include any person that (1) has an established place of business in the United States which is accessible during every business day and (2) represents to the IRS that it has at least 30 employer-clients each of which is reasonably expected to timely adopt the Sponsoring Organization's basic plan document. A Sponsoring Organization may request opinion letters for any number of basic plan documents and adoption agreements, provided the 30-employer requirement is met with respect to at least one

[3] The GUST amendments were a series of required amendments to all qualified retirement plans. "GUST" refers to the first letters of four of the six laws from which the required amendments are derived: (1) the Uruguay Round Agreements Act or the Uruguay Round of the General Agreement on Taxes and Tariffs ("GATT"); (2) the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"); (3) the Small Business Job Protection Act of 1996 ("SBJPA"); (4) the Taxpayer Relief Act of 1997 ("TRA '97"); (5) the Internal Revenue Service Restructuring and Reform Act of 1998; and (6) the Community Renewal Relief Act of 2000.

basic plan document. Notwithstanding the above, any person that has an established place of business in the United States which is accessible during every business day may sponsor a plan as a word-for-word identical adopter or minor modifier adopter of a plan of an M&P Mass Submitter, regardless of the number of employers that are expected to adopt the plan.

By submitting an application for an opinion letter for an M&P plan under Rev. Proc. 2005-16 (or by having an application filed on its behalf by an M&P Mass Submitter as required for a minor modifier), a person represents to the IRS that it is a Sponsoring Organization, as defined above, and agrees to comply with any requirements imposed on Sponsoring Organizations by such Revenue Procedure.

(b) M&P Mass Submitter

An "M&P Mass Submitter" is any person that (1) has an established place of business in the United States which is accessible during every business day and (2) submits opinion letter applications on behalf of at least 30 unaffiliated Sponsoring Organizations, each of which is sponsoring, on a word-for-word identical basis, the same basic plan document. An M&P Mass Submitter will be treated as an M&P Mass Submitter with respect to all its M&P plans, provided the 30 unaffiliated Sponsoring Organizations requirement is met with respect to at least one basic plan document. There is an exception for any M&P Mass Submitter that received a favorable TRA '86 opinion letter for a plan as an M&P Mass Submitter under the previous Rev. Proc. 89-9. Such M&P Mass Submitter will continue to be treated as an M&P Mass Submitter with respect to all its M&P plans, if it submitted applications on behalf of at least 10 Sponsoring Organizations, each of which is sponsoring, on a word-for-word identical basis, the same basic plan document.

(c) National Sponsoring Organization

A "National Sponsoring Organization" is a Sponsoring Organization that has either (a) 30 or more Adopting Employers in each of 30 or more states (treating, for this purpose, the District of Columbia as a state) or (b) 3000 or more Adopting Employers.

(d) Volume Submitter Practitioner

A "VS Practitioner" is any person that (1) has an established place of business in the United States, which is accessible during every business day and (2)

represents to the Service that it has at least 30 employer-clients, each of which is reasonably expected to timely adopt a plan that is substantially similar to the VS Practitioner's specimen plan. There is an exception in the case of money purchase pension plans, where the required number of employer-clients reasonably expected to timely adopt a substantially similar money purchase pension specimen plan is generally reduced to 10. A VS Practitioner may submit any number of specimen plans for advisory letters, provided the 30 employer requirement (or 10, if applicable) is separately satisfied with respect to each specimen plan. Notwithstanding the above, any person that has an established place of business in the United States which is accessible during every business day may sponsor a specimen plan as a word-for-word identical adopter of a specimen plan of a VS Mass Submitter, regardless of the number of employers that are expected to adopt the plan.

(e) VS Mass Submitter

A "VS Mass Submitter" is any person that (i) has an established place of business in the United States, which is accessible during every business day, and (ii) submits advisory letter applications on behalf of at least 30 unaffiliated practitioners each of which is sponsoring, on a word-for-word identical basis, the same specimen plan. A VS Mass Submitter may submit an advisory letter application on its own behalf as one of the 30 unaffiliated practitioners.

2. Adopting Employer

The Adopting Employer or "plan sponsor" is generally the corporation, unincorporated business or employee association adopting the plan.

3. Internal Revenue Service

The IRS is the agency that sets the requirements with regard to the M&P and VS programs, approves plan documents, and determines whether a Sponsoring Organization has satisfied its duties and obligations under the most current Revenue Procedure regarding the submission of M&P plan or Volume Submitter plan documents.

III.

LEGAL BACKGROUND

A. Legal Requirements for all Qualified Plans

In order for employer-sponsored retirement plans, such as 401(k) plans, profit-sharing plans and defined benefit pension plans (including so-called cash balance plans), to enjoy the tax benefits offered to those employers and to employees covered by those plans,[4] the Code imposes a complex set of rules, which are implemented through a series of regulations, rulings and other IRS guidance. These Code requirements include rules regarding (i) eligibility to participate, (ii) vesting of benefits, (iii) accrual of benefits or allocation of employer and employee contributions, (iv) prohibitions on discrimination in favor of highly-compensated employees, (v) distribution of benefits, (vi) use of plan assets for the exclusive benefit of plan participants, and (vii) obligations and timing of required amendments to the plans.

This series of lengthy and complex requirements imposed on qualified retirement plans, including the large number of permitted alternatives, requires knowledgeable assistance in the design, implementation and ongoing administration of those plans.

B. Document Approval Process

1. General Classification of Plans

From a document standpoint, generally, there are two classifications into which all qualified retirement plans can be divided: PAPs and individually designed plans ("IDPs"). PAPs are plans which are submitted to the IRS by the Sponsoring Organizations and receive an opinion letter or advisory letter pre-approving the plan's language.[5] An IDP is a plan which is specifically designed for one employer or a group of employers and then submitted to the IRS for a determination letter. The purpose of the document approval process is to provide employers and plans assurance that their plan document complies with the requirements of the Code and other IRS guidance.

M&P plans can be further divided into two sub-classes: standardized and nonstandardized. A standardized plan is an M&P plan which meets specific criteria outlined by the IRS. This type of plan restricts the choices that are available to Adopting

[4] The benefits include a permitted deduction to the employer upon the contribution, while deferring the income inclusion to the employees until distribution.

[5] As discussed below, some Adopting Employers also seek their own determination letter with respect to special provisions of the plan and non-discrimination issues.

Employers. For this reason, once a standardized M&P plan receives an opinion letter from the IRS, there is no need for an individual employer to request a determination letter. The IRS' opinion letter is all that is needed to provide that Adopting Employer assurance that the form of their plan is acceptable.

A standardized M&P plan must meet the following requirements:[6]

- The plan's eligibility and participation requirements must generally be extended to all employees except those who: (i) do not meet the age and service requirements, (ii) are nonresident aliens with no US source income, or (iii) are members of a collective bargaining unit.
- The plan's eligibility requirements may not be more favorable for highly compensated employees than other employees.
- Total compensation (e.g., exclusion of bonuses and/or overtime is not permitted) must be used in allocating contributions in a defined contribution plan or calculating benefits in a defined benefit plan. However, integration of the plan with Social Security is permitted.
- Only participants who terminate employment during the year and have less than 500 hours of service during the year may be excluded from an allocation or an accrual for such plan year.
- Unless the plan is a target benefit plan or a 401k/m plan, contributions or accruals must meet the design-based safe harbors of Code Section 401(a)(4).
- Crediting past service for participants must meet the safe harbor contained in Reg. Section 1.401(a)(4)-5(a)(3).

A non-standardized plan is an M&P plan which does not meet the standardized plan requirements. As such, a non-standardized plan may have many more options and choices available to the Adopting Employer. However, because of this, not only does the plan receive an M&P opinion letter from the IRS, but the Adopting Employer in many instances also must submit the plan along with the choices selected in the Adoption Agreement to the IRS for an individual determination letter.[7]

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[6] Rev. Proc. 2005-16, 2005-10 I.R.B. 674 at §4.10

[7] Under certain circumstances, an adopter of a non-standardized plan may get reliance from the Sponsoring Organization's opinion letter if the requirements of §19.02(2), (3), and (4) of Rev. Proc. 2005-16 are met.

A VS plan is a specimen or sample plan sponsored by a VS Practitioner, which is submitted to the IRS for its pre-approval.[8] If approved, the IRS will issue to the Sponsoring Organization an advisory letter. VS plans have greater flexibility and generally more options than are available in M&P plans. For example, Adopting Employers may vary their document and include provisions that are not part of the VS Practitioner's specimen plan and still be considered as an adopter of a VS plan. This is unlike the requirement for M&P plan adopters that the plan must be adopted word-for-word without any changes to the language in the plan. For an Adopting Employer to obtain reliance, the employer may be required to submit the plan to the IRS for an individual determination letter.[9]

2. Approval Process for PAPs and IDPs

The approval process for a PAP is based on a 6-year approval cycle.[10] Sponsoring Organizations were required to submit PAPs to the IRS for EGTRRA and other requirements (outlined in the 2004 Cumulative List)[11] by January 31, 2006. It is anticipated that those plans will be reviewed and approved by the IRS by January 31, 2008. It is then anticipated that the IRS will allow Adopting Employers to complete the adoption of these amended plans during the period ending January 31, 2010 (although the 6-year approval cycle contains the flexibility to extend that date through January 31, 2011). The next submission deadline for PAPs will be January 31, 2012. For certain intervening legislative changes and other guidance issued by the IRS, interim amendments may be required.

The determination letter process for IDPs is based on a 5-year rolling period.[12] These 5-year cycles are determined by the last digit of the employer's EIN. The cycles are based on the following schedule:

Year 1 - EINs ending in 1 & 6 (Cycle A)
Year 2 - EINs ending in 2 & 7 (Cycle B)
Year 3 - EINs ending in 3 & 8 (Cycle C)
Year 4 - EINs ending in 4 & 9 (Cycle D)

8 *Id* at §13.01
9 Like non-standardized plans, an Adopting Employer need not submit for an individual determination letter if the requirements of §19.02(2), (3), and (4) of Rev. Proc. 2005-16 are met.
10 Rev. Proc. 2005-66, 2005-37 I.R.B. 509
11 Notice 2004-84, 2004-52 I.R.B. 1030
12 Rev. Proc. 2005-66 at §9.01

Year 5 - EINs ending in 5 & 0 (Cycle E)

The deadline for Cycle A submissions was January 31, 2007. Cycle B plans will be due on January 31, 2008, and so on. There are also special exceptions for certain types of plans, such as multiple employer plans, collectively bargained plans, and plans maintained by controlled groups of businesses. Employers are also permitted to submit "off-cycle;" however, in many instances these plans will only be reviewed after the "on-cycle" plans have been completed.

An employer that maintains an IDP and desires to "convert" to a PAP may be required to execute, along with the Sponsoring Organization, an IRS Form 8905 no later than the end of their submission cycle. This will permit the employer to adopt the PAP indicated on the Form 8905, when the PAP receives its approval, in lieu of adopting and submitting the IDP for a determination letter during its submission cycle.

C. Qualified Plan Failures

1. Types of Plan Failures

A qualification or plan failure is any failure that adversely affects the tax qualified status of a plan. Plan failures may be divided into four classifications:[13] (i) plan document failures, (ii) operational failures, (iii) demographic failures, and (iv) employer eligibility failures.

Plan document failures include plan provisions (or the absence of plan provisions) that, on their face, violate the requirements of Section 401(a) or Section 403(a) of the Code. For example, the failure of a plan to be amended to reflect a new qualification requirement within the plan's applicable remedial amendment period under Section 401(b) is considered a plan document failure. Additionally, a "non-amender" (an employer that has not adopted amendments required by legislation or IRS guidance by the required date) would also be considered a plan document failure.

An operational failure is a type of plan failure that arises solely from the failure to administer the plan in accordance with plan provisions. For example, allowing an "in-service" distribution to a plan participant in contravention of the plan's provisions is considered to be an operational failure. A plan does not have an operational failure to the extent the plan is permitted to be amended retroactively pursuant to Section 401(b)

[13] Rev. Proc. 2006-27, 2006-2 I.R.B. 945, §5.01(2)

or another statutory provision to reflect the plan's operations. However, if within the applicable remedial amendment period under Section 401(b), a plan has been properly retroactively amended for statutory or regulatory changes, but during that retroactive period the amended provisions were not followed, then the plan is considered to have an operational failure.

A demographic failure is the type of plan failure which results from violations of Section 401(a)(4), Section 401(a)(26) or Section 410(b), which are not operational failures or employer eligibility failures. For example, a plan's failure to meet the minimum coverage requirements of Section 410(b) is a demographic failure. Generally, the correction of a demographic failure requires a corrective amendment to the plan document expanding eligibility or benefits for plan participants.

The final type of failure is an employer eligibility failure. These failures result when an employer was not eligible to adopt a certain type of plan. For example, state and local governments are ineligible to adopt 401(k) plans.

2. Employee Plans Compliance Resolution System (EPCRS)

EPCRS is a collection of three programs, which allows employers, Sponsoring Organizations, third party administrators, or an entity that provides administrative services for a qualified plan, 403(b), SEP, or SIMPLE to correct plan failures and thereby continue to provide plan participants with retirement benefits on a tax-favored basis. The current requirements of EPCRS are set forth in Rev. Proc. 2006-27. The three programs[14] include:

- Self-Correction Program (SCP) – The plan sponsor discovers the failure(s) and corrects the failure(s) without IRS involvement. Generally, this program is available to correct insignificant operational failures or any other failure discovered and corrected by the end of the second plan year following the year in which the failure occurred. This program is available even for plans with insignificant failures that are under audit by the Employee Plans Division of the IRS.
- Voluntary Correction Program (VCP) – The plan sponsor discovers the failure(s) and corrects the failure(s) with IRS approval. A compliance fee is

[14] *Id* at §4.01

due based on the number of participants in the plan. This program is generally available for operational failures, document failures, demographic failures, and employer eligibility failures.

- Audit Closing Agreement Program (Audit CAP) – This program is an option that is available for the purpose of resolving qualification failures identified by the IRS during an audit of the plan. All types of failures are available for this program. Under this program, the plan sponsor is required to pay a negotiated monetary sanction which represents a negotiated percentage of the tax the IRS could collect if it disqualified the plan.

The general principles of EPCRS are as follows:[15]

- Sponsors of qualified retirement plans, 403(b)s, SEPs, and SIMPLEs should be encouraged to establish administrative practices and procedures that ensure that plans are operated properly in accordance with the tax qualification requirements.
- Sponsors and other administrators of qualified retirement plans should maintain plan documents satisfying the tax qualification requirements.
- Sponsors should make voluntary and timely correction of any plan qualification failures, whether involving discrimination in favor of highly compensated employees, plan operations, the terms of the plan document, or adoption of a plan by an ineligible employer. Timely and efficient correction protects participating employees by providing them with their expected retirement benefits, including favorable tax treatment.
- Voluntary compliance is promoted by providing for limited fees for voluntary corrections approved by the IRS, thereby reducing employers' uncertainty regarding their potential tax liability.
- Fees and sanctions should be set at levels which encourage prompt correction.
- Sanctions for failures identified during an audit should be reasonable in light of all circumstances.

[15] *Id* at §1.02

- The administration of EPCRS should be uniform and consistent.

IV.

PRE-APPROVED PLAN BACKGROUND

A. History of Pre-Approved Plan Program

M&P plans conceptually date back to the early 1960's.[16] Originally, a master or prototype plan was a standardized form of a qualified plan that could only be made available by a trade or professional association, bank, insurance company, or regulated investment company, and was intended to be used by groups of self-employed individuals.[17] Master plans were those standardized form plans that had a related form of trust or custodial agreement, that was administered by a bank or insurance company which acted as a funding medium to provide the benefits on a standardized basis; whereas a prototype plan need not have included a form of trust agreement, was only for use by employers without modification, and was not administered by the Sponsoring Organization.[18] Rulings as to the acceptability of the M&P plans were made by the National Office of the IRS, and a separate determination letter was required as to the qualification of the plan as adopted by a particular employer.[19] Effective August 1, 1964, M&P plans were required to be filed with the District Office for opinion letters as to the acceptability of the form of plan,[20] but effective January 3, 1972, M&P plans seeking opinion letters were again required to be filed with the National Office.[21]

After receiving repeated requests to create procedures for processing M&P plans to be adopted by corporate employers (as opposed to only employers with self-employed individuals), the IRS promulgated procedures for obtaining opinion letters as to the acceptability of M&P plans that did not include self-employed individuals ("Corporate M&P Plans").[22] Under Rev. Proc. 68-45, a variable form plan was introduced which permitted an employer to select options related to basic plan provisions, but was only

[16] Rev. Proc. 63-23, 1963-2 C.B. 757 (describing "the general procedures of the various offices of the Internal Revenue Service for issuing determination letters relating to the initial qualification of pension, annuity, profit-sharing, and bond purchase plans which cover self-employed individuals, under sections 401(a) and 405(a) of the Internal Revenue Code of 1954 . . . ").
[17] *Id.* at §2.02
[18] *Id.*
[19] *Id.* at §2.03
[20] Rev. Proc. 64-30 §3.02, 1964-2 C.B. 944
[21] Rev. Proc. 72-7 §2.01, 1972-1 C.B. 715
[22] Rev. Proc. 68-45, 1968-2 C.B. 957

available to Corporate M&P Plans. From that point forward, the IRS issued separate revenue procedures for Corporate M&P Plans and those M&P plans that included self-employed individuals. By 1972, the only distinguishing characteristic between a master plan and a prototype plan was that a master plan specified the funding organization in the sponsor's application, whereas a prototype plan did not, and instead the Adopting Employer's application specified the funding organization.[23]

After the Code was amended by the Employee Retirement Income Security Act of 1974 ("ERISA"), the IRS ceased reviewing requests for the issuance of opinion letters for M&P plans and determination letters for the adoption of such plans by employers until guidelines could be developed in accordance with the new requirements.[24] The guidelines for defined contribution Corporate M&P Plans[25] and M&P plans for self-employed individuals[26] were issued in 1975. They were somewhat limited and prohibited the issuance of opinion and determination letters with respect to certain types of money purchase pension plans or those with certain provisions.[27] The IRS further required for the first time that employers requesting determination letters for M&P plans notify interested parties of the filing.[28] Later that year, the IRS expanded the program by issuing guidelines that allowed for the issuance of an opinion letter or determination letter for Corporate M&P Plans that were either of a defined contribution or defined benefit nature.[29]

Beginning in March of 1976, the IRS developed a procedure for law firms to obtain approval for a defined contribution plan form which the law firm contemplated using in its submission of determination letters for multiple Adopting Employers. These were referred to as "pattern plans."[30] Pattern plans could not include target benefit, stock bonus, bond purchase, or employee stock ownership plans, or plans adopted by partnerships,[31] and a law firm was limited to two district-approved plans for each type of

[23] Rev. Proc. 72-8 §3.02, 1972-1 C.B. 716
[24] Rev. Proc. 74-40, 1974-2 C.B. 4941
[25] Rev. Proc. 75-47, 1975-2 C.B. 581
[26] Rev. Proc. 75-51, 1975-2 C.B. 590
[27] *Supra* notes 10-11
[28] *Id*.
[29] Rev. Proc. 75-52, 1975-2 C.B. 592
[30] Rev. Proc. 76-15, 1976-1 C.B. 553
[31] *Id.* at §3.01

defined contribution plan allowed under Rev. Proc. 76-15.[32] Additionally, the IRS required that the law firm requesting a notification letter as to the acceptability of the pattern plan submit the request simultaneously with an Adopting Employer's request for a determination letter.[33]

In 1977, the IRS created "field prototype plans;" a defined contribution or defined benefit plan that did not include self-employed individuals, submitted by a firm[34] that had at least 10 Adopting Employers in each region for which a notification of acceptability was sought.[35] Unlike pattern plans, field prototype plans did not have to be submitted simultaneously with an Adopting Employer's request for a determination letter,[36] and there was not a limit on the number of field prototype plans a firm could have for each type of plan.[37] Types of allowable plans for the field prototype plan program included unit benefit, fixed benefit, flat benefit, profit-sharing, stock bonus, money purchase, bond purchase, and employee stock ownership plans.[38] Requests for notification letters and determination letters for field prototype plans were required to be submitted to District Offices.[39]

Following the issuance of final ERISA regulations, the IRS issued a "simplified procedure for requesting opinion, notification and determination letters" in connection with M&P, pattern, and field prototype plans.[40] While Rev. Proc. 79-28 did nothing more than refer the sponsors of such plans to the previously issued applicable Revenue Procedure, it was the first instance in which all types of PAPs had been addressed collectively in the same Revenue Procedure; a foreshadowing of what was to come. Again, in the spirit of simplification, the IRS issued Rev. Proc. 80-29 to address both corporate M&P plans as well as "H.R.-10" plans, M&P plans that included self-employed individuals.[41] While the two types of M&P plans were addressed in a single Revenue Procedure, there were still distinctions between H.R.-10 M&P plans and Corporate M&P

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32 *Id.* at §4.01
33 *Id.* at §5.01
34 A firm is an entity "other than a trade or professional association, bank, insurance company, or regulated investment company." *Id.* at §3.01
35 Rev. Proc. 77-23, 1977-2 C.B. 530
36 *Id.* at §5.01
37 *Id.* at §4.01
38 *Id*.
39 *Id*.
40 Rev. Proc. 79-28, 1979 C.B. 569
41 1980-1 C.B. 681

Plans. One of the distinctions was that an employer who adopted the H.R.-10 M&P plan received automatic reliance on the plan (i.e., assurance that any disqualification of the plan would not be retroactive), whereas an employer who adopted a Corporate M&P Plan had to obtain a favorable determination letter to receive reliance on the M&P plan.[42] Subsequently, the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)[43] largely eliminated the distinctions between Corporate M&P Plans and H.R.-10 M&P plans.[44] As a result, the IRS issued Rev. Proc. 84-23 and removed the distinction between the two types of M&P plans, referring to them collectively as "M&P plans."[45] Under Rev. Proc. 84-23, an employer was entitled to rely on a favorable opinion letter issued for a standardized form of M&P plan the employer had adopted, without having to obtain a determination letter.[46] Where an employer adopted an M&P form of plan other than a standardized form, a determination letter was still required, as the IRS needed to address the particular facts and circumstances of the Adopting Employer.[47]

Rev. Proc. 84-23 also marked the introduction of the Mass Submitter Program.[48] Under this program, an entity faced reduced procedural requirements and expeditious processing; if it could establish that at least ten Sponsoring Organizations would sponsor the identical M&P plan. Sponsoring Organizations only included banks, insured credit unions, insurance companies, regulated investment companies, certain investment advisors, and certain principal underwriters.[49] The Mass Submitter Program was intended as an experimental program to reduce the IRS's paperwork burden in addressing the required plan amendments to comply with TEFRA's qualification changes.[50]

Following the changes to qualification requirements imposed by the Tax Reform Act of 1986,[51] which had a specific provision requiring the IRS to accept applications for

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42 Rev. Proc. 84-23, 1984-1 C.B. 457
43 Pub. L. 97-248, 1982-2 C.B. 462
44 Rev. Proc. 84-23 §3.01
45 *Id.* at §4.01-02
46 *Id.* at §3.01
47 *Id*.
48 *Id.* at §17
49 *Id.* at §17.01-03
50 *Id.* at §3.06
51 Pub. L. No. 99-514, 100 Stat. 2085 (1986)

opinion letters for M&P plans that included cash or deferred arrangements (CODAs),[52] the IRS issued model amendments for Sponsoring Organizations to use to conform their plans to the new law.[53] Rev. Proc. 87-18 set forth the procedure for submitting the amendments to M&P plans and included priority handling for Mass Submitters.[54]

In the late 1980's, the IRS instituted a fee schedule for opinion and determination letters[55] as required by the Revenue Act of 1987.[56] Pursuant to public comment regarding the excessive nature of the user fee program for Mass Submitter plan adoptions and VS plans,[57] the IRS reduced the fees for those two programs.[58] The fee for a word-for-word adoption of a Mass Submitter's plan was reduced from $100 to $50, with a $15,000 cap on the aggregate amount a Mass Submitter paid within a calendar year.[59] Furthermore, under the revised schedule, a VS plan was no longer subject to the fees for individually designed plans, but instead was assessed a fee of $1,000 for the lead plan and $100 for each subsequent adoption of the VS plan.[60] In 1989, the Mass Submitter program became a permanent program for expedited review of plans that complied with the procedures set forth in Rev. Proc. 89-9.[61]

Also, in 1989, the IRS created a program for "regional prototype plans," which lessened the requirements otherwise applicable to uniform plans and allowed practitioners to sponsor M&P plans, in addition to institutional sponsors.[62] Regional prototype plans were not required to use the top-heavy vesting requirements contained in Section 416 of the Code in all cases, and adopters of regional prototype plans were

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52 *Id.* at §1142. Previously, the IRS would not issue opinion letters with respect to plans containing CODAs as described in Section 401(k) of the Code. *See* Rev. Proc. 84-23 §8.033, 1984-1 C.B. 457.

53 Notice 87-33, 1987-1 C.B. 380 (containing model amendments for M&P plans to comply with the qualification requirements under the Tax Reform Act of 1986); Notice 87-34, 1987-1 C.B. 390 (containing a model amendment for sponsors of M&P plans to include a CODA).

54 1987-1 C.B. 709. Mass Submitters were those entities that had previously applied for and received favorable opinion letters on a profit-sharing plan for ten or more qualified sponsoring organizations. *Id.* at §5.01

55 Rev. Proc. 88-8, 1998-1 C.B. 628

56 Pub. L. 100-203 § 10511

57 Rev. Proc. 89-4 §6.02, 1989-1 C.B. 767 (defining a volume submitter plan as "a pension, profit-sharing or stock bonus plan the form of which meets certain criteria established by an individual key district which is submitted pursuant to procedures established by the key district for filing determination letter applications under the district's volume submitter program"). Rev. Proc. 90-17 §6.02(b), 1990-1 C.B. 479 defines a volume submitter specimen plan as a volume submitter plan "that is submitted to the key district office by a practitioner who certifies that no fewer than 30 employers within any two regions of the Service are expected to adopt a plan that is substantially identical to the specimen plan following the district office's approval of the specimen plan."

58 *Id.* at §§2.02-03

59 *Id.* at §2.02

60 *Id.* at §2.03

61 1989-1 C.B. 780

62 Rev. Proc. 89-13, 1989-1 C.B. 801

able to retain their prototype status and reliance following changes in the law if certain requirements were met.[63] Additionally, the regional prototype plan was intended to increase flexibility for Adopting Employers and provide reciprocity among IRS regions once a plan was approved in one region.[64] A sponsor of a regional prototype plan was defined as a firm[65] which "(1) has an established place of business in the United States where it is accessible during every business day, and (2) either has at least 30 clients that have their principal place of business within the jurisdiction of not more than two regions of the IRS and are expected to adopt the sponsor's regional prototype plan, or has at least three clients that are expected to adopt a 'mass submitter regional prototype plan.'"[66]

The regional prototype plan program and the M&P plan program operated separately, each being amended a number of times thereafter as procedural requirements changed in accordance with the law, until the two were finally unified under a single M&P plan program in 2000.[67] Stating that it was no longer practical to maintain separate programs, the IRS issued Rev. Proc. 2000-20, setting forth the "Unified Program," creating one set of requirements and procedures for all M&P plan sponsors and expanding the availability of options previously available to only one program to make them universally available under the Unified Program.[68] The Unified Program dispensed with the additional requirements that were formerly applied to M&P plans sponsored by trade or professional organizations, expanded sponsorship eligibility to include the criteria under both the M&P plan program[69] and the regional prototype program,[70] and allowed any person with an established place of business in the U.S. to sponsor an M&P plan that was identical or a minor modification of a mass submitter

63 *Id.* at §3.01
64 *Id*.
65 "[A] partnership or corporation at least one of whose members or employees is authorized to practice before the Internal Revenue Service with respect to employee plans matters, or an individual who is so authorized." *Id*. at § 4.03
66 *Id.* at §4.02
67 Rev. Proc. 2000-20, 2000-1 C.B. 553
68 As way of example, the Revenue Procedure explains that while M&P sponsors were previously allowed to sponsor paired defined benefit and defined contribution plans, regional prototype sponsors could not, but under the Unified Program, all sponsors can sponsor paired defined benefit and defined contribution plans. *Id.* at § 3.04
69 Rev. Proc. 89-9, 1989-1 C.B. 780
70 Rev. Proc. 89-13, 1989-1 C.B. 801

plan, regardless of how many employers were expected to adopt the plan.[71] Yearly notices to the IRS and each Adopting Employer, previously required of Sponsoring Organizations,[72] were eliminated and replaced with a simplified requirement that all M&P plan Sponsoring Organizations maintain a list of Adopting Employers and that Sponsoring Organizations supply the list to the IRS upon request.[73] The Unified Program also made uniform the Mass Submitter program by creating a single definition of a mass submitter as any person who could establish that at least 30 unaffiliated adopting sponsors would adopt the basic plan document, while allowing those mass submitters who obtained an opinion letter as a mass submitter of M&P plans under Rev. Proc. 89-9[74] to generally qualify as a mass submitter under the Unified Program.[75] Finally, as was previously the case for standardized M&P plans, under the Unified Program, opinion letters issued for all standardized plans, including regional prototype plans, could be relied upon by an Adopting Employer except in certain situations.[76]

Despite the unification of procedures that was occurring during that period, the VS program remained separate. The VS program emerged in the 1980s and was first addressed by the IRS in Rev. Proc. 89-4.[77] A VS plan was a "pension, profit-sharing or stock bonus plan, the form of which met certain criteria established by an individual key district and which was submitted pursuant to procedures established by the key district for filing determination letter applications under the district's VS program."[78] Pursuant to the program, a practitioner could submit a "lead" or "specimen" plan only if he could certify at the time of the submission that in the future he would submit no fewer than 30 determination letter requests on behalf on employers who have adopted a plan substantially identical to the lead plan. [79] Unlike M&P plans, VS plans allowed the Sponsoring Organization to delete any plan provisions from the lead plan that did not

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71 Rev. Proc. 2000-20 at §3.06
72 Rev. Proc. 89-13 at §14.05
73 Rev. Proc. 2000-20 at §3.07
74 "[A]ny person that received a favorable TRA '86 opinion letter for a plan as a mass submitter under Rev. Proc. 89-9 will continue to be treated as a mass submitter if it submits applications on behalf of at least 10 sponsors (regardless of affiliation) each of which is sponsoring, on a word-for-word identical basis, the same basis plan document and one or more of the adoption agreements associated with that plan document." Rev. Proc. 2000-20 at §4.10
75 Rev. Proc. 2000-20 at §3.08
76 *Id.* at § 6
77 1989-1 C.B. 767
78 *Id.*
79 *Id.* at §6.02

apply and were generally more compact and simpler to use than their M&P counterparts.[80] While the VS program was maintained through separate programs at each Key District Office, it was centralized in 1998, and all VS specimen plans were required to be filed with the Volume Submitter Coordinator in the Ohio Key District Office.[81]

Since 2000, there have been minor amendments to the Unified Program, most notable of which was in 2005, when the IRS issued Rev. Proc. 2005-16, attempting to simplify and combine the otherwise separate programs for PAPs.

B. Current Requirements for Pre-Approved Plans

Rev. Proc. 2005-16 sets forth the IRS' current procedures for issuing opinion and advisory letters regarding the qualification of PAPs under Sections 401(a) and 403(a) of the Code.[82] It delineates the requirements and responsibilities of Sponsoring Organizations and Adopting Employers in connection with the establishment, qualification and operation of PAPs.

Some differences between an M&P plan and a VS plan continue under Rev. Proc. 2005-16.[83] An M&P plan generally consists of a basic plan document and an Adoption Agreement, with no amendments permitted except for choosing among options permitted in the Adoption Agreement. A VS plan may consist of a basic plan document and Adoption Agreement or a single plan document (referred to as an individually-designed format) that can be amended on a limited basis as long as the extent and complexity of the amendments are not inconsistent with the purposes of the VS program. The Rev. Proc. expanded the program so that it can apply to a greater number of practitioners sponsoring VS plans ("VS Practitioners") and M&P Plan Sponsoring Organizations who would like to participate in PAP programs and allows somewhat more flexibility by specifying provisions that can be amended without

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80 Steven J. Franz et al., 401(k) Answer Book 3-4 (2005 ed.)

81 Rev. Proc. 98-6, 1998-1 I.R.B. 183

82 The Service maintains two separate programs- the M&P Program and VS Program. Under Rev. Proc. 2005-16, the Service states that "the narrowing of the differences between the programs makes it appropriate to set forth the rules for both programs in a single revenue procedure." Rev. Proc. 2005-16at §3.01

83 The ACT considered a recommendation to eliminate all distinctions between the two programs. While it recognizes the historical aspects of each program, it has observed that certain complexities (and resulting plan failures) concerning M&P plans could be eliminated, if all pre-approved plans were granted the flexibility provided in a VS plan.

jeopardizing qualification of the plan.[84] Two of the most significant changes brought about by Rev. Proc. 2005-16 include the ability of Adopting Employers with non-standardized M&P plans to adopt an allocation formula designed to be cross-tested for nondiscrimination on the basis of equivalent benefits under § 1.401(a)(4)-8 of the Code and the ability of VS Practitioners to amend VS plans on behalf of Adopting Employers.[85]

1. M&P Plans

(a) Plan Document Requirements

Section 5 of the Rev. Proc. generally contains a description of the provisions that must be included in every M&P plan document and Adoption Agreement. For example, Section 5.01 requires the plan to provide a procedure for the Sponsoring Organizations to adopt amendments to the plan documents so that changes in the Code, regulations, revenue rulings and other guidance issued by the IRS, or corrections of prior plan documents may be implemented on behalf of all Adopting Employers, without any affirmative action on their part.

Certain plan document requirements (anti-cutback provisions and top-heavy requirements) are applicable to all M&P plans, while others are only applicable to standardized (i.e., no last day rule permitted for receiving a contribution) or non-standardized plans (i.e., the plan must provide for a "total compensation" definition option). As noted previously, standardized plans are plans that by design must meet the Code's eligibility, contribution or benefit, and non-discrimination requirements, thereby assuring its Adopting Employers of "reliance" without the need for an individual determination letter.[86] Non-standardized plans are any M&P plans that are not a standardized plan.[87]

In the event of changes in the qualification requirements resulting from legislation or regulatory guidance issued by the IRS, M&P plans must be amended by the Sponsoring Organization to retain M&P status and, if necessary, also by the Adopting Employer to retain the plan's qualified status. Generally, the IRS announces

[84] Rev. Proc. 2005-16 at §4.10
[85] *Id* at §4.11
[86] *Id* at §4.10
[87] *Id* at §4.11

the date by which the M&P plan must be amended by the Sponsoring Organization and if necessary by the Adopting Employer.

(b) M&P Adoption Agreement

The Adoption Agreement is the portion of the M&P plan that contains basic information about the plan and the Adopting Employer, as well as the variable or optional provisions selected by the Adopting Employer. The Rev. Proc. delineates certain Adoption Agreement requirements for all M&P plans and others that are applicable to only standardized or non-standardized M&P plans.

All M&P Adoption Agreements must:[88]

- include a dated Adopting Employer signature line;
- state that it can be used with one and only one specific basic plan document;
- contain a cautionary statement to the effect that the failure to properly fill out the Adoption Agreement may result in the failure of the plan to qualify;
- contain a statement that provides that the Sponsoring Organization will inform the Adopting Employer of any amendments made to the plan or of the discontinuance or abandonment of the plan; and
- include the Sponsoring Organization's name, address and telephone number for inquiries by Adopting Employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the opinion letter.

Additionally, every M&P Adoption Agreement must include, in close proximity to the signature blank, a statement that describes the limitations of employer reliance on an opinion letter without a determination letter and the circumstances under which an Adopting Employer will have no reliance without a determination letter. The limitations for standardized and non-standardized plans are different and, as such, each must have its own cautionary statement.[89]

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[88] *Id* at §5.11 and §5.12. *See also*, Defined Contribution Listing of Required Modifications and Information Package (LRM) issued August 2005, question 85.

[89] *Id* at §5.10. *See also*, Defined Contribution Listing of Required Modifications and Information Package (LRM) issued August 2005, questions 90 and 92.

(c) M&P Sponsor Recordkeeping and Notification Requirements

The Rev. Proc. prescribes a series of record keeping and notification requirements for Sponsoring Organizations in order to obtain an opinion letter and maintain an M&P plan. These requirements are generally designed to assure that a Sponsoring Organization keeps its Adopting Employers apprised of plan document changes and, when necessary, appropriate action is taken by an Adopting Employer. These requirements include:

- making reasonable and diligent efforts to ensure that each Adopting Employer which, to the best of its knowledge, continues to maintain the plan as an M&P plan, amends its plan when necessary;[90]
- making reasonable and diligent efforts to ensure that Adopting Employers have actually received and are aware of all plan amendments and that such Adopting Employers complete and sign new Adoption Agreements when necessary;[91]
- furnishing each Adopting Employer with a copy of the approved plan, subsequent amendments, and the most recently issued IRS opinion letter;[92]
- notifying each Adopting Employer that a request for an opinion letter has been withdrawn and that the Adopting Employer will be deemed to have an IDP;[93]
- maintaining, for each of its plans, a record of the names, business addresses, and taxpayer identification numbers of all Adopting Employers that have adopted the plan. The Sponsoring Organization need not maintain records for Adopting Employers that, to the best of its knowledge, ceased to maintain the plan as an M&P plan more than three years earlier. Upon written request, a Sponsoring Organization must provide this list to the IRS;[94]

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90 *Id. a*t §8.02
91 *Id.* at §5.01
92 *Id.* at §7.06
92 *Id.* at §9.01
93 *Id.* at §9.01
94 *Id.* at §11.02

- notifying the Adopting Employers that its plan may no longer be qualified, the adverse tax consequences that may result from loss of the plan's qualified status, and the availability of EPCRS if the Sponsoring Organization reasonably concludes that an Adopting Employer's M&P plan may no longer be a qualified plan;[95]
- notifying the IRS in writing of an approved M&P plan that is no longer used by any Adopting Employer and which the Sponsoring Organization no longer intends to offer for adoption;[96]
- informing each Adopting Employer that the form of the plan has been terminated, that the plan will become an IDP (unless the employer adopts another approved M&P plan), and that any reliance will not continue if there is a change in law or other change in the qualification requirements, if a Sponsoring Organization intends to abandon its M&P plan; and after informing all Adopting Employers, also notifying the IRS in writing;[97] and
- notifying the Adopting Employers of the revocation of its opinion letter and how the revocation affects any reliance on the previously issued opinions.[98]

The Rev. Proc. further provides that a Sponsoring Organization's failure to comply with any requirement delineated, including the notice and recordkeeping requirements, may result in the loss of the ability to maintain an M&P plan or the revocation of an existing opinion letter. As noted hereinafter, the ACT is unaware of any IRS audit program designed to determine a Sponsoring Organization's level of compliance, or any sanction taken against a Sponsoring Organization for any failure.

(d) M&P Plan Adopting Employers

Under the Rev. Proc., the requirements for Adopting Employers generally consist of following the procedures provided by the Sponsoring Organization with regard to plan documents, amendments and operation. Adopting Employers must complete and sign the Adoption Agreement upon first adopting the plan, complete and sign a new

[95] *Id.* at §8.05
[96] *Id.* at §10.01
[97] *Id.* at §10.02
[98] *Id.* at §22

Adoption Agreement if the plan has been restated and complete and sign a new signature page if modifications of any prior elections are made in the Adoption Agreement. Additionally, Adopting Employers must follow directions provided by the Sponsoring Organization with regard to the timely adoption of amendments to comply with new legislation and new guidance issued by the IRS. Regardless of when amendments are required to be made, Adopting Employers must operationally comply, as of the applicable effective date, with such legislation and guidance.

2. Volume Submitter Plans

(a) Plan Document Requirements

As noted above, a VS plan may either take the form of a single integrated document or an Adoption Agreement paired with a basic plan document. Many of the plan provisions required for M&P plans are also required in VS plans.[99] Additionally, VS Practitioners are required to amend their specimen document from time to time to comply with legislative changes, and if necessary, the Adopting Employer must also adopt the amendment to maintain the plan's qualified status. The principal difference between the VS and M&P programs is the ability of Adopting Employers to modify provisions that are contained in the VS specimen document or include additional provisions that were not in the VS specimen document and still qualify as a VS plan.[100]

A VS plan may, but is not required to, include a provision that authorizes the VS Practitioner to amend the plan on behalf of Adopting Employers, without affirmative action on their part, so that changes in the Code, regulations, revenue rulings, other statements published by the IRS (including model, sample or other required good faith amendments that specifically provide that their adoption will not cause such plan to be individually designed), or corrections of prior approved plans may be applied to those Adopting Employers. By taking this action, as noted below, the VS Practitioner subjects itself to substantially greater notice and recordkeeping responsibilities.

(b) VS Practitioner Recordkeeping and Notification Requirements

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[99] *Id.* at §14

[100] Form 5307, Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans provides that the form may not be used if the Adopting Employer of an M&P plan amends the plan other than through the choice of elections offered in the Adoption Agreement (and thus be considered an IDP). On the other hand, the form further provides that in the case of a VS plan, the Adopting Employer must submit a written statement which delineates any modifications made to the VS specimen plan (and thus retain its VS status).

Generally, VS Practitioners have few ongoing obligations with respect to their Adopting Employers, although "good practice" dictates that they continue to apprise Adopting Employers of required plan changes. In instances, however, where the VS Practitioner's plan provides a right of the VS Practitioner to adopt plan amendments on behalf of their Adopting Employers, the Rev. Proc. now imposes on the VS Practitioner substantially the same notification and recordkeeping requirements as those delineated in Section IV.B.1(c) above with regard to M&P plans.[101]

V.

DATA GATHERING PROCESS

Through anecdotal evidence and the observations of ACT members[102] at the outset of this project, it was believed that adopters of PAPs generally maintained lower levels of compliance than adopters of IDPs. The ACT, however, recognized that it could not rely upon its own experiences and observations, but instead should obtain independent verification to sustain this premise. Ideally, empirical data already existed or could be developed. Unfortunately, the ACT quickly determined that neither the IRS nor any other constituency could provide statistical information.

The ACT then concluded that the best available evidence would have to be gathered through a process which engaged the members of each of the PAP constituencies and obtained focused anecdotal evidence of the most frequent plan failures they encountered and their recommendations for improving compliance. As discussed below, the collection of background information focused on three communities involved in the design, operation and regulation of PAPs, including (1) Sponsoring Organizations, (2) Adopting Employers and practitioners who assist them in the adoption process and/or administration of their plan, and (3) the IRS. The following is a summary of the ACT's data gathering efforts:

A. Sponsoring Organizations

The ACT believed that Sponsoring Organizations would be the community best able to provide information and help provide suggestions for formulating recommendations. To that end, on October 23, 2006, the ACT met in Washington with representatives of 13

[101] Rev. Prov. 2006-16 at §15.06

[102] The ACT project members are all experienced retirement plan practitioners.

institutional organizations.[103] Entities that attended included brokerage firms, insurance companies, mutual fund companies, trade associations, third party administrators, and benefits counsel. With a broad cross section of attendees, the ACT recognized that Sponsoring Organizations were keenly sensitive to the issues related to the ACT's project. While the participants expressed numerous and varied concerns regarding the M&P program, including very thoughtful technical comments regarding the operation of M&P plans, certain basic themes, which are discussed below, emerged from the discussion.

B. Adopting Employers and Practitioners

The ACT considered it important to solicit information from Adopting Employers of PAPs. Unfortunately, this proved extremely difficult. To directly reach Adopting Employers, the ACT placed an article in the EP's *Retirement News for Employers*. The article simply inquired about the assistance Adopting Employers received in adopting and administering their PAPs, the difficulty they encounter in complying with the IRS' requirements and any recommendations they would make to improve the PAP system. Only three responses were received and none provided a sufficiently meaningful comment or recommendation to be relied upon.

As an alternative to a direct solicitation of the views of Adopting Employers, the ACT approached various organizations representing small businesses to determine if they either had empirical data of their own or would allow the ACT to survey its membership with respect to their experiences with PAPs. Here again, the ACT failed to find an effective means of surveying Adopting Employers due to the reluctance of these organizations to grant the ACT access to its membership.

At this juncture, the ACT determined that the next most effective means of surveying this constituency would be to survey practitioners who assist Adopting Employers in adopting and administering PAPs. To that end, the ACT posted a survey on the BenefitsLink[104] web site (the survey and results are available at

[103] The ACT extends its gratitude to the representatives of Association for Advanced Underwriting, Capital Research & Management Co., Fidelity, Investment Company Institute, Merrill Lynch, NTSAA, Oppenheimer Funds, Principal Financial Insurance Co., Prudential, Retirement Plan Resources, Securities Industry Association, The Vanguard Group, and Wolff, Block, Schorr and Solis-Cohn, LLP for their assistance in providing information and insight used in the preparation of this report.

[104] The ACT extends its gratitude to Dave Baker of BenefitsLink, who assisted with the publication of this survey and the tabulation of its results.

http://benefitslink.com/cgi/surveys/act-survey-results.cgi). BenefitsLink is a web site that caters to the employee benefits community. It is a widely recognized source of benefits information and also offers a forum for discussion and analysis of various retirement plan related issues. The site is generally frequented by professionals who provide legal counsel or administrative and testing services to Sponsoring Organizations, as well as employers maintaining qualified retirement plans.

In order to survey this group, the ACT developed and posted three simple questions.

- What are the most common plan failures you encounter, when Adopting Employers utilize a PAP?
- Do you believe that plan failures are less likely to occur, just as likely to occur, or more likely to occur when Adopting Employers utilize a PAP?
- What recommendations do you have for improving compliance and reducing the most common plan failures for Adopting Employers utilizing PAPs?

110 individuals responded to the ACT's survey. While most of the responders were not Adopting Employers, the practitioners who did respond were professionals who work closely with such employers and were therefore familiar with the issues confronting them.

C. The IRS

Finally, the ACT solicited the views of the IRS. This process involved holding in-depth interviews with senior members of the EP leadership team,[105] the leadership of the EP Determinations Group and the manager of the EPCU group,[106] as well as surveying EP audit agents as to their views. The ACT met with senior EP personnel on July 31 and August 1, 2006 and with the EP Determinations Group on January 8, 2007.

[105] The ACT extends its gratitude to Carol Gold, Former Director, Employee Plans; Joseph Grant, Director, Employee Plans; Michael Jullianelle, Former Director, EP Examinations; Mark O'Donnell, Director, EP Customer Education & Outreach; Martin Pippins, Manager, EP Technical Guidance & Quality Assurance; and Joyce Kahn, Manager, EP Voluntary Compliance for the assistance they provided in gathering data and information used in the preparation of this report.

[106] The ACT extends its gratitude to Craig Chomyok, Manager EPCU for the assistance he provided in the preparation of this report.

While PAPs are regularly subject to EP Audits, the IRS does not maintain empirical data that compares compliance levels of PAPs to IDPs.[107] Also, the IRS does not currently maintain, nor has it historically maintained audit programs focused on issues unique to PAPs and their Sponsoring Organizations. Furthermore, the IRS does not separately track PAPs and IDPs submitted under the VCP program. Based upon the discussions with the EP leadership team, the ACT determined that additional data could be obtained through a survey of EP audit agents. To that end, a questionnaire similar in nature to the BenefitsLink survey was developed and distributed to these agents. The ACT received 33 responses,[108] most of which provided thoughtful and helpful responses.

VI.

FINDINGS AND CONCLUSIONS

A. General Observations and Recommendations of the Constituencies

1. From Senior IRS Personnel Interviews:

The following general observations and recommendations were received from senior IRS personnel during interviews by ACT members:

- It is critical that Adopting Employers understand their own responsibilities and the role and responsibilities of the Sponsoring Organization and service providers (such as the TPA, record keeper, attorney, accountant, etc.).
- Each Sponsoring Organization and service provider should better communicate with the Adopting Employers concerning their roles and responsibilities.
- The role and responsibilities of each Sponsoring Organization and service provider should be clarified at the time of the adoption of the plan by the Adopting Employer.

[107] The IRS reported that in 2005, it closed approximately 9,000 EP audit cases, 40% of which involved M&P plans. The IRS also indicated that this percentage may not be accurate since these results reflect employer designations on the Form 5500 which are often not accurate.

[108] The ACT extends its gratitude to these EP Agents who participated in its survey and their contribution to this report.

- Some compliance problems may result from the Sponsoring Organization's failure to comply with obligations established in Rev. Proc. 2005-16.
- The IRS has never conducted a focused audit of Sponsoring Organizations to determine if they are compliant with the requirements of Rev. Proc. 2005-16.
- While some Sponsoring Organizations may try to sell PAPs as a "complete package," certain administrative responsibilities may not be addressed (e.g., determining eligibility of participants).
- Sponsoring Organizations often "oversell" the services they will be providing to Adopting Employers, leading Adopting Employers to believe they have no compliance responsibilities.

2. From Sponsoring Organization Representatives

The following general observations and recommendations were received from the Sponsoring Organization representatives during the October 23, 2006 meeting with ACT members:

- Adopting Employers need competent assistance in completing the M&P Adoption Agreements and other plan documents; however, many Adopting Employers either cannot afford or do not want to spend the money to obtain such assistance.
- In the retail market – a term used by Sponsoring Organizations to mean small plans (e.g., less than 10 participants) – there is little, if any, interaction between the Adopting Employers and them.
- Adopting Employers typically lack the knowledge to understand how to operate and comply with their plan documents and the law governing them.
- The rules governing PAPs and the plans' terminology are often too technical or cumbersome for small employers, and as such, employers need education and training to better understand the legal requirements, their plan, and its administration.

- There is not enough flexibility in the M&P plan system to allow Sponsoring Organizations to continue handling plans once they are amended in a manner which takes them out of M&P status, even if the amendment is only minor.
- Where a controlled group member ceases to be part of the controlled group, there is uncertainty on how to handle this situation, since M&P plans are not available for multiple employer groups. Moreover, Adopting Employers are often unaware of whether a controlled group exists or not, making this issue even more pronounced when it comes to light.
- Records and data are often unavailable, making compliance difficult or impossible. This is particularly true with inherited plans, or where the prior Sponsoring Organization no longer exists.
- The new staggered remedial amendment system is too complex for most Adopting Employers and may lead to increased noncompliance, since Adopting Employers will not understand the various rules related to timing and interim amendments.
- More PAP options should be available for non-ERISA plans.
- Further IRS guidance is needed by Sponsoring Organizations concerning their responsibilities for situations where their Adopting Employers encounter document or operational failures.

3. Summary of Survey Results

Inasmuch as each of the questions in the two ACT surveys was “open-ended,” the responses that were received were widely dispersed. Within each of the constituencies, certain responses did appear more prevalent than others. In some instances, the responses were consistent from constituency to constituency, while in other instances that was not the case.

(a) Most Common Failures

The following represents the most common plan failures identified with respect to adopters of PAPs (starting with the most frequently identified failure and listing them in descending order):

The IRS Audit Agent Group[109]

- ADP/ACP failures
- Non-amenders/late amenders
- Eligibility failures
- Vesting and/or forfeiture failures
- Contribution allocation failures
- Failures based upon the definition of compensation

The Practitioner Group[110]

- Eligibility failures
- Failures based upon the definition of compensation
- Non-amenders/late amenders
- Failures to follow plan documents
- Late 401(k) deposits
- Participant loan failures

While there was agreement among these groups with respect to eligibility failures, plan amendment failures, and issues concerning the definition of compensation, there were also significant discrepancies regarding other failures. For example, the IRS audit agent group identified ADP/ACP failures as the most significant failure they encountered, while few members of the practitioner group considered this to be significant. On the other hand, the practitioner group identified such items as late 401(k) deposits and the failure to follow plan documents as frequently encountered failures, while the IRS audit agent group did not identify these to be significant problems for PAP adopters.

[109] See Exhibit A for data. It should be noted that the information shown on Exhibit A reflects only those issues identified by the agents on those audits and may not include other common errors.

[110] See Exhibit B for data.

(b) Frequent Failures in PAPs

With respect to the question of whether the identified plan failures were more likely to occur in a PAP than in an IDP, the following results were noteworthy:

The IRS Audit Agent Group[111]

- ADP/ACP failures – 30% felt they were more likely to occur in a PAP than an IDP
- Non-amenders/late amenders – 44% felt they were more likely to occur in a PAP than an IDP
- Eligibility failures – 38% felt they were more likely to occur in a PAP than an individually designed plan

With respect to all identified failures, the IRS Audit Agent Group believed that 10% of the failures were less likely to occur in a PAP; 53% of the failures were just as likely to occur in a PAP; and 37% of the failures were more likely to occur in a PAP.

The Practitioner Group[112]

- Eligibility failures – 23% felt they were more likely to occur in a PAP than in an IDP.
- Failures based upon the definition of compensation – 40% felt they were more likely to occur in a PAP than in an IDP.
- Non-amenders/late amenders – 55% felt they were more likely to occur in a PAP than in an IDP.

With respect to all identified failures, the practitioner group believed that 6% of the failures were less likely to occur in a PAP; 55% of the failures were just as likely to occur in a PAP; and 39% of the failures were more likely to occur in a PAP.

In light of these findings, which are observations of a limited number of IRS audit agents and practitioners, no conclusion can be reached that adopters of PAPs are more likely to encounter a plan failure than the adopters of an IDP. However based upon the information gathered by the ACT, it is noted that a significant percentage of the IRS agents and practitioners who responded to its inquiry, believe that certain plan failures are more likely to occur in PAPs than IDPs.

(c) Recommendations

[111] See Exhibit A for data.
[112] See Exhibit B for data.

The last inquiry made by the ACT was simply a request for recommendations to improve compliance for Adopting Employers of PAPs. The following represents a summary of the most frequent responses (starting with the most frequently identified recommendation and listing them in descending order):

The IRS Audit Agent Group

- Adopting Employers should have a better understanding of how their plan operates.
- Sponsoring Organizations should have increased responsibilities to ensure that documents are updated timely and the plan administration handled appropriately.
- The IRS should increase its education and outreach efforts.
- Adopting Employers should be encouraged to seek out and retain competent assistance in the administration of their plan.
- A summary of pertinent plan provisions and/or a summary of the responsibilities to be provided by the Adopting Employer, service providers, and other professionals should be completed and maintained as a part of the plan document.

The Practitioner Group

- Plan documents should be simplified to the extent possible. This includes simplifying Adoption Agreements and requiring Adoption Agreements and plan documents to be written in “plain English.”
- Adopting Employers should be encouraged to seek out and retain competent assistance in the administration of their plan.
- Adopting Employers should have a better understanding of how their plan operates.
- Sponsoring Organizations should have increased responsibilities to ensure that documents are updated timely and the plan administration handled appropriately.
- The amendment process should be simplified by reducing the number of required amendments.

B. Conclusions

The ACT believes that the PAP system can be improved through realistic and workable recommendations, which assist each of the constituencies participating in the PAP in discharging its responsibilities. With this background, the ACT has learned that Adopting Employers often do not understand the most essential elements of their plans. For example, Adoption Agreement failures often occur due to missing information, the failure to understand the implications of the options being selected, inconsistencies with prior Adoption Agreements when moving to a new Sponsoring Organization or the failure to timely amend when required. Furthermore, Adopting Employers often fail to understand their responsibilities for the maintenance of these plans, as well as the responsibilities of its service providers and professionals. Finally, Adopting Employers often fail to appreciate the consequences of their failure to operate the plan in conformity with plan documents and the requirements of the IRS and other government agencies.

The ACT has further learned that plan failures often occur due to inadequate resources and personnel required for an Adopting Employer to maintain a qualified retirement plan (or at least the type of plan they have adopted). Additionally, plan failures occur because of the failure of Sponsoring Organizations to apprise Adopting Employers of the complexities of the plan and their respective responsibilities. Finally, plan failures occur because Adopting Employers fail to utilize the services of competent and knowledgeable service providers and professionals.

VII.

RECOMMENDATIONS

A. Increased Responsibilities for Sponsoring Organizations

1. Acknowledgement and Information Form

The ACT recommends that the IRS require M&P plan Sponsoring Organizations to include on a separate page, attached to the Adoption Agreement as the first page, an Acknowledgement and Information Form.[113] The purpose of this form is generally to (i) advise an Adopting Employer of the requirements for adopting a PAP

[113] Attached as Exhibit C is a sample Acknowledgement and Information Form as contemplated by the ACT.

(including providing the Adopting Employer with a copy of the special IRS Publication referred to in VII.B.2. below, when issued by the IRS) and (ii) include a list of the parties responsible for performing various administrative functions on behalf of the plan.

This form should include:

- An acknowledgement that the Adopting Employer has received copies of the basic plan and trust documents from the Sponsoring Organizations.
- An acknowledgement that the Adopting Employer has completed and executed the Adoption Agreement.
- A list of parties responsible for performing the following functions:
  - Preparation of plan documents and summary plan descriptions.
  - Preparations of annual reports (Form 5500 series).
  - Record keeping.
  - Plan administration (i.e., allocations of contributions, non-discrimination testing, benefits statements, etc.)
  - Trusteeship.
- A prominent notice of availability of information on the IRS web site and/or IRS newsletters.
- Such other information that the IRS deems appropriate.

The ACT believes that many plan failures result from Adopting Employers not understanding their own responsibilities and the responsibilities of service providers/professionals. While it is recognized that these responsibilities will shift over time, it will make Adopting Employers, at least initially and from time to time thereafter, focus on administration and understand the various parties' responsibilities.

2. Simplified M&P Plans

The ACT recommends that each Sponsoring Organization of an M&P plan be required to offer a "simplified" version with few or no options.[114] The objective of this recommendation is to simplify plan documents for many Adopting Employers in order to minimize document non-compliance. The ACT believes that many document failures

[114] Although the ACT understands that since the enactment of EGTRRA, many financial institutions offer single participant 401(k) plans (commonly referred to as EZ-Ks, Solo-Ks, and Uni-Ks) which are "simplified" documents, it is the recommendation of the ACT that all Sponsoring Organizations of PAPs be mandated to offer a type of "simplified" document.

occur in M&P plans simply because the only Adoption Agreement made available by a Sponsoring Organization is far too complicated and contains too many options for the smallest of Adopting Employers. The IRS also should determine whether it is advisable and feasible for them to prescribe standard terms for these plans.

3. Document Retention Policy

The ACT recommends that the IRS impose a document retention policy as part of Rev. Proc 2005-16. The policy should require Sponsoring Organizations of M&P plans to retain and make available upon request of Adopting Employers copies of their own plan documents and opinion letters, along with all amendments, for an indefinite period of time, or for such shorter periods of time as the IRS determines appropriate. The ACT believes that some Sponsoring Organizations do not maintain prior plan documents, which becomes problematic when an Adopting Employer moves to a new Sponsoring Organization and prior plan documents cannot be located.

B. <u>IRS Education and Outreach for Adopting Employers</u>

1. Use of IRS Newsletters

The IRS maintains on its web site a section devoted to the retirement plans community. One of the items provided within that section is a link to its quarterly publication entitled "*Retirement News for Employers*." While this newsletter provides valuable information to employers who have adopted a retirement plan, little of the content is devoted to employers who utilize a PAP. The ACT believes that these employers need information that is designed specifically for them. Accordingly, the ACT recommends that either the IRS develop a PAP newsletter that is a stand-alone document or if that is not feasible, a regular page or column in the *Retirement News for Employers*, devoted to the Adopting Employer community. The type of issues that could be addressed would include: an Adopting Employer's legal responsibilities, plan amendment requirements, audit checklists, and commonly-found compliance errors. Circulation of the newsletter could be enhanced by requiring Sponsoring Organizations to enter subscriptions for new Adopting Employers.[115] The ACT strongly believes that one of the most effective means of educating Adopting Employers about their

[115] The ACT recognizes that the current system requires the Employer to accept the confirmation email after the subscription is entered.

responsibilities in maintaining a retirement plan is to provide them with regular, understandable and "high quality" information through newsletters and the IRS web site and to make them aware of these resources. In this regard, the ACT further recommends that the IRS make every reasonable effort to dramatically increase the circulation of the *Retirement News for Employers* for Adopting Employers.[116]

2. Special IRS Publication for Adopting Employers

The ACT believes that many of the document failures that arise in the preparation of M&P plan documents result from the preparer having insufficient knowledge or expertise to understand the intricacies related to the options available under the plan. The ACT recognizes that the preparer may be a representative of the Sponsoring Organization or the Adopting Employer itself. Thus, the ACT recommends that the IRS produce a special publication for Adopting Employers and other document preparers assisting employers in adopting M&P plans which would include, such things as: (i) information regarding the completion of an Adoption Agreement or development of the plan, (ii) special requirements to obtain a determination letter, if the plan is a non-standardized M&P plan, and (iii) special considerations if it is an amendment of a pre-existing plan. The IRS should require that, at the time of the adoption of an M&P plan, whether the adoption initially establishes the plan or is an amendment and restatement of a pre-existing plan, the Sponsoring Organization distribute the publication to the Adopting Employers and any other document preparer who is known by the Sponsoring Organization.

3. Self-Audit Checklist

In recent years the IRS has successfully developed and made available a series of "self audit" checklists. These include checklists for 401(k) plans, 403(b) plans, SEPs, SIMPLE IRA plans, and SARSEPs. The ACT recommends that the IRS establish a checklist to be used by Adopting Employers to “self-audit” their plans. For example, such checklist may highlight the proper completion of the Adoption Agreement, maintenance of timely amendments, providing copies of the Summary Plan Description to employees, etc.

4. Specialized Web Site

[116] As of March 19, 2007, the IRS reported 9,595 subscriptions to its *Retirement News for Employers*.

The ACT recommends that the IRS develop a web site for Adopting Employers similar to the online training web site it has created for tax-exempt organizations entitled "Stay-Exempt-Tax Basics for 501(c)(3)s" (www.stayexempt.org). It is the ACT's belief that this type of educational tool, if properly advertised to the Adopting Employer community, will assist these employers in understanding their responsibilities and complying with the requirements imposed on PAPs.

C. Other Recommendations

1. IRS Audit Functions

The ACT understands that a project is being undertaken by the Employee Plans Compliance Unit to initiate a limited number of "soft contacts" with Sponsoring Organizations in order to determine if those Organizations are complying with the various requirements of Rev. Proc. 2005-16. The ACT applauds the IRS's efforts in this regard and recommends that after the guidance described in Sections VII.A and VII.C.3 has been provided, the IRS make the examination of Sponsoring Organizations a permanent part of its compliance efforts.

2. Use of M&P Plans by Multiple Employer Groups

The ACT has observed that an inordinate number of plan failures occur when either commonly controlled groups of Adopting Employers utilizing M&P plans lose controlled group status through "shifts" of ownership, or when a plan is mistakenly adopted by a group of employers not meeting the definition of a controlled group. Currently Rev. Proc. 2005-16 prohibits the use of M&P plans by multiple employer groups not under common control. As such, the ACT recommends that the IRS should modify and expand Rev. Proc 2005-16 to permit non-commonly controlled, multiple-employer groups to adopt M&P plans and to revise LRMs to include appropriate sample language.

3. Publication of Additional Guidance

During its October 23, 2006 meeting with Sponsoring Organization representatives, the ACT learned that many in attendance believed that further guidance beyond that contained in Rev. Proc. 2005-16 was needed to better clarify their responsibilities. Specifically they requested clarification of their obligations (i) in connection with Adopting Employers who do not respond to amendments and other

information requests sent by the Sponsoring Organizations, or (ii) where the Sponsoring Organization has a reasonable belief that there may have been document or operational failures by an Adopting Employer. Accordingly, the ACT recommends that the IRS issue further guidance to Sponsoring Organizations with respect to the following:

- What responsibility, if any, does a Sponsoring Organization have to determine whether an Adopting Employer has timely amended a PAP when necessary?
- What responsibilities or actions, if any, are required of the Sponsoring Organization where it reasonably believes that due to operational errors, the plan may no longer be qualified or where an Adopting Employer fails to timely amend a PAP (beyond notification of the availability of EPCRS)?
- What constitutes a "reasonable and diligent effort" to apprise Adopting Employers of required amendments and what information should be maintained by the Sponsoring Organization to demonstrate its compliance with this requirement?
- What actions may be required for a Sponsoring Organization to withdraw the availability of the use of its PAP for an Adopting Employer (presumably after notifying the Adopting Employer of a plan failure which remains uncured)?

Exhibit A

SUMMARY OF BENEFITSLINK SURVEY (33 RESPONSES)

	Failures	1	2	3	4	5	Totals	Less Likely	Just as Likely	More likely
1	412(i) Plans exceeding 415	1					1		1	
2	Participation under 401(a)(26)		1				1		1	
3	ADP/ACP tests	4	5	6	2	3	20		14	6
4	Exclusions of part-time employees			1	1		2		2	
5	Independent contractors				2		2	1	1	
6	Seasonal employees/farming				1		1		1	
7	Eligibility failures	7	5	2	2		16		10	6
8	RMD failure					2	2			2
9	Definition of compensation	3		2	1	2	8		4	4
10	Controlled group failure		1				1			1
11	Non-amenders	8	5	3	1	1	18	3	7	8
12	Matching/compensation/true-ups				3		3		2	1
13	Excesses not timely distributed				1	1	2		1	1
14	Top-heavy minimum	1	2	1	1	1	6	1	3	2
15	Spousal consent			1	1		2		1	1
16	Participant loans		2	1		1	4		2	2
17	Checking the wrong box	2	1	2	1	1	7			7
	Failures	**1**	**2**	**3**	**4**	**5**	**Totals**	**Less Likely**	**Just as**	**More likely**

									Likely	
18	Self-correction - EPCRS method					1	1		1	
	not used									
19	Not completing Adoption Agreement correctly						0			
20	Ignoring multiple plan rules				1		1			1
21	No prior plan records	1					1		1	
22	415 excesses		1		3		4		3	1
23	Vesting/forfeiture failures		4	2	2	3	11	1	8	1
24	Sign and date amendments	1					1		1	
25	Not provided safe harbor notice			2			2			2
26	Testing method		1			1	2			2
27	Allocation method		1	4	2	3	10	3	6	1
28	Excess deferrals	1		2			3		3	
29	Failing coverage				1		1			1
30	411(d)(6)				1		1			1
31	Plan asset rule	1			1	2	4	1	1	2
32	No problems	1					1	1		
33	S Corp ESOPs		1	1			2	2		
34	Hardship					1	1		1	

Exhibit B

SUMMARY OF BENEFITSLINK SURVEY (110 RESPONSES)

	Failures	1	2	3	4	5	Totals	Less Likely	Just as Likely	More likely
1	412(i) Plans exceeding 415								1	
2	Participation under 401(a)(26)								1	
3	ADP/ACP tests	2	0	2			4		2	2
4	Exclusions of part-time employees	2	1	1			4		3	1
5	Independent contractors									
6	Seasonal employees/farming									
7	Eligibility failures	23	13	7			43	3	26	9
8	RMD failure			4			4		2	
9	Definition of compensation	13	8	5			26	2	10	8
10	Controlled group failure	4	1	4			9		1	8
11	Non-amenders	7	9	3			19	3	5	10
12	Matching/compensation/true-ups	2	2	3			7		4	2
13	Excesses not timely distributed.									
14	Top-heavy minimum		2				2		2	
15	Spousal consent									
16	Participant loans		5	4			9		3	3
17	Checking the wrong box									

	Failures	1	2	3	4	5	Totals	Less Likely	Just as Likely	More likely
18	Self-correction - EPCRS method									
	not used									
19	Not completing Adoption Agreement correctly	5		2			7		1	6
20	Ignoring multiple plan rules									
21	No prior plan records	1					1		1	
22	415 excesses									
23	Vesting/forfeiture failures		1	2		3			1	1
24	Sign and date amendments									
25	Not provided safe harbor notice		1				1			2
26	Testing method		1	1			2			2
27	Allocation method		2	1			3		3	
28	Excess deferrals									
29	Failing coverage									
30	411(d)(6)	1					1			1
31	Plan asset rule									
32	No problems	9					9			
33	S Corp ESOPs									
34	Hardship		1	2			3		1	2

	Failures	1	2	3	4	5	Totals	Less Likely	Just as Likely	More likely
35	Improper calculation of service	1	4	1			6		2	3
36	Late 401k deposits	7	2	1			10		9	
37	Not following plan document	6	4	3			13		6	5
38	Distribution errors	3	3	1			7		5	
39	414(h) plans		1				1	1		
40	401k deferral limit		1				1		1	
41	Improper effective dates			1			1			1
42	Bad information from employer	1					1		1	
43	Failure to be clear about			1			1			
	investment									
44	Failure to properly calculate			1			1	1		
	contributions									
44	Failures in conjunction with		1				1		1	
	mergers of entities and plans									

EXHIBIT C

PRE-APPROVED PLAN
ACKNOWLEDGEMENT AND INFORMATION FORM
Required to Comply with Legal Requirements[117]

Who Must Complete: Each Adopting Employer and Sponsoring Organization of a pre-approved plan[118] must complete all sections of this form and sign and date it below.

Retention of this Form: This form is to be retained by both the Adopting Employer and Sponsoring Organization. It is a required attachment to the Adoption Agreement (in the case of a Master or Prototype Plan and Volume Submitter Plan using an Adoption Agreement approach) or the plan document (in the case of a Volume Submitter Plan not using an Adoption Agreement). It must be available upon request of the Internal Revenue Service.

Part I – To be Completed by Adopting Employer

Name of Adopting Employer:	
Address of Adopting Employer: Employer Identification Number: (xx-xxxxxxx)	
Plan Number (3 digit):	
Employer Contact Name/Telephone No.:	
Receipt of Completed and Signed Adoption Agreement	☐ Yes; ☐ No; ☐ N/A (for VS single doc only)
Receipt of Plan and Trust Documents from Sponsor	☐ Yes

Part II – To be Completed by Sponsor of Plan

Type of Pre-Approved Plan	**Other Features**
☐ Master or Prototype Plan	☐ Standardized; ☐ Non-Standardized
☐ Volume Submitter	☐ With Adoption Agreement ☐ Without Adoption Agreement Authority to Amend on behalf of Adopting Employer ☐ Yes; ☐ No
IRS Publication No. [ ] – Provided to Adopting Employer and Document Preparer	Date Provided:
Subscription to IRS' *Retirement News for Employers*	_____ *Adopting Employer E-mail Address*

Service Provider Information	**Name, Address, Telephone, Fax**
Sponsoring Organization	
Third Party Administrator	
Record keeper	
Trustee of Plan Assets	

Administrative Responsibility	**Name, Address, Telephone, Fax**
Adoption Agreement/Plan Document Completion	
Preparation of Summary Plan Description	
Preparation of 5500s (put N/A if not required)	

I certify that the above information is true and correct to the best of my knowledge. I also certify that the Sponsoring Organization has explained my responsibilities as an Adopting Employer and that I am responsible for making certain that the administration of the plan is consistent with the terms of the plan and the Adoption Agreement.

Name of Adopting Employer	**Name of Sponsoring Organization**
[signature]	***[signature]***
[Title]	***[Title]***
[Date]	***[Date]***

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117 See IRS Rev. Proc. [ ]

118 A pre-approved plan includes all Master and Prototype (Standardized and Non-Standardized and Volume Submitter Plans)