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Michael D. Julianelle
Director, Employee Plans
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

**Re: Possible Changes to Administrative Procedures and Rules for IRAs**

Dear Mr. Julianelle:

On behalf of a group of financial institutions which offer products and services to individual retirement accounts and annuities ("IRAs"), we request that the Service consider several areas in which the administrative procedures and rules for IRAs for tax purposes, which have not significantly changed in many years, could be improved or supplemented.

As you know, IRAs have been the focus of growing attention for a number of reasons. For example:

- *TIGTA Report*. In March of 2008, the Treasury Inspector General for Tax Administration ("TIGTA") issued a report descriptively entitled *Individual Retirement Account Contributions and Distributions Are Not Adequately Monitored to Ensure Tax Compliance*. The report, which only became publicly available recently, focuses primarily on misreporting of contributions, particularly in the Roth area, as well as errors in required minimum distributions ("RMDs"), and calls for closer monitoring and additional reporting duties for those.[1] These potential errors are only likely to increase with the new complexity added by the 2009 suspension of the RMD rules.[2]

- *GAO Report*. On June 5, 2008, the Government Accountability Office released a report suggesting that Congress consider whether employer payroll-deduction IRAs

[1] Report Reference Number: 2008-40-08, March 28, 2008. The TIGTA report suggests, incidentally, that some such additional duties could be imposed on providers. However, we would point out that the RMD rules would have to be significantly simplified in order for that to be possible. The complexity of post-death RMDs to beneficiaries and the rule that the RMD can be satisfied by an aggregate of different IRAs through distributions from only selected IRAs are but two examples of why an IRA provider will not normally have sufficient information to accurately calculate an owner's RMD for a particular IRA it holds.

[2] We appreciate the clarifying guidance issued in Notice 2009-9.

be given direct oversight by the Department of Labor ("DOL").[3] That report also recommended that the Service more routinely publish and provide to DOL data on IRAs.

- *Administration Initiatives*. Lastly, on a going-forward basis, this focus on IRAs appears likely to further increase if the new Administration makes automatic IRA proposals a centerpiece of its retirement security initiatives.

Accordingly, we believe that these many factors indicate that it is an opportune time to consider that the Service's various procedures for IRAs have, in some cases, become somewhat out of date, not kept up with industry practice, and/or not kept up with the procedures the Service has begun to apply to qualified plans. Such areas include the Service's IRA opinion letter process, the timing of amendments to IRAs for recent legislation, increased use of inherited IRAs, the status of updated IRA listing of required modifications ("LRMs"), and IRA disclosure statements. We understand that the Service has limited resources and works very hard to serve the various retirement system constituencies, but we would note, as the GAO has noted, that assets held in IRAs now exceed those held in 401(k) plans.[4]

We believe that updating, clarifying, and streamlining the major Service-issued procedures for IRAs would benefit IRA owners, by providing them with more and easier to understand information about how their IRAs are supposed to work (particularly inherited IRAs), IRA providers to whom many such owners look for assistance with their IRA questions by providing them with more answers and permitting better documentation, and the Service by facilitating compliance with the IRA rules.

## Recommendations

In particular, we respectfully recommend the following:

### 1. Update IRA Opinion Letter Revenue Procedures

Revenue Procedure 2002-10, as updated by Announcement 2002-49, provides the most recent Service guidance on the procedures for requesting an IRA opinion letter, relating mainly

[3] Individual Retirement Accounts: Government Actions Could Encourage More Employers to Offer IRAs to Employees (GAO-08-590). The report also indicates that the DOL could look at ways to encourage employer sponsorship of IRAs, to determine whether employers offering IRAs are in compliance with the law, and to collect additional information on IRAs. The report indicates that neither IRS nor DOL agree or disagree with the recommendations.

[4] The GAO report referred to above in footnote 1 provides a fair amount of information on IRAs generally, and indicates that IRAs hold more assets than any other type of retirement vehicle, indicating that, in 2004, IRAs held about $3.5 trillion in assets compared to $2.6 trillion in defined contribution plans including 401(k) plans and $1.9 trillion in defined benefit plans. It is widely believed that this significant concentration in IRAs is due in large part to rollovers.

to EGTRRA and RMD rule changes. This guidance essentially builds on Revenue Procedure 87-50, which first established the IRA opinion letter program. We believe the following modifications to these procedures would create a more streamlined system that would better serve IRA providers and owners:

### a. Implement Regular Periodic Prototype IRA Filing Cycles

In the past, from time to time, the Service has indicated that prototype IRAs of various types must be amended and submitted to the Service for approval for certain changes by specified dates, most recently in Revenue Procedure 2002-10.[5] It is our understanding that these deadlines have, much like in the qualified plans context, led to spikes in IRA filings. Since issuing this Revenue Procedure, the Service has implemented a five-year determination letter filing cycle for qualified retirement plans.[6] Currently, however, the Service does not have a regular filing cycle for IRA submissions. Indeed, it is not clear when IRAs are supposed to be submitted for approval by the Service. Instead, the Service sets deadlines by Revenue Procedure from time to time.[7] Furthermore, the current process does not clearly dovetail with the need to submit revised IRA documents to state insurance regulators for approval after changes, including those requested by the Service during the opinion letter process.[8]

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[5] For example, in Revenue Procedure 2002-10, the IRS stated that "[a]ll prototype sponsors with currently approved prototype IRAs, SEPs and SIMPLE IRA plans must amend these documents and submit an application for opinion letters on the amended documents no later than December 31, 2002, in order to remain a prototype sponsor of such documents."

[6] *See* Revenue Procedure 2007-44.

[7] As with qualified plan determination letters, it appears that approval by the IRS of a prototype IRA is not required, though it is customary. Revenue Procedures subsequent to Revenue Procedure 87-50 discussed in footnote 8 seem to indicate, however, that, once an opinion letter has been issued to a prototype by the IRS, further submissions for specified amendments become mandatory.

[8] For example, under Revenue Procedures 97-29 (for the inception of prototype SIMPLE IRAs) and 98-59 (for the inception of prototype Roth IRAs), a prototype was required to be submitted to the Service by the prototype sponsor on or before December 31, 1997 (for SIMPLE IRAs) or June 30, 1999 (for Roth IRAs). Generally, upon IRS approval, the employee, employer or individual owner was required to adopt the approved document within 120 days after the later of (i) date the Service issued a favorable opinion letter on the document to the prototype sponsor, (ii) if the prototype sponsor sought approval of the document from one or more state insurance departments, not later than 90 days after the later of the date the Service issued a favorable opinion letter on the document or the date the document was approved by all such state insurance departments, or (iii), if, as a result of the submission to the state regulator in (ii), amendments to the document were required by a state insurance department, and the prototype sponsor applied to the Service for an opinion letter on the amended document within 90 days after it was approved by such state insurance department, the date the Service issued a favorable opinion letter on the amended document.

Subsequent to these Revenue Procedures, the Revenue Procedure for EGTRRA amendments to IRAs, Revenue Procedure 2002-10, required that in cases where a prototype sponsor must apply to one or more state insurance departments for approval of amended IRA documents, the Service would grant expedited review of Service-approved EGTRRA prototype IRA documents amended for changes required by a state insurance department, provided: (1) the Service-approved EGTRRA document is submitted to the state insurance department within 90 days of the date the Service issued a favorable EGTRRA opinion letter on the document, and (2) the prototype sponsor resubmitted the document, as amended to comply with changes required by the state insurance department,

We suggest that the Service consider creating a submission cycle for prototype IRA opinion letters similar to the qualified plan determination letter process -- one which could be more clearly coordinated with the requirement that revised IRA annuity documents be submitted to state insurance regulators for approval. This change would create a predictable timetable regarding the timing of necessary filings with the Service and might effectively provide a concept similar to a "remedial amendment period" for IRAs. In updating these procedures, we recommend that the following issues also be addressed:

- *Delays Due to State Insurance Regulatory Compliance Requirements and Activities*. The Service's procedures should make it clear that no adverse affect will result from delays in approval by the insurance regulator of changes required by changes in the law (or changes required by the Service in connection with the review of an IRA for an opinion letter) that are not within the control of a prototype sponsor; and

- *Interaction between State Insurance Authorities and the Service*. Clearly and consistently recognize the possibility of such delays for all types of IRA amendments, and not require adoption and distribution of an amendment to an IRA until a reasonable time after approval by both the Service and all relevant insurance regulators, including situations in which multiple resubmissions are required to settle on language acceptable to both the Service and insurance regulators.[9] It should also be made clear that multiple Form 5306s and multiple filing fees do not have to be made on account of such resubmissions of changes required by insurance regulators.

**b. Simplification of Form 5306 Opinion Letter Process for Annuities**

Currently, every version of an IRA prototype document that is filed with the Service for approval is subject to a $3,000 filing fee.[10] However, with respect to the many insurance companies operating in multiple states, each state's insurance regulators may require IRA annuity contracts or endorsements used in their state to differ slightly from the IRA documents used in other states, which can result in dozens of nearly identical filings with the Service. These unnecessary additional filings place a financial burden on the submitting companies and add to the caseloads of Service reviewers. In most cases, the state-by-state distinctions do not even

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to the Service within 90 days after it is approved by such state insurance department. An individual using a currently approved prototype IRA was required to adopt the prototype sponsor's amended document within 180 days after the date the Service issued a favorable EGTRRA opinion letter on the amended document.

[9] *See* footnote 8. Note that these provisions were for only certain specified amendments, did not clearly state whether the employee or employer had to adopt the first approved version of the amendment or the version approved by the Service after the re-submission with state changes, and did not clearly state whether a Form 5306 and additional fee were required for the resubmission (though we understand that was not required).

[10] *See* Revenue Procedure 2009-8, Section 6.02.

relate to items addressed in the LRMs. As such, we recommend that the Service procedures be modified to permit the option to submit for approval a "basic" IRA contract or endorsement redlined to show minor variations in contracts or endorsements that do not relate to any applicable Code requirements. The Service could retain the discretion to require separate filings (and filing fees) if it determined that the variations were not substantially similar. Further, we also understand that the Service currently keeps records for submitted IRA contracts and endorsements by contract and endorsement name. Commonly, these substantially similar state variations will also have one basic number, differentiated by following the basic number with a few digits or letters to identify it by state version. Based on this understanding, it would seem that the Service could still recordkeep such contracts or endorsements on the basic number excluding those state-identifying digits.

#### c. Provide a Streamlined Procedure for Minor Updates of Opinion Letters

Generally, any change to a prototype IRA, whether annuity, trust or custodial account, including changes to the custodian or trustee or even a change to the TIN of the IRA sponsor such as would result from a reorganization, would require a full-blown Form 5306 filing, take many months, and cost $3,000 per prototype (which, again, for dozens of contract/endorsement combinations could cost tens of thousands of dollars).[11] With changes and reorganizations commonplace in the financial industry, we would request that the Service accommodate filings to change only institution names, custodian names and TINs on an expedited and lower-filing fee basis. A full-blown Form 5306 filing with a $3,000 filing fee should not be required in these instances. The current $3,000 fee encourages IRA sponsors to delay updating their opinion letter filing with the Service, which negatively impacts the Service's ability to monitor the IRA industry. In fact, we believe that a procedure may already exist for this in the user fee Revenue Procedure (currently Revenue Procedure 2009-8, but also existing in its predecessors), as a "[s]ponsoring organization's word-for-word identical adoption of mass submitter's prototype IRA, SEP, SIMPLE IRA, SIMPLE IRA Plan, or Roth IRA, per plan document or an amendment thereof", which is subject to a $200 fee; however, it is not clear that the Service has recognized its application to these types of changes.[12]

### 2. Simplify the Manner of Making IRA Amendments

Amending a prototype IRA document results in a number of administrative issues that we believe could be avoided, or at least mitigated, if the Service were to formally address the following:

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[11] The Service has made only a few exceptions to this rule, mainly related to discrete statutory changes. *See* Revenue Procedure 87-50, Section 6.03; and Revenue Procedure 97-29, Sections 5.01(2), 5.02(2).
[12] Revenue Procedure 2009-8, Section 6.02(2).

### a. Clarify That IRA Sponsors May Amend Prototype IRAs Using A Negative Consent Process

As discussed above, when a prototype document is amended, the Service generally requires that each IRA owner "adopt" the amended document by a specified time.[13] Often, these amendments are required by law and do not require an IRA owner to make any elections. Even when an amendment provides some choice, the vast majority of IRA owners will select the same option. Consequently, it has become common practice in the IRA industry over the years to include a provision in a prototype IRA that the IRA can be amended by the sponsor with the negative consent of the IRA owner (*e.g.*, pursuant to a provision of the IRA under which the sponsor may amend the IRA account or annuity, so notify the owner and send the owner a copy and summary of the amendment, and advise the owner that the owner is deemed to have adopted the amendment unless the owner objects in writing within a reasonable amount of time, typically 30 to 60 days). The Service has issued favorable opinion letters on a large number of IRA prototypes including such provisions. As such, we request the Service specifically provide in guidance that such amendments to IRAs by negative consent are permissible.

### b. Clarify Rules for Retroactive Amendments

Informally, some IRS officials have questioned in the past whether there is a remedial amendment period for amendments to IRAs, and there appears to be no authority on what the rules for the timing of making either discretionary amendments or amendments required by changes in the law to an IRA may be, or whether retroactive IRA amendments are permitted in general. We propose that, in connection with the proposed IRA filing cycles, the Service provide a remedial amendment period during which IRAs could be amended to reflect recent legislative or regulatory updates. It is important, though, that such rule be practical and not become a "trap for the unwary", a complaint often levied against the rules for qualified plans regarding minor amendments not related to Code qualification requirements, or adding to (rather than detracting from) the benefits to participants. This concern is particularly acute in the IRA context because of the need to obtain the approval of one or more state insurance regulators after a favorable opinion letter is issued. So long as IRAs comply in operation in a reasonable, good faith manner during the remedial amendment period, and are amended within the remedial amendment period specified by the Service, the IRA should be considered to be in compliance with the Code's IRA rules. We note that creation of a periodic filing cycle would facilitate the operation of a reasonable IRA remedial amendment period.

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[13] *See* footnote 8; *see also* Treas. Reg. §1.408-6(d)(4)(ii)(C), which requires furnishing a copy of the amendment, but does not refer to adoption of the amendment by the owner.

### c. Clarify Application of Electronic Notice, Election and Consent Rules to IRAs

The regulations implementing electronic administration generally apply to IRAs, but it would be useful for the Service to clarify how they would apply to the adoption of IRA amendments by IRA owners, including by negative consent as noted above.

## 3. Changes to the IRA Listings of Required Modifications

Although partially updated in 2007, we propose a number of changes to the IRA LRM provisions that might provide certainty to and enhance the quality of IRA administration, including the following:

### a. Inherited IRAs

Inherited IRAs have been a growing part of the IRA marketplace over the past 20 years. With the implementation of nonspouse rollovers in the Pension Protection Act of 2006 and their adoption as a mandatory plan feature starting in 2010 pursuant to the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), the rules applicable to inherited IRAs will only become more important. However, traditional and Roth IRA language in existing LRMs and forms does not address inherited IRA issues and in many respects is misleading when used for an inherited IRA (because inherited IRAs are not permitted to receive ordinary contributions, and the owner is the beneficiary, not the deceased original owner, and may have their own remainder beneficiaries).[14] We strongly recommend that the IRS provide additional language in the LRMs that can be used to implement inherited IRA requirements. Specific inherited IRA issues to be addressed would include:

- *Omission of Contribution Provisions*. That inherited IRAs need not include IRA LRM contribution language. We note, incidentally, that the Service has approved a number of single premium annuity IRA prototypes in the past, which similar to an inherited IRA, omit the contribution provisions of the IRA LRM language.

- *Application of RMD Rules*. That inherited IRAs need only include post-death distribution provisions and, when applying these rules, should state that the current owner is the beneficiary (including greater clarification as to whether, if the current owner is a surviving spouse, they have elected to treat the IRA as an inherited IRA and not as his or her own IRA).

[14] The LRM language for contributions to an IRA (Traditional IRA LRM (6-2007) paragraphs (1), (2), (13) and (14) – the "individual" can contribute) or the LRM language for required minimum distributions (Traditional IRA LRM (6-2007) paragraphs (5), (6), (15) and (16) – referring to distributions by the individual and the individual's beneficiary).

### b. Additional Provisions to Reflect Recent Legislation

While the recent amendments to the LRMs reflect some PPA provisions, other PPA provisions (*e.g.*, direct rollovers to Roth IRAs, nonspousal rollovers and qualified charitable distributions) are not currently addressed by the LRMs. In addition, the recent HEART Act contains additional provisions impacting IRAs (*e.g.* the contribution of military death gratuity to a Roth IRA). We propose that the Service issue LRM language addressing these additional PPA and HEART act provisions. In this regard, we note that one of the items on the IRS/Treasury Priority Guidance Plan issued on September 10, 2008 for the current fiscal year (July 2008 though June 2009) is "Guidance on pre-approved IRAs regarding recent law changes."

### c. Good Faith Compliance

The IRA LRMs provide model language for most important IRA requirements, but the LRMs do not at most points in time encompass every then-current Code-based requirement for IRAs. This situation means that prototype sponsors often have to draft language implementing important IRA requirements without examples of language the Service considers to satisfy a Code-based requirement. We propose that the IRS provide guidance stating that a reasonable, good faith standard will be used to analyze IRA document language implementing provisions that are not described in current LRMs.

## 4. Coordination of Disclosure Statement Requirement with IRS Publication 590

Publication 590 is the comprehensive document available to the general public that describes the IRA rules. It now runs 100+ pages. Under regulations, to the extent that Publication 590 covers information (other than financial information) required to be included in the disclosure statement, that publication can be used in lieu of the disclosure statement with respect to the information covered.[15] We propose that:

- *Revision of Publication 590*. Publication 590 be revised to provide a clear description of the information that suffices for the disclosure statement and more clearly delineate what other information the separate disclosure statement provided by the IRA issuer must contain. The need for any additional information beyond Publication 590 should be minimized.

- *Reliance on Publication 590.* It be clarified that, concerning matters covered in Publication 590, the disclosure statement requirement is satisfied by providing the most recent Publication 590 promulgated by the IRS, notwithstanding that

[15] Treas. Reg. § 1.408-6(d)(4)(iii)(A).

intervening changes in the law may have rendered provisions of that Publication 590 out-of-date.

**5. Coordination of Disclosure Statement Financial Disclosures with Other Readily Available Financial Disclosure**

Some of the information required to be contained in the IRA disclosure statements duplicates information that must be contained in other financial disclosure forms (*e.g.*, fees associated with certain investments). Many of these financial forms are provided to an IRA owner at the same time as an IRA disclosure statement. We recommend that the Service clarify that the IRA disclosure statement financial disclosure requirement should be deemed satisfied when the disclosure statement refers to another form provided with the disclosure statement that contains the applicable information (*e.g.*, a mutual fund fact sheet or prospectus).

**6. Expand IRA Corrections under EPCRS**

Recently, the Service added specific IRA corrections to EPCRS under Revenue Procedure 2008-50 to:

- *Code Section 4973 and Code Section 72(t) Taxes*. Permit an exception to the Code section 4973 excise tax (generally 6% per year on uncorrected excess IRA contributions) and the Code section 72(t) early distribution tax for correction of amounts improperly distributed to participants and beneficiaries from a plan and rolled over to the IRA when the plan makes a Voluntary Correction Program ("VCP") filing with the Service; and

- *Streamlined SEP, SARSEP, and SIMPLE IRA Correction Procedures*. Streamline the procedures for certain corrections under SEP, SARSEP and SIMPLE IRAs.

We certainly support those efforts. However, given the large number of traditional and Roth IRAs, we would also recommend to the Service that it consider expanding EPCRS to allow correction by an IRA holder of other inadvertent excess contributions and ineligible rollovers (*e.g.*, where the IRA owner does not have the ability to control whether the IRA sponsor has made a correction under VCP) as well as violations of Code section 401(a)(9), which, as noted above, often run across multiple IRAs.

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We and members or our group of IRA providers would be happy to meet with representatives of the Service to discuss further how the Service and the industry can together update and clarify the rules and procedures for this growing part of the financial security of many

Americans. And please let us know if you have any questions or if we can be of any other assistance.

Sincerely yours,

David W. Powell

David N. Levine

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