

May 19, 2009

Via Email

Craig Chomyok
Manager, Employee Plans Compliance Unit
Internal Revenue Service
Craig.Chomyok@irs.gov

Monika A. Templeman
Director, Examinations, Employee Plans
Internal Revenue Service
Monika.A.Templeman@irs.gov

Andrew E. Zuckerman
Director, Rulings and Agreements, Employee Plans
Internal Revenue Service
Andrew.E.Zuckerman@irs.gov

Re: Governmental Plans Initiative

Dear Ms. Templeman and Messrs. Mr. Chomyok and Zuckerman:

We write to provide comments on the information gathering survey and cover letter (the "Survey") that was publicly released in February 2009 and sent to a pilot group of 25 governmental plans with the stated intention that the survey will, after initial review, be subsequently be sent to a larger group of governmental plans. In this regard, our firm represents a number of governmental defined benefit and defined contribution plan sponsors who are likely to receive the Survey.

Governmental plans have long occupied a unique space in the tax-qualified plan universe. Such plans are exempt from the requirements of ERISA and many of their parallel Internal Revenue Code provisions. As such, governmental plans are not subject to the ERISA eligibility, vesting, funding, or prohibited transaction rules and are not under the jurisdiction of the United States Department of Labor. In public comments, senior Service staff have indicated a concern that governmental plans have been an "underserved" IRS constituency and that the Governmental Plans Initiative is an effort to remedy this perceived lack of attention.

Below we provide comments on two distinct topics – (1) steps that might be taken prior to the broader distribution of the Survey and (2) steps that might be taken to improve and make the Survey more manageable for resource-strapped governmental plans.

A. Pre-Survey Guidance

While we applaud the Service's desire to provide more guidance to the governmental plan sector, we believe that there are a number of steps that the Service might consider prior to broadly distributing the Survey and possibly causing undue alarm in the governmental plan sector.

As you know, the Survey (and earlier drafts of the Survey) have generated significant interest in the governmental plan sector. After many decades of limited attention from the Service, governmental plans are concerned that the Service will take an "audit first, correct later" approach that will lead to stiff financial penalties or changes for governmental plans at a time they can least afford to bear these costs.

We understand that there have been informal contacts made with various industry groups and through Members of Congress where the Service has indicated its desire to encourage voluntary compliance before following on with stricter enforcement activity. However, this message has not been widely disseminated to a number of governmental employee benefit plans – both large and small. Many governmental plans are, except for reporting and withholding purposes, unfamiliar with the Service's Employee Plans function. Further other governmental defined contribution plans are based on prototype or volume submitter documents and have limited staff devoted to the management of these plans because of reliance on outside providers.

Although the Survey describes "next steps" to be taken after the pilot survey is completed, we suggest that this summary of "next steps" needs to be enhanced with further detail and topics and separately published before the Survey is sent to governmental plans outside the pilot group. This separate set of "next steps" should, much like the helpful Employee Plans Newsletter, be written in non-technical language so as to be understandable for as many governmental entities as possible. The "next steps" guidance, whether in formal or "soft" guidance form, could include the following information:

- *Statement of Purpose.* A general statement of purpose indicating a "voluntary compliance first, audit later" approach.
- *Explanation of Future Guidance.* An explanation of future guidance relevant to governmental plans. This guidance should include (1) EPCRS updates permitting governmental plans to make VCP filings under EPCRS with a minimal filing fee within a window of at least 12 months after the EPCRS updates are issued so as to

bring themselves into compliance, and (2) reduced Audit CAP fees for governmental plan failures discovered on an EGTRRA Cycle C or Cycle E review.

- *Survey.* An explanation that the upcoming Survey (1) is for informational purposes only, (2) will be held confidential, and (3) will not be used in any way for current or future audit activities, or (4) will not be used in any future enforcement activities. As noted below, we believe the existing language in the Survey does not sufficiently address these items that could be of significant concern to governmental plans and thus serve as an impediment to their response to the Survey.
- *Timeline.* An explanation of the timeline of how the Survey and other guidance will be issued to governmental plans and how this timeline will be taken into account with respect to the Service's enforcement efforts.

C. Survey Specific Comments

1. Cover Letter

We recommend that any future cover letter revisions include changes along these lines:

- *Timeline for Response.* We recommend that a 180 day response window be provided instead of the 90 day response window provided in the cover letter. Governmental plans often have many more stakeholders than private sector plans. A 90 day response window may not be possible for many plans that have employers, trustees, directors, state or local bargaining units and other constituencies that may want to be consulted or have input, even if the Survey is technical in nature. Further, many governmental defined contribution plans rely on outside vendors for a significant number of operational functions which could overwhelm the vendors if a response is required within 90 days of the issuance of the Survey.
- *Non-Audit Status.* The cover letter states that the Survey is not an audit or investigation. However, many governmental plan sponsors may not understand the distinction between soft contact and an audit/investigation. We recommend adding specific "plain English" language stating that unless a plan is under separate audit or investigation, EPCRS remains available for correcting any governmental plan failures.
- *Use of Survey.* The cover letter indicates that "[p]ilot data will not be used to select any plan for examination." This language is very narrow in scope and we believe should be expanded to state that "[a] response or non-response to the survey will not give rise to an audit or investigation and any information provided in a response will be held confidential and not used in any subsequent Service audit or investigation." As drafted, many governmental plans are concerned that information provided in the Survey could be used as proof of failures in a subsequent audit or in public

investigations that many governmental plans face. This concern is particularly acute where a governmental plan reveals a failure in a Survey response or mistakenly provides an inaccurate response on the Survey.

2. Scope of Survey

The Survey addresses a number of areas beyond those addressed by the Code's requirements. Examples of these areas include:

- *Financial Statements (Item 14)*. Of course, we also note that public plan financial statements are not subject to Service review.
- *Eligibility (Item 18) and Year of Service (Item 19)*. Although governmental plans are subject to pre-ERISA eligibility and vesting rules, and benefit accrual rules, the Service has provided no guidance on these rules in 35 years. Further, governmental plans do not generally need to answer questions similar to these that are contained in the Form 5300 determination letter application.
- *Benefit Formula (Item 27)*. Governmental plans are not subject to the Code's accrual rules, joint and survivor annuity, pre-retirement survivor annuity, and actuarial assumption rules. While some information in Item 27, such as normal retirement age information which would likely be helpful in the Service's creation of future guidance on permissible governmental plan normal retirement ages, appears relevant to areas within the Service's authority, other information does not. As such, this question could be significantly simplified.
- *Funding Rules (Item 31)*. As noted in the Survey, the Code's funding rules do not apply to governmental plans and thus should not be relevant to the Service.
- *Plan Communications (Items 40-46) and Plan Administration and Fiduciary Duties (Items 47-53)*. Governmental plans are not subject to the ERISA sections where requirements in these areas are found.

In that the areas we described above do not relate to Code requirements, we respectfully suggest that these areas are outside the Service's authority and questions about them should be eliminated from the Survey. To the extent the information may be relevant to other authorities, it may be sought by them, and as noted in the Survey, the Government Accountability Office and Governmental Accounting Standards Board have separate studies ongoing for governmental plans.

Further, although the Survey is apparently intended to be simple, the nearly 25 pages of questions are likely to generate significant personnel, actuarial, legal, and accounting fees for cash-strapped and personnel-short systems. As such, we recommend an overall shortening and simplification of the Survey. For example, a governmental plan might be asked to provide a

Craig Chomyok
Monika A. Templeman
Andrew E. Zuckerman
May 19, 2009
Page 5

series of answers to a few pages of yes/no/multiple choice questions, and then attach a copy of its plan document and/or other summary or publicly available material (much of which is already available on the internet) in lieu of the full survey.

* * * *

We would be happy to meet with representatives of the Service or Treasury to discuss our comments further. Please let us know if you have any questions or if we can be of any other assistance. We can be reached at (202) 857-0620.

Very truly yours,

David N. Levine

David W. Powell

cc: Michael Julianelle (via email)
W. Thomas Reeder (via email)