

December 28, 2010

Via Email

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Andrew E. Zuckerman
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Re: Request for Governmental Plans Cycle E Deadline

Dear Ms. Migdail and Mr. Zuckerman:

We write to request an extension of the upcoming January 31, 2011, "Cycle E" determination letter deadline for governmental plans described in Code section 414(d). We appreciate the significant steps the Service has previously taken to address the unique properties of governmental retirement plans. However, we believe that a one-time extension of the "Cycle E" determination letter deadline for governmental plans until January 31, 2012, would serve the best interests of the Service, plan participants, governmental retirement systems, and sponsoring employers for the following reasons:

- *Budgetary Restraints.* The combined VCP-determination letter process many governmental plans now face is a costly one because of the significant funding restrictions currently imposed on governmental entities. While many governmental entities have made significant efforts, budgetary limitations have sometimes slowed their review of necessary documents and materials, thus making it difficult for them to complete all necessary internal reviews by January 31, 2011. Extending the "Cycle E" deadline would allow these costs to be potentially spread over multiple budget years. Given that these filings are often the first filing for a determination letter by the public plan, requiring extensive review, this will facilitate the governmental entity's ability to make the filing, thus encouraging more filings. We would also point out that spreading out such filings for some period past January 31, 2011 may place less burden on the Service and its senior agents that are often assigned to these cases.
- *Multiple Constituencies.* The administrative structure for governmental plans can vary from a simple system run by part of a governmental entity to complex retirement

- boards with independent staff and a need to have proposed filings and/or plan amendments approved by one or more legislative, executive, and other regulatory bodies. As you know, state and local governments are frequently under significant time pressures, which, often because of time allocation issues, is also making it difficult for some governmental plans to obtain approvals they will need to file their determination letter and VCP applications by January 31, 2011.
- *Uncertainty over Required Plan Language.* A continuing concern by potential governmental plan filers is the extent to which the Service will accommodate public plan practices regarding required plan language. Many governmental plans rely upon cross-references to Code sections and satisfy Code requirements by their terms rather than including the sort of language found in the listing of required modifications ("LRMs") used by private sector plans. Any question of the sufficiency of this plan language implicates remedial amendment issues. It also raises questions of what language is required to be tax qualified versus what language the Service requires to receive a determination letter. While we have often found that language issues can be resolved within the determination letter process due to the Service's recognition of the unique nature of governmental plans, the prospect of a determination letter application submission by a public plan resulting in the imposition of significant audit closing agreement program penalties unless a VCP application is made may be discouraging such applications. An extension of the "Cycle E" deadline would provide more time for the Cycle C filings to be worked through and for these concerns to be addressed.
 - *Regulatory Uncertainty.* Despite the significant efforts made by the Service and in its agents when reviewing governmental determination letter applications, there still remains apprehension in many governmental entities about filing determination letter and VCP applications when certain regulatory issues appear to be unresolved. For example, the "Cycle E" cumulative list set forth in Notice 2009-98 reflects the Service's prior guidance (in Notice 2008-98)¹ on the definition of governmental plan normal retirement age issues that indicates that future guidance will clarify the application of the Service's normal retirement age regulations to governmental plans. Another concern is the public discussion by the Service, Department of Labor and Pension Benefit Guaranty Corporation of possible changes to the definition of governmental plan. While we understand that this issue is being reviewed by the governmental plans cadres, many governmental plans are hesitant to put their plans before the Service before knowing what regulatory standard they will be held to. Further guidance – either addressing this issue to provide regulatory clarity or indicating that normal retirement age issues will instead be addressed in the next five-year cycle – would likely facilitate more filings by governmental plans thus ensuring

¹ Notably, the new "Cycle A" cumulative list (Notice 2010-90) also contains a reference to the further delay in governmental plan normal retirement age guidance until 2013.

greater governmental plan compliance which promotes the interests on all stakeholders in this process.

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We understand that the goal of the Service is to have public plans generally begin to participate in the determination letter filing cycle process and appreciate its significant outreach efforts thus far. 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,

/s/

David N. Levine

/s/

David W. Powell

cc: governmentalplansdialogue@irs.gov