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**Public Employers & Pensions**

**Thomas R. Dowling**
Stinson Morrison Hecker LLP
1201 Walnut, Ste. 2900
Kansas City, MO 64106
(T) 816-691-3469
(F) 816-412-1113
email: tdowling@stinson.com
www.stinson.com

**Louis Mazawey**
Groom Law Group, Chartered
1701 Pennsylvania Avenue, N.W.
Washington, DC 20006-5811
T: 202-861-6608
F: 202-659-4503
email: lmazawey@groom.com
www.groom.com

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## INTRODUCTION

Although governmental retirement plans have been around for decades, there has been additional public and regulatory focus on these plans in recent years. The IRS has convened a governmental plans roundtable with various stakeholders in governmental plans, has worked aggressively to bring governmental tax-qualified defined benefit and defined contribution plans into its determination letter process, and has been working on surveys for §403(b) and tax-qualified governmental plans to improve its understanding of the governmental plan sphere. Additionally, the IRS issued two sets of final regulations, including a comprehensive update of regulations for Code §457(b) plans in 2004 and a finalized set of updates for Code § 403(b) plans in 2007. This paper will provide an overview of these developments.

## IRS DETERMINATION LETTERS

One aspect of the IRS's increased interest in governmental plans has been to formally require individually-designed governmental plans that wish to obtain IRS determination letters to request updated letters every five years. This determination letter program,[1] when coupled with the Code's remedial amendment rules,[2] allows the sponsor of a tax-qualified defined benefit or defined contribution plan to request a determination that a plan document, based on its terms and conditions, complies with applicable IRS requirements. This determination is generally a determination as to the form of a plan, and not a judgment on its operational compliance with the Code or the level of benefits, rights or features provided under the plan. A favorable determination letter can be helpful in limiting the impact of documentary issues raised during a subsequent IRS audit.

As part of the IRS's updated determination letter process, under which plan are grouped into one of five cycles, known as cycles A through E, governmental plans have been specifically grouped into cycle C (one of the five cycles created by the IRS). The end of cycle C under Revenue Procedure 2007-44 and thus the filing deadline for governmental plans during the first five year cycle was January 31, 2009. However, on November 5, 2008, the IRS modified its position and allowed plans to file by either the end of cycle C or by January 31, 2011 (the end of cycle E) for the first five year cycle.

In Revenue Procedure 2009-36, I.R.B. 2009-35 (Aug. 31, 2009), the IRS modified the determination letter process by (1) extending the timeline by which a governmental tax- qualified plan must adopt amendments required as a condition of a favorable determination letter after the favorable letter is issued and (2) formally revising the determination process rules in Revenue Procedure 2007-44 to permit governmental plans to file during Cycle E by January 31, 2011 as provided in the prior guidance published on the IRS website.

[1] Rev. Proc. 2007-44, 2007-28 I.R.B. 54.
[2] Code §401(b).

In addition, the Revenue Procedure permits a cycle C governmental plan filer to withdraw its previously filed cycle C determination letter application. For example, if an application was filed on or before November 7, 2008, and a refund request was filed with the IRS on or before January 31, 2009, it was also eligible to have its user fee refunded.

In future five year cycles, governmental plans that choose to file should return to cycle C, regardless of whether they file in cycle C or cycle E in the current five year cycle which ends in January 2011.

Regardless of whether governmental plans file in cycle C or E, the IRS's updated determination letter procedures impose a key requirement on governmental plans. Now, governmental tax-qualified plans must be amended each year for any "discretionary" amendments and, except as specifically provided in applicable legislation, required amendments must be adopted within a limited period following the plan year in which they went into effect.[3] The Revenue Procedure extends the period for adopting amendments required in connection with an IRS determination letter application from 91 days after the date of the favorable determination letter to 91 days after the last day of the first regular legislative session beginning more than 120 days after the date of the favorable determination letter in which the governing body with authority to amend the plan can consider a plan amendment under the laws and procedures applicable to its deliberations. Notably, this relief also extends to situations where a declaratory judgment is sought from the U.S. Tax Court regarding the tax-qualified status of a plan.

The Revenue Procedure is helpful in that it provides significant relief for governmental plans that have been hesitant to file determination letter applications. However, there are a number of open issues that governmental plan sponsors should continue to take into account when evaluating whether to file a determination letter application:

- The remedial amendment period relief provided by the Revenue Procedure is applicable only to governmental plans described in Code §414(d). Additional IRS guidance on the definition of "governmental plan" is likely to be issued in the current IRS guidance year ending June 30, 2010.
- It is not clear if or how the extension to a governmental plan's remedial amendment period would apply to a governmental plan that is governed by a committee or board that does not have a "regular legislative session."
- As currently provided in IRS guidance, governmental plans that choose to file in cycle E would be subject to review for compliance with amendments required by the Pension Protection Act of 2006. Because governmental plans generally have until the end of the first plan year beginning on or after January 1, 2011 to adopt amendments made pursuant to the Pension Protection Act of 2006, we would anticipate that the IRS would provide relief in

[3] Rev. Proc. 2007-44, 2007-28 I.R.B. 54 §5.

cycle E with respect to this compliance requirement as was done with respect to certain cycle D filers, but, as of this date, the IRS has not provided any formal or informal guidance with respect to this potential issue.

- Governmental plans should still be sure to carefully consider their compliance status with respect to legally-required amendments prior to filing a determination letter application to avoid facing potentially significant "Audit CAP" penalties for failures discovered during the determination letter process. If failures to timely adopt legally- required amendments are discovered, governmental plan sponsors should consider filing under the Employee Plans Compliance Resolution System to correct these failures instead of simply filing a stand-alone determination letter application.

Exhibits A and B contain a checklist governmental entities can use to ensure legal compliance when submitting retirement plans for determination letters. The checklists are divided to detail the requirements applicable to both defined benefit (Exhibit A) and defined contribution (Exhibit B) retirement plans. In addition, Exhibit C contains a checklist governmental entities can use to assist in completing Form 5300 (the application for a determination letter).

**IRS SURVEY**

In February 2009, the IRS publicly released an information gathering survey and cover letter (the "Survey") and sent the Survey to a pilot group of 25 governmental plans, with the stated intention that, after initial review, the checklist would subsequently be sent to a larger group of governmental plans. Since governmental plans are exempt from the requirements of ERISA and parallel Internal Revenue Code provisions, the IRS has indicated a concern that governmental plans have been an underserved IRS constituency and the Survey is a step in an IRS plan to remedy this perceived lack of attention. Attached as Exhibit D is a letter to the IRS regarding this recent IRS initiative.

**PLAN YEAR-END UPDATES**

In addition to the amendments listed in Exhibits A and B, governmental plans should consider how to address the change in required minimum distributions applicable in 2009. Generally, required minimum distributions (or RMDs) are minimum amounts that a retirement plan participant must withdraw starting with the year that he or she reaches 70 ½ years of age or, if later, the year in which he or she retires. Section 201 of the Worker, Retiree and Employer Recovery Act of 2008 ("WRERA") suspends that required minimum distribution for the calendar year 2009 for defined contribution plans.

The Technical Explanation of the Required Minimum Distribution Suspension by the Congressional Joint Committee on Taxation is as follows:

In the case of an individual whose required beginning date is April 1, 2010 (e.g., the individual attained age 70 ½ in 2009), the first year for which a minimum distribution is required under current law is 2009. Under the provision, no distribution is required for 2009 and thus, no distribution will be required to be made by April 1, 2010. However, the provision does not change the individual's required beginning date for purposes of determining the required minimum distribution for calendar years after 2009. Thus, for an individual whose required beginning date is April 1, 2010, the required minimum distribution for 2010 will be required to be made no later than the last day of calendar year 2010. If the individual dies on or after April 1, 2010, the required minimum distribution for the individual's beneficiary will be determined using the rule for death on or after the individual's required beginning date.

If the five year rule applies to an account with respect to any decedent, under the provision, the five year period is determined without regard to calendar year 2009. Thus, for example, for an account with respect to an individual who dies in 2007, under the provision, the five year period ends in 2013 instead of 2012.

If all or a portion of a distribution during 2009 is an eligible rollover distribution because it is no longer a required minimum distribution under this provision, the distribution shall not be treated as an eligible rollover distribution for purposes of the direct rollover requirement and notice and written explanation of the direct rollover requirement, as well as the mandatory 20-percent income tax withholding for eligible rollover distributions, to the extent the distribution would have been a required minimum distribution for 2009 absent this provision. Thus, for example, if an employer-provided qualified retirement plan distributes an amount to an individual during 2009 that is an eligible rollover distribution but would have been a required minimum distribution for 2009, the plan is permitted but not required to offer the employee a direct rollover of that amount and provide the employee with a written explanation of the requirement. If the employee receives the distribution, the distribution is not subject to mandatory 20-percent income tax withholding, and the employee can roll over the distribution by contributing it to an eligible retirement plan within 60 days of the distribution."

Under the provision, no minimum distribution is required for calendar year 2009 from individual retirement plans and employer-provided qualified retirement plans that are defined contribution plans (within the meaning of section 414(i)). Thus any annual minimum distribution for 2009 from these plans required under current law, otherwise determined by distribution for 2009 from these plans required under current law, is not required to be made.

The next required minimum distribution would be for calendar year 2010. This relief applies to life-time distributions to employees and after-death distributions to beneficiaries.

IRS guidance in this area is expected later this year.

**§403(b) PLANS**

2009 marked a major milestone for governmental §403(b) plans, such as those sponsored by public schools. For the first time ever, under the final Code §403(b) regulations, §403(b) plans will be required to have a detailed plan document to be legally compliant. Although preparing a simple §403(b) plan document can be relatively straightforward and can be designed based on model plan language provided by the IRS,[4] the need to coordinate and administer plans with vendors can create more cost and complexity than many governmental entities want to assume. Under IRS transition relief, §403(b) plan sponsors now have until December 31, 2009, to adopt their January 1, 2009, plan documents.[5]

In Announcement 2009-34 (May 4 IRS Bulletin), the IRS issued a draft revenue procedure that would establish a 403(b) prototype plan program. Proposed 403(b) sample plan language (67 pages) has also been posted on the IRS website (http://www.irs.gov/pub/irs-tege/draft_lrm_403b_prototypes.pdf). These long-awaited pieces of proposed guidance establish a proposed framework for a prototype plan design, approval and adoption process that generally parallels the opinion letter program for master and prototype tax-qualified defined benefit and defined contribution plans.

The IRS has requested comments on the draft revenue procedure, the draft sample plan language, or any other aspect of the proposed 403(b) prototype plan program, generally by June 1. In addition, prototype sponsors (i.e., generally sponsors that expect at least 30 eligible employers to adopt its prototype plan) and mass submitters (i.e., a person that expects to file at least 30 opinion letter requests for word-for-word prototype sponsors adopters of the mass submitters' 403(b) plan) are asked to separately report how many opinion letter applications it will submit to ep.prototype.projections@irs.gov.

The 403(b) prototype plan program is not expected to be open for filings until later in 2009. 403(b) prototype plan submissions will be required to be submitted under the program no earlier than March 15, 2010, although a later deadline may apply. The IRS intends to establish an individually designed determination letter plan program for 403(b) plans after the prototype program is implemented.

Meanwhile, we understand that IRS is working on updated 403(b) Audit Guidelines that reflect the final regulations and hopes to have them completed by year-end. The expectation is that IRS agents would use them during audits beginning in 2010. In this regard, it is not clear how IRS audit

[4] Rev. Proc. 2007-71, 2007-51 I.R.B. 1184.
[5] Notice 2009-3, 2009-2 I.R.B. 250.

staff will view non-compliant plan terms during audits of the 2010 and possibly 2011 calendar years.

## CONCLUSION

In light of the numerous developments surrounding governmental plans and the guidance expected over the next couple of years, governmental plan sponsors should be diligent with monitoring and implementing compliant plan documents and procedures. While the increased attention does create compliance concerns for governmental entities, it also provides an opportunity to develop programs better suited for its population.

EXHIBIT A

GROOM LAW GROUP

## Governmental Plan Amendments – Defined Benefit Plans

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| **PPA Change** In-Service Distributions | Optional | Distributions in Plan Years beginning after December 31, 2006 | Last day of the first plan year beginning on or after 1/1/2011. | A plan may be amended to provide in-service distributions to a participant who (i) attains age 62 and (ii) continues in employment – even if the plan's normal retirement age is 65. |
| **PPA Change** Rollover of After-Tax Amounts | Optional/Required | January 1, 2007 | Last day of the first plan year beginning on or after 1/1/2011. | Plans **may** be amended to **accept** after-tax rollover amounts from 403(b) plans if separately accounted for (although the IRS guidance is not entirely clear). Plans **must** be amended to **permit** participants to directly roll over any after-tax contributions from the plan to DB, DC, or 403(b) plans that separately account for them. |
| **PPA Change** Rollovers by Non-spouse Beneficiaries | Optional/Required | Optional as of January 1, 2007 (mandatory for plan years after December 31, 2009) | Last day of the first plan year beginning on or after 1/1/2011. | Plans must be amended to permit nonspouse beneficiaries to transfer amounts from plan directly to an IRA. The IRA is treated as an inherited IRA for purposes of the minimum required distribution rules. |
| **PPA Change** Direct Rollovers to Roth IRAs | Required | January 1, 2008 | Last day of the first plan year beginning on or after 1/1/2011. | Plans must be amended to permit direct rollovers from the Plan to a Roth IRA (subject to AGI restrictions). |

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| **PPA Change** $3,000 Health Care Distribution | Optional | January 1, 2007 | Last day of the first plan year beginning on or after 1/1/2011. | Code section 402(l) permits governmental employers to allow an "eligible retired public safety officer" to elect a tax-free distribution from the plan of up to $3,000 annually for qualified health insurance premiums. |
| **PPA Change** Reasonable Good Faith MRD Rules | Required | August 17, 2006 | Last day of the first plan year beginning on or after 1/1/2011. | Governmental plans only need to comply with a reasonable, good faith interpretation of the minimum required distribution requirements. |
| Permissible Normal Retirement Age | Required | Plan Years beginning on or after January 1, 2011 | Plan sponsor's tax filing deadline for the year in which the change is effective (which is generally the 15th day of the 10th month following the employer's tax year in which the change was effective), or, if later, the last day of the next regular legislative session beginning after the amendment's effective date in which the governing body with authority to amend the plan can act. | "Normal retirement age" must be no earlier than the age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. Normal retirement ages are evaluated as follows:<br>• Normal retirement ages of age 62 or later are deemed to satisfy this rule.<br>• Normal retirement ages between age 55 and 62 must be reasonably representative of typical retirement age based on a facts-and-circumstances analysis.<br>• Normal retirement ages less than age 55 are presumed to not satisfy these rules, unless IRS determines otherwise.<br>• If qualified public safety employees are substantially all of the participants in a plan, a normal retirement age of 50 or later shall be deemed reasonably representative of typical retirement age. |

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| Final Section 415 Regulations | Required | Generally, limitation years beginning on or after July 1, 2007, but governmental plans can delay until 90 days after the close of the first regular legislative session of legislative body with authority to amend the plan that begins on or after July 1, 2007. | Plan sponsor's tax filing deadline for the year in which the change is effective (which is generally the 15th day of the 10th month following the employer's tax year in which the change was effective) (at least with respect to mandatory provisions), or, if later, the last day of the next regular legislative session beginning after the amendment's effective date in which the governing body with authority to amend the plan can act. | The final regulations include a comprehensive revision of Section 415 maximum benefit limitations. These rules also address when post-termination pay counts as compensation, COLAs, and other optional provisions. |
| PFEA and PPA Section 415 Changes | Required | 2004 and later limitation years | Last day of the first plan year beginning on or after January 1, 2009. | For 2004 and 2005, lump sum and other non-annuity form conversions for applying the 415 limits must be based on an interest rate of the greater of the plan rate (if any) or 5.5%. For 2006 and later years, an additional limitation, not more than 105% of the 30-year Treasury rate, also applies. |
| **Heart Act** Death Benefits | Required | Deaths occurring on or after January 1, 2007 | Last day of the first plan year beginning on or after January 1, 2012. | Beneficiaries of a participant who dies during qualified military service receive any death benefits (other than additional accruals) otherwise entitled to if the participant died while an active employee (e.g., full vesting). |
| **Heart Act** Death and Disability Benefit | Optional | Deaths or disabilities occurring on or after January 1, 2007 | Last day of the first plan year beginning on or after January 1, 2012. | Adopting employers can treat all individuals who die or become disabled while performing qualified military service as if they were first reemployed and then become disabled or die. |

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| Accruals | | | | For this purpose, employee contributions are determined using the individual's average contribution rates for the 12-month period of service immediately prior to the military leave (or length of continuous service, if less). |
| **Heart Act** Differential Wage Payments | Appears to be Required (Guidance expected) | January 1, 2009 | Last day of the first plan year beginning on or after January 1, 2012. | An individual receiving differential wage payments is treated as an active employee, and the differential wage payment (which must be on reasonably equivalent terms) is treated as plan compensation uniformly for all participants. |

EXHIBIT B

GROOM LAW GROUP

## Governmental Plan Amendments – Defined Contribution Plans

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| **PPA Change** In-Service Distributions | Optional – Money Purchase Pension Plan ("MPPP") Only | Distributions in Plan Years beginning after December 31, 2006 | Last day of the first plan year beginning on or after 1/1/2011. | A MPPP may be amended to provide in-service distributions to a participant who (i) attains age 62 and (ii) continues in employment – even if the plan's normal retirement age is 65. |
| **PPA Change** Rollover of After-Tax Amounts | Optional/Required | January 1, 2007 | Last day of the first plan year beginning on or after 1/1/2011. | Plans **may** be amended to **accept** after-tax rollover amounts from 403(b) plans if separately accounted for (although the IRS guidance is not entirely clear).<br>Plans **must** be amended to **permit** participants to directly roll over any after-tax contributions from the plan to DB, DC, or 403(b) plans that separately account for them. |
| **PPA Change** Rollovers by Non-spouse Beneficiaries | Optional/Required | Optional as of January 1, 2007 (mandatory for plan years after December 31, 2009) | Last day of the first plan year beginning on or after 1/1/2011. | Plans must be amended to permit nonspouse beneficiaries to transfer amounts from plan directly to an IRA. The IRA is treated as an inherited IRA for purposes of the minimum required distribution rules. |
| **PPA Change** Direct Rollovers to Roth IRAs | Required | January 1, 2008 | Last day of the first plan year beginning on or after 1/1/2011. | Plans must be amended to permit direct rollovers from the Plan to a Roth IRA (subject to AGI restrictions). |

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| **PPA Change** Hardship Withdrawals | Optional (Grandfathered 401(k) Only) | Plan Years beginning on or after January 1, 2006 | Last day of the first plan year beginning on or after 1/1/2011. | For hardship withdrawals, determination of need may be expanded to hardships of participant's designated beneficiary, even if not a spouse or dependent (e.g., domestic partner). |
| **PPA Change** $3,000 Health Care Distribution | Optional | January 1, 2007 | Last day of the first plan year beginning on or after 1/1/2011. | Code section 402(l) permits governmental employers to allow an "eligible retired public safety officer" to elect a tax-free distribution from the plan of up to $3,000 annually for qualified health insurance premiums. |
| **PPA Change** Reasonable Good Faith MRD Rules | Required | August 17, 2006 | Last day of the first plan year beginning on or after 1/1/2011. | Governmental plans only need to comply with a reasonable, good faith interpretation of the minimum required distribution requirements. |
| **PPA Change** Automatic Contribution Arrangements | Optional (Grandfathered 401(k) Only) | Plan years beginning on or after January 1, 2008 | Last day of the first plan year beginning on or after January 1, 2011. | Plans may "auto enroll" participants if certain requirements are met – applies to grandfathered 401(k) plans (and 403(b) and 457(b) plans). |
| Permissible Normal Retirement Age | Required (MPPP Only) | Plan Years beginning on or after January 1, 2011 | Plan sponsor's tax filing deadline for the year in which the change is effective (which is generally the 15th day of the 10th month following the employer's tax year in which the change was effective), or, if later, the last day of the next regular legislative session beginning after the amendment's effective date in | "Normal retirement age" must be no earlier than the age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. Normal retirement ages are evaluated as follows:<br>• Normal retirement ages of age 62 or later are deemed to satisfy this rule.<br>• Normal retirement ages between age 55 and 62 must be reasonably representative of typical retirement age based on a facts-and-circumstances analysis. |

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| | | | which the governing body with authority to amend the plan can act. | • Normal retirement ages less than age 55 are presumed to not satisfy these rules, unless IRS determines otherwise.<br>• If qualified public safety employees are substantially all of the participants in a plan, a normal retirement age of 50 or later shall be deemed reasonably representative of typical retirement age. |
| Hurricane Relief Provisions | Optional | Various | Last day of the plan year beginning on or after January 1, 2009 (2012 for EESA relief). | KETRA and GOZA allowed for hurricane-related distributions, recontributions of withdrawals for home purchases, and added special loan rules.<br>(Ann. 2005-70 provided additional relief for loans and hardship distributions to victims of hurricane Katrina, but if the plan already provided for loans and hardship provisions the 2005 amendment deadline may not apply.)<br>Similar relief provisions apply under the EESA for 2008 floods, which are also optional and may need a plan amendment by the last day of the plan year beginning on or after Jan. 1, 2012. |
| Final Section 415 Regulations | Required | Generally, limitation years beginning on or after July 1, 2007, but governmental plans can delay until 90 days after the close of the | Plan sponsor's tax filing deadline for the year in which the change is effective (which is generally the 15th day of the 10th month following the employer's tax year in which the change was effective) (at least with respect to mandatory | The final regulations include a comprehensive revision of Section 415 maximum contribution limitations. These rules also address post-severance pay that could impact the amount of leave conversion permitted on or after termination of employment and other common practices. |

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| | | first regular legislative session of legislative body with authority to amend the plan that begins on or after July 1, 2007. | provisions), or, if later, the last day of the next regular legislative session beginning after the amendment's effective date in which the governing body with authority to amend the plan can act. | |
| **Heart Act** Death Benefits | Required | Deaths occurring on or after January 1, 2007 | Last day of the first plan year beginning on or after January 1, 2012. | Beneficiaries of a participant who dies during qualified military service receive any death benefits (other than additional accruals) otherwise entitled to if the participant died while an active employee (e.g., full vesting). |
| **Heart Act** Death and Disability Benefit Accruals | Optional | Deaths or disabilities occurring on or after January 1, 2007 | Last day of the first plan year beginning on or after January 1, 2012. | Adopting employers can treat all individuals who die or become disabled while performing qualified military service as if they were first reemployed and then become disabled or die. For this purpose, employee contributions are determined using the individual's average contribution rates for the 12-month period of service immediately prior to the military leave (or length of continuous service, if less). |
| **Heart Act** Differential Wage Payments | Appears to be Required (Guidance expected) | January 1, 2009 | Last day of the first plan year beginning on or after January 1, 2012. | An individual receiving differential wage payments is treated as an active employee, and the differential wage payment (which must be on reasonably equivalent terms) is treated as plan compensation uniformly for all participants. |

| Topic | Provision Optional or Required | Effective Date | Deadline for Plan Amendment | Description of Amendment |
|---|---|---|---|---|
| **Heart Act** 401(k) Distributions | Appears to be Required (Guidance expected; Grandfathered 401(k) Plans) | January 1, 2009 | Last day of the first plan year beginning on or after January 1, 2012. | Individuals that request a 401(k) distribution while performing military service described in Code section 3401(h)(2)(A) are treated as having a severance from employment. For 6 months following the distribution, the participant cannot make employee contributions or elective deferrals. |
| **WRERA** 2009 MRD Relief | (Guidance expected) | January 1, 2009 | Last day of the first plan year beginning on or after January 1, 2012. | DC Plans are not required to distribute required minimum distribution for the 2009 calendar year. If distributed, these amounts may be treated as eligible rollover distributions. Plan sponsors are taking various approaches to meet these requirements. |

Exhibit C

STINSON MORRISON HECKER LLP

# Memo

**To:** Governmental Entities

**Year Updated:** 2009

**Re:** Checklist for Submission of a Determination Letter

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Please use the following as a guide to assist in the completion of a Form 5300, Application for Determination for Employee Benefit Plan, and to assist in the assembly of required documents for such a submission:

1. Submit a Form 8717**,** User Fee for Employee Plan Determination Letter Request, along with the appropriate user fee.
2. If appropriate, submit a Form 2848, Power of Attorney and Declaration of Representative.
3. In the completed Form 5300, make sure to enter the Employer Identification Number (EIN) of the **plan sponsor/employer** (NOT the trust's EIN) on line 1b.
4. Submit a copy of your plan's latest determination letter, if any.
5. Include a copy of the plan, trust, and all amendments since your last determination letter.
6. Ensure that the Form 5300 is signed and dated.
7. Give interested parties the required notification of the application.
8. If requesting a determination as an Affiliated Service Group or as a member of a Controlled Group of Corporations, include the information requested in the instructions for Form 5300.
9. For Multiple Employer Plans, include the required information as specified in the instructions under "Specific Plans—Additional Requirements."
10. For Partial Termination Requests, include the required information as specified in the instructions under "Types of Determination Letters, Partial Termination."
11. If you maintain any other qualified plans under IRC Section 401(a), attach a list for each plan with the following information:
    a. Name of plan;
    b. Type of plan;
    c. Plan number; and
    d. Indicate if another application is simultaneously being submitted with this application.

12. If requesting additional determinations regarding the ratio percentage test, average benefit test, or the nondiscrimination design-based safe harbors of IRC Section 401(a)(4), complete page 4 of the Form 5300.
    a. In addition, attach a Schedule Q showing all appropriate demonstrations for a determination regarding the average benefits test (See Instructions for Schedule Q).
13. For PBGC Terminations, include the required information as specified in the instructions under "Types of Determination Letters."

EXHIBIT D

GROOM LAW GROUP

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 n 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.

## B. 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 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)