Transcript for the EP Determination Letter Program Update

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Moderator: Welcome to the EP Determination Letter Program Update Phone Forum. At this time, all participants are in a listen-only mode. As a reminder, today's call is being recorded. I would now like to turn your conference over to your host, Mr. John Schmidt. Please go ahead.

J. Schmidt: Thanks a lot, Cindy. Hello, everyone. As Cindy said, I'm John Schmidt. I'm the acting director of Customer Education and Outreach for the IRS Employee Plans. Welcome to our phone forum entitled Employee Plans Determination Letter Program Update.

Today, we'll be hearing from Donald Kieffer, Area Manager Employee Plans Determinations and Andrew Fedders, Group Manager, Employee Plans Determinations. Before we start, I'd like to point out a couple of things. Everyone registered for this forum will receive a certification of completion by e-mail approximately one week after the forum. You must attend the entire live forum to receive a certificate. Enrolled agents, enrolled retirement plan agents and enrolled actuaries are entitled to continuing professional education credit for this session. Other types of professionals could consult their licensing organization to see if this session qualifies for continuing professional education credits.

As with all our presentations, the comments expressed by our speakers should not be construed as formal guidance from the Internal Revenue Service. For more information regarding the IRS Employee Plans Determination Letter Program, please visit our retirement plans website at www.IRS.gov/EP. You can also get there by going to the main IRS webpage and clicking on the Retirement Plans Community Tab along the top. Look to the left-hand navigation bar. Select More Topics, and click on Determination Opinion and Advisory Letters about two-thirds of the way down the page.

While visiting our website, you might also want to subscribe to our free electronic newsletters. The link for newsletters is also on the left-hand navigation bar. We have two newsletters, the *Retirement News for Employers* for small employers sponsoring retirement plans and the *Employee Plans News* for retirement plan professionals. So, without further adieu, here's Donald Kieffer.

D. Kieffer: Thanks, John. Good afternoon, everybody. Welcome to today's phone forum. With me also in moment will be Andy Fedders. We're two of the managers in the Determination Letter Program. We're going to talk about some of the current guidance, development of our program, some of the issues that we face and try to give an overview of what's going on with Determination Letters and the plan amendment process.

We did put a PowerPoint out. If you don't have it in front of you, that's okay. You can probably follow along without it. If you do, we'll try to identify what slide we're on as we're speaking.

If you look at the first one, I have to apologize. I was trying to put an enhanced font in the title, so if you printed it out and you see this shadowing, that's not your printer. That's my fault. I apologize. We'll get it corrected when up online.

I'm going to start on slide three, which is the agenda for today. I'm going to start by talking about some of the current issues facing the program. You've probably heard us talk quite a bit about the issues that we face, some of the changes that we have to make and certainly judging by the questions that we've gotten in advance. Eliminating demonstrations and limiting inbound form 5307s are probably the two biggest concerns many of you have.

After that, I'll turn it over to Andy, who will talk about some of the issues we face in cases, the things our reviewers are looking for right now. We're pretty much right around the Cycle D. We're reviewing cases that were submitted right around Cycle D or a little bit later. So, the things that we found during multi-employer reviews are coming up, so Andy will cover those.

Then, I'll come back and talk about things that we are likely to see down the road. We did get about I think almost 18 or 24 questions submitted in advance. So, we'll try to leave the last 15 minutes to take questions, and whatever we don't get to, we'll try to e-mail all of you individually and maybe post what we can't up on our webpage in the future.

So, with that, if you're following along, I want to start on slide four, and this is the kind of state of where we are. Right now, we're generally working in the middle of Cycle D with regard to our more complicated questions. We started to get in our less complicated submissions into Cycle E and maybe even cracked open the first submissions in the second Cycle A.

The third bullet point on the slide, I did say I was going to wait until the end to take questions, but I'll take one right now. I have a question submitted—what progress has been made in eliminating or reducing the backlog of requests for determination letters for ESOPs? I'm assuming the questioner is asking a followup to the last time we did a phone forum, which was on the ESOP determination letter practice, and I outlined how we were pretty far behind. We were trying to do some things to improve it.

I think the two things I cited, I'm not even sure how long ago that was. I think it was six months ago. The two things I cited were bringing more people on and trying to take some more merit, resolve things very quickly on a quick look, what we would call screening basis. The question asks how successful have you been since the last time we talked about it.

Well, going back to slide four, we're still a little bit behind where we should be. We're finished with Cycle C, ESOP submissions and just starting to go into Cycle D. So, I guess I'd make two observations.

Number one, that's about a full cycle behind where the rest of our work is, which is still not good. Number two, we do have a webpage, as I think I said before, where we put up the kind of status where we are with all our plans. So, if you want to see how we do in the future, you can keep checking that and see how we move along.

The good news is I do seem to see a little bit of improvement in our movement of cases. That's a function of the two things I outlined before. We tried to streamline the review process for ESOPs up front, and I think a secondary thing that worked is we put out all the different guidance on ESOPs that I talked about last time, and I think that by putting that out there and sharing it, the next wave of submissions that come in are, you would think, generally more compliant with what we said we're going to be looking for in those guidance bulletins. So, that's a long-winded way of saying we're not as good as we need to be with ESOPs, but we're starting to see some of the improvements we would hope for.

I'm going to slide number five, and let me talk briefly about pre-approved plans because Monday is a very important day, and I assume there are a couple of people on the phone that are looking at a hopefully not too busy weekend. We issued Rev. Proc. 2011-49, and then right behind that, we issued IRS Announcement 2012-3, and 2011-49 says submit all these plans by the end of January, and 2012-3 says in response to a lot of public and practitioner requests, okay, we'll give you a couple extra months.

So, the deadlines for preapproved plans, this is to get in defined contribution, lead, line submitter or matcher and prototype documents is next Monday. We started to do all the behind-the-scenes work to get ready to receive them. We actually started doing that once before and then once the delay came, put that to the side obviously, but I think we're ready to go to start receiving the lead plan submissions.

Now, April, I think for all of you is going to be a pretty busy month for those of you that work with preapproved documents, and it's certainly going to be a busy one for us because next Monday is the submission deadline for the re-plans. Then, at the end of the month, it's the filing deadline for 5307 adopters for defined benefit plans. Now, it's kind of ironic if you look at the initial setup of the Staggered Remedial Amendment Program, there was kind of this separation between when the lead plans came in and when the adopters would be worked, and I really ... adopters of DC plans, but I don't think we ever thought we'd have all of this preapproved work coming in in the month of April, but nevertheless, that's what we've got. So, to summarize, April is going to be a very busy month for us with regard to dealing with preapproved plans, as I suspect it's going to be for many of you on the phone.

Let's turn briefly to slide six. Let me talk about one—I listed a couple of pieces of guidance. I don't want to go through them too much. Andy is going to cover a little bit of hybrid regs when he talks about cash balance plans momentarily. The user fee guidance is very complicated to read, but all it basically says is we're going to try to give as many people as we can a free pass on the user fee if you're small and not too old vintage.

One thing I don't have on there is IRS Notice 2011-96, which we probably won't get into today, but which will be, I think, reasonable ... for its own phone forum, and that is the amendments required for Section 436. Four-thirty-six is a very difficult concept, and yet, in some ways, it's a very simple concept. It's a very simple concept because in writing PPA and writing all the changes that became Code section 436, what Congress did was move minimum funding issue into the qualification requirements of the Code. Then, by doing that, the difficult part is okay, well if these are now qualification issues, what does the plan have to say with regard to how it's going to pass what were generally understood to be operational concepts.

So, if you look at 2011-96, it really does two things. One is it gives a deferral of the interim amendment requirement to the end of this plan year, which is probably from a ... year plan this year, next year tax filing return date, but the other thing that I think for the purposes for this forum is far more important is we have a whole set of model language constraints attached to the back of it. Now, I was looking once before, we don't really put too much model language out that is outside our list of required modifications. Most of the time, whenever we give you sample language and we say this is what has to be in the document, most of the time we kind of migrate that out into the LRMs and say this is the standard we're going to review preapproved plans by and then what we say informally is well, if you're using individually-designed documents, you don't have to use those model language exactly, but in concept or in spirit, you've got to get close to this.

On the fourth and sixth amendment, we're trying to do, I guess, a similar thought process. It's a very complicated subject matter. Here is sample language. We didn't say that you must use it, but we're trying to convey the intents and spirit of the law, which plan submission has to carry. We recognize that people have a lot of challenges trying to draft benefit restrictions for 60% ACT pass and things like that. So, rather than have everybody guess, we thought the best way to do it was let's attach it the back of the notice, and then, that way, people can in some way see for themselves what it is we're going to be looking for when you come in with it.

So, that's one piece of guidance that is probably one of the more important ones we delivered to the program that I don't have on the slide. So, I could specifically talk about it. It's noted 2011-96, which again is two parts, a fun part, which describes the extension of the remedial amendment period. Then, a second part which describes the model language that we're looking for that would address—the language that we would be looking for modeled as to what it should say.

Okay, let's change to slide seven, if you will. I want to talk about a couple of pieces of guidance we've got right now, and I think I'll save the on-the-horizon for later. The guidance that we have right now, if you look on our website, we have what's called an ANPRM, an advanced notice of proposed rule-making. What we've said is in layman's terms, we want to start a dialogue with the government plan community about getting out more formalized rules on what it needs to be a governmental plan and a nongovernmental plan or maybe more accurately a governmental entity and a nongovernmental entity in the same context, and we'd like to hear your feedback.

Generally, in the hierarchy of IRS administrative materials, you start with an ANPRM which is advanced notice, and you eventually you come in with a notice, and with the notice are usually the proposed rules, then you get final rules, etc. So, an ANPRM is kind of really the starting point. In furtherance of that, we've been doing the dialogue, that if you look on our webpage, we describe through a series of town halls. I think we had one in Oakland, California, I think about a month ago. I think we've got another one scheduled, I want to say in Ohio in the short term. I actually don't remember, but we want to engage with the community and hear what people's concerns are if we're going to start writing into administrative rules a series of constants that never before existed.

So, you can look at our webpage, you'll see the issues that we're looking at and where we intend to issue proposed rules. I think down the road at some point, you'll see the progress that I described falling from that.

Now, that was all a lot of introduction to get me to slide eight, which is what I would really like to focus the balance of my comments on, which are changes in the program. With that, I want to go to, again, two more questions that were submitted in advance. I'm going to paraphrase it.

The first one says—while Schedule Q may not be very practical for most nondiscrimination situations, we needed it. How can you get rid of it in employee terms? A second one says we really need to come in with a Form 5307. We like the assurance that we did everything right up front. What is it that was behind the thought-making process by eliminating it?

With that, I want to briefly go over what I see to be the kind of state of the universe of determinations. Number one, I've been here since I think September of 2009, I can't remember a day where we weren't looking at this program. How can we make it better? How can we do things more efficiently? Number three, how can we compensate for the fact that we really are challenged to apply our resources the best?

We've got a lot of cases coming in, a lot of issues that we find in those cases, but relatively small number of employees to work on them. There are certain categories of things that we need to do and we have to do, but we have a whole lot of things that we just can't seem to get to. I guess ESOPs is one of those things that I would put in the latter, not that we're not getting to it, but that we're not getting to it quick enough.

So, there's been quite a bit of analysis and study of this program, and I would divide it up into kind of two sectors, the external and the internal. The external, there's been a number of study groups that have looked at this program, certainly the advisory committee to TEGE and the ACT report, which if you follow John's navigation link that he described earlier, you can find it on our web pages. That was an external study, and it was about a 120-page report that brought up many, many different ideas and concepts and things we should do to change, do some differentiated case management techniques, set up a special ... of government plan compliance and voluntary compliance programs and increase more staffing.

In the 120 pages, there were as many different ideas advanced as you could fill in a document, but by and large, I think the one that got the most amount of publicity or following is interim amendments. That's kind of like ... of the external analysis is can the IRS do something to change interim amendment requirements. Now, I'm not going to in any way, hold this offense open. I'm not here today to deliver what our answer is going to be. I know many people are waiting for us to come out with this law. All I'm going to try to explain what I see the issue is and why we don't have an answer yet.

Specifically with regard to interim amendments, there's really a policy and a legal consideration that has to be resolved before we can come out with what we're going to do. The ACT Report kind of offered, reading between the lines, four different possibilities. One was do nothing. I don't think it says that explicitly but implicitly is that is don't do anything different.

The other is get rid of them altogether. I don't think that was explicit either, but by inference was really one thing you could do. IRS is willing to make them altogether.

The two that have kind of been the major focus of the report have been this choice between reducing the frequency by limiting interim requirements only to 411(d)(6) issues. That would be anytime the law changes that would potentially cut back on employee benefit. We're going to a kind of core versus noncore analysis where you would look at law changes on which ones are integral to plan operations, and if it affected real core set of rules, those things would have to be reduced to an annual plan amendment. That's kind of the choice I get that the ACT Report proposes to the Service.

The reason we don't come out with an answer yet, we've been doing a lot of analysis on this behind the scenes, a lot of work, a lot of discussion, a lot of evaluation and consideration is again going back to what I said. There are policy and legal reasons between picking any choice. I guess to summarize this, the policy issue really is how frequently should a plan be amended. To express the written concerns and the concepts and the benefits that are available to participants, how frequently should a plan catch up to the state of law?

If you look at the interim amendments rules as they are written, they basically say it should be done every year. If you were to be of the belief that they should be drastically reduced, then you would be one of the people that could be caught up much later as long as the employer is keeping track of what they are when they restate documents whenever it is, they can bring them up at that time. So, there's the policy issue, really.

How frequently should a plan express its provisions to participants and to be able to have people rely on what they are?

The legal issue is kind of well, here is the rule and here is what we have today. If we change it, what can we do to accommodate whatever concerns we have to even beget that initial policy? For example, let's say we believe that the plan has to be amended much more frequently than a five or six-year cycle period. What things can be done, and again, I'm not saying that that's our answer, but let's say we start with a belief or precept that it has to be done more frequently than a restatement period. What can be done by taking this outside of the document amendment process that would be a suitable substitute, and under what circumstances would that substitute satisfy the legal considerations that those things would express participant benefits?

When you move this into a notice or can you move this into summary material outside of the plan amendment process and still create that legal reliance that the policy even begat in the first place? I think that sets up the division, if you will, or the strings that target the issue, and therein, is why we don't have an answer yet is because we're really trying to resolve something that falls in the middle of both.

Again, the ACT Report advanced a lot of things. Interim amendments are but one of them. We still today wait for guidance, which I think will come eventually on picking from among all these different choices what we think is the legally appropriate policy decision that is best for participants and in the long run, enhances the compliance process that we need it to be.

Now, let's go to the second thing, the second cluster is what I call the internally proposed changes, and these are the things that we've worked on behind the scenes to try to develop the efficiencies and the accommodations I described earlier. The ACT Report is kind of from the community hey, IRS, here's what we think you should be doing for us. Internally, we've been looking at our resources and our staffing and our programs and trying to identify very clearly

what things do we have to provide to the community because let me go back to slide three, we're getting into Cycle D ESOPs. That's for us, to see how quickly we got to that point is in some ways, successful, but you look back, take a step back and look at it in the broader picture, wow, we're pretty far behind.

The reason we're behind there is because very simply, we don't have the resources to cover all of the different components that make the comprehensive Determination Letter Program. We're not unique in that regard. I know any governmental and many private agencies feel they don't have enough resources and staffing to execute all the things that they want to do, but I think here, it's acute. We're just really challenged to deploy the number of people we've got to service all the different aspects of the ruling process.

So, we sat down and took a look and said what things are there that we're doing service on that maybe we don't need to do, and I know this has been described to some degree as scaling back or pulling back. I think we would look at it more like we have this available pot of resources, where do we need to apply them and where can we apply them best. The two things we came to an idea on are the demonstration process and the 5307 program. I'm taking the second one first.

5307s in general are submissions of plans that are adopting plans we already reviewed. So, if we could take the amount of resources and staffing from that and apply it to other things, we can conserve resources by not re-reviewing plan language we have already looked at. Now, I fully understand that the 5307 process is far more than that. I know many of you had had clients that you picked up their adoption agreement in a takeover situation or you have a new client walk in the door and you're flipping through the plan document and there it says in section five, this plan offers distributions as A, lump sums; B, installments; C, survivor annuities and none of them are checked or page 21, two years of service and then you go back vesting in six year ....

We've got combinations that don't work or the provisions of the plan have already been pulled out. By coming into the IRS with a ... adoption agreement and getting a determination letter, if nothing else, you know we'll find that. Fix that, and you'll have it resolved within the remedial amendment ... hopefully before there's any kind of harm to it. I realize that's a tremendous service, but just quite frankly, we can't do it anymore.

Let's look at demonstrations. We did an analysis that takes us basically the equivalent of an entire workgroup of people working end-to-end in the cycle just on the demonstration and with actuarial support to resolve only the nondiscrimination portion, not the language and the plan, not the case file, just the demonstration demographic information although I personally think we get a lot of compliance out of that process. We've found quite a number of arrangements that we don't find acceptable. We've devolved quite a bit of guidance off of defined contribution demonstration fixes.

We don't have the number of people we need to be able to do that and to address our inventory in the timeframes that we need to do. Although there are very compelling reasons to keep working on both of those types of cases, what we found is we don't either have the resources to do it or we can, maybe more accurately stated, better spend those resources doing other things. So, that's why we decided we're going to stop the flow of inbound demonstration fixes beginning next May and limit inbound 5307s to modifiers.

I've got a couple questions about that. Under what circumstances would we consider something coming in anyway? I'm going to have to leave that until the end when I get to the questions. With that, I'm now going to turn to slide eleven, and we're going to start on the most common errors for determination letter applications.

I'll start by turn it over to Andy Fedders. Andy has a group of employees that work on cases every day. He's also manager in charge of the cash balance cadre, so he and his employees work all of the cash balance retirement submissions all the way from ... through to our first round submissions A through E. So, with that, let me turn it over to Andy Fedders.

A. Fedders:Thank you, Don. I'll start with some of our more mundane but very important errors that we discovered in our review of determination applications. The 415 issues related to post-employment severance pay, this kind of drives us crazy, and I think maybe drives some of you all crazy too. There are two different levels of post-severance compensation that we need to be concerned about. Both those are measured during the same periods, two-and-a-half months after severance or that was later of the limitation unit improved the date of severance.

Some of that compensation is required to be in 415 and some of it is optional. The required part is compensation where payments would have been paid to the employee while the employee was continuing unemployment for regular services or for things like overtime or shift differential, commissions and bonuses, more of a routine compensation. Those are required to be included in 415 compensation when paid during the post-severance period.

Unfortunately, that frequently gets confused with optional compensation paid during the same period. That optional compensation of sick time, vacation time that the employee would have been able to use had he kept working or payments from unfunded deferred comp plans that would have been paid at the same time if they would have been cleared in gross income. Those are optional and don't have to be included. Yet, we see these items round together very frequently, and it costs us time and takes away some of our efficiency.

Another recurring 415 issue is the 415 correction method, most specifically the suspense account method from the old 415 regs. We're still showing up in plan documents. Frequently, they show up though with more of a provision that tries to parrot back the sentence and the preamble of the 415 regs that provide that the suspense account method could possibly be used or may well be

used as part of the voluntary compliance submission or even under closing agreement. We see that language showing up in plan documents.

Often, it's the attempt to parrot that results in a strange situation where a plan says we're going to follow a process and blow ourselves up by violating 415, but then, we'll walk it in to voluntary compliance. We have some issues with that. Sometimes it works. Sometimes it doesn't, but in most events, it costs us time and costs us having to make contact that we would like to avoid.

Major issue that comes up is failure to update for the final regs, final 415 regulations that affect the plan years beginning after July 1, 2007. I don't know why that one is missed frequently but it is. We do realize that many plans have various styles of incorporating by reference and the incorporation works. It's not missing an amendment. Sometimes the incorporation doesn't work, but the issue of compliance with the final 415 regs occurs much more frequently than we're comfortable with.

Demonstrative issues that we have that probably cost us time and I'm sure cost you all time is the way that Form 8821 is filled out. Line five of the 8821 deals with disclosure of tax information, and there's some instruction right on the face of the form saying that a block must be checked. Internally, when we receive a form where one of those blocks is not checked, we have to disregard the 8821. Sometimes, we end up making contact in other areas.

Many times, the taxpayer was told something upon completion of that form, finds that the right people that they thought were helping them out, representing them, can't be contacted, which is unfortunate. Please pay particular attention to line five of 8821. It will help all parties involved get the right results.

Pension Funding Equity Act of 2004 remains a common issue. The PFEA, as it's called, we pronounce any acronym here in the government, but the PFEA is effective for planning for 2004 and 2005, but PFEA first appeared on the 2005 cumulative list brought into effect by PPA, and PPA provided the final amendment deadline was the end of the 2008 year, and we extended that to 2009. It's been around. It's been floating around, but it's not amendments for it. We're not finding their way into determination applications or determination letter into pension plan documents. We paid particular attention to PFEA.

On slide 12, we have recently over the last eight months to a year, had a rash of applications come in with documents that aren't signed. These aren't documents that are proposed amendments or working copies but just documents that show up that aren't signed. There are no tracks on the file that indicate that the documents were executed by a board separately or anything like that.

We end up making contact in many of these cases, securing something that's very routine. Having to do that renders us very inefficient. Sometimes, there's an issue behind it. If there are enough issues behind it, sometimes actually a document was not signed. It was not in a situation where it was a proposed amendment or a restated document wasn't proposed.

Enough of that comes up that we can't turn our head to this. We have to pursue these unexecuted documents of any sort, and it's costing us time. For those folks that might be sending us applications for 5307 by the 4/30/12 deadline, please help everybody out and let's get the documents signed. We would appreciate it. It's one thing that we can all do to help us be more efficient.

Another 4/30/12 submission deadline item would be lack of modification statements for preapproved plans. Technically, that renders the application incomplete. Frequently we have 5307s, line seven of the ... indicate that there has been a modification of the preapproved document, which is absolutely not an issue in and of itself, but the requirement to have a complete application would be that there's a statement explaining very directly where that modification occurs in a document or if it's a PD plan that it's attached. Those are again being left out of the application, again, causing us to estimate contact very, very frequently in situations where we wouldn't have to make contact. We wouldn't have to expend resources, and we could process the case more efficiently.

An interesting item that has come up now for years are late amendments. Frequently, late interims, Don discussed considerations with interims, but just as frequently as late interims, there are late discretionary amendments, especially amendments not adopted by the deadline of 401(b) that's been in place forever and ever. From my angle, I don't understand why those come to us without going to voluntary compliance.

The way that the voluntary compliance program is set up is "that's a much better deal." We want it to be a much better deal. We'd like to have any defect self-identified, self-corrected, walk through the program. That's the whole idea.

We here in the determination business, don't want to have to deal with situations like that. Now, we do very frequently. We know how to get that done in a fairly efficient manner, but the best way to go would be if amendments got signed or executed properly within a proper timeframe.

Going to slide 13, instructions for applications ask that cover letter contain explanations of unusual items. We do read the cover letters. Some people often claim we don't, but we do read the cover letters and rely on the cover letters for areas where things like a cycle-changing event, the explanation of what changed the cycle and the cycle to and from cycles can easily be laid out in a cover letter and help us effectively get through the case and not have—sometimes, if we're not following just by information in the file, we end up asking for more material or more stuff,

shall we say, than what would really be needed if a good solid explanation of the transaction was already there.

We have an advance question about the new form fits in here where the form is currently—the 5300 form currently published has some different limitations on size of fields than what was in the past. We hope as you fit in all you can fit in these asterisks or marks direct us then to the cover letter and fill out the rest of the information that we need and you want to provide to us there on the cover letter.

The category of plans that we work as ... plans are plans that are new plans within their first two years that are submitted by end of their original or unmodified 401(b) periods. Those plans are entitled to come in based on the table and Rev. Proc. 2007-44 as long as their regular on-cycle cycle is more than two cycles away and during their own modified 401(b) period. Frequently, unmodified 401(b) period, which is basically the due date of the employer's tax return, causes us in order to verify that that deadline is met, causes us a fair amount of legwork, where if it's explained in the cover letter how an extension occurred or if there was a merger combination involved, just please lay it out for us. Give us an indication of why something is on time and on cycle and we should be able to work much more efficiently.

Slide 14 discusses prior law compliance. Every determination letter application should address what we call prior law compliance. Part of the assurance bulletin that's available through IRS.gov under the retirement plans community explains in good detail what we're looking for. The ...-6 specifically 2012-6 infraction 6.08 provides that if a plan has previously received a determination letter, the application must include a copy of that letter. If there isn't a letter, the document listed is still required.

Documentation generally would be a prior plan document that was in compliance. That prior plan document was subject to any opinion or advisory letter, that should be included also, fairly routine item that we make or team context is secure. We would be much more efficient and able to process cases faster with that material in the application as is required.

Slide 15 gets us to a huge headache, merged plans. We talk about merger, we really mean consolidation, any kind of combination spinoffs, spin- togethers, those items come under mergers. A merger occurs during a remedial amendment cycle in order to show that the final plan arrangement is a qualified plan prior to law compliance will have to be provided for each of the plans involved in the merger, be it two or twelve or whatever it may be. Prior law compliance is, again, a favorable determination letter or prior plan documents, including prior interim advisory letters and also the interim amendments, good faith interim amendments required to keep the remedial amendment cycle extended and open. Those are need for all merged plans.

We frequently hear compliance, well, we took it over. We don't have that. We asked. They don't have it. Nobody can come up with it.

We can deal with that situation from determ. We would appreciate it if you disclose it to us and save us making a contact and having to wait and keep the case open while we're waiting, but better yet, how about voluntary compliance. If you know the situation is there, take it to voluntary compliance. They'll work with you quickly and get you in a spot where we can go ahead with the determination application.

One of the issues related to not having demos even though it speeds us up, shall we say, in levels that apply what resources we have directly to the plan work, we have come to rely in many cases when evaluating plan formulas, be it allocation or defined benefit formulas, on the material in the demo to help us judge whether the qualification requirements for predetermined formulas are definitely determinable pension formulas are met. Since we won't have demos in the future, warning I guess to maybe be on guard that we may have some additional questions on how formulas work. If you think we might, a cover letter would be a great place to explain how a formula works or your position on what we should be looking at to judge whether something is predetermined or definite.

Moving to slide 17, compliance statements, frequent occurrence is a termination specialists receives an application that has a compliance statement from VC. Usually that's welcomed. That means that things have been through a self-identification process, ... professionally checked it out. ... proposed and accepted by voluntary compliance.

There's a bit of a disconnect sometimes where a couple of things come up. One is very technically, the voluntary compliance, especially on Appendix F case, basically is an extension of the 401, the remedial amendment period. The 401(b) period is extended, the .... In those cases, in most voluntary compliance cases involving plan form, the entire thing is contingent on the determination letter, which means that there still might be some issues to work out with either the correction or items that weren't corrected. Not usually a problem.

But the VC compliance statement is not a complete path. Sometimes, other issues come up that would require a closing agreement or sometimes voluntary compliance reopens the case, which they're not obligated to do, but frequently they do.

Moderator: Pardon, the interruption. This is the operator. We have 12 minutes until the conclusion of today's call.

Fedders: Thank you very much. I bring this up just to note we should all be on guard if the situation occurs. It's not unusual and we'll do everything we can to work through getting those plans a good letter as quickly as possible.

The next slide, multiemployer plans, as Don said, we're dealing with a lot of multiemployer plans and Cycle D submissions. One thing that comes up in multiemployer plans is because of the complicated arrangement, plans frequently incorporate terms into the plan document that appear in ancillary documents, collective bargaining agreement or reciprocity agreement.

Slide 19 shows two situations in facing reliance. The submitter of the multi-employer plan can elect to receive reliance under the determination letter on this plan terms they've incorporated but to do so must append them to the document or they can elect to forgo reliance.

Slide 20 has the caveat that goes on every multiple employer letter, a note in the interest of time that does require the exact language that is incorporated to be appended. Frequently, we see situations where references to ancillary documents are borderline disaster due to the ancillary documents changing different time periods and different paces than the plan document.

Slide 21 clearly lays out that the applicant really is selecting reliance. It's very clear from the caveat in slide 20 that the determination letter does not provide reliance. It has zero, zip, no reliance on things that are not appended. Choose wisely.

Cash balance plans, slide 22, I'd like just to make a couple of points quickly. The one big point is that with all of the changes that have been brought about by PPA, all the changes to the code and regs under 411 have been brought about by PPA, the final hybrid regs, the proposed hybrid regs, none of those changes have impacted IRC 411(a)(7), the definition of accrued benefits. That remains as in place, as it has for many, many years.

The present value, as laid out on slide 23, can be determined based on a lump sum. The present value or lump sum can be determined based on the cumulated amount and hypothetical account, but the accrued benefit is still defined as single-life annuity at normal retirement age. Just its present value is determined differently than if it was completely subject to 417(3) rules.

Slide 24 talks about some of the accrual rules. This is an area where we did receive a few questions, and it's an area that comes up frequently in working. Post-PPA shows cash balance plans, especially ones that might have been around before PPA. There's nothing magic about that.

The accrual rules have changed. 133 1/3% accrual rule requires the requirements haven't changed with PPA. A formula that wouldn't pass a graduated formula, that wouldn't have passed the accrual rules before and after PPA is on impact, but what a cash balance plan can do because the hypothetical interest credits or as the slide calls it, minimum interest rates, because that can be used or is used by definition under notice 96-8 as part of the accrued benefit and it accrues at the same time as the hypothetical allocation accrues, if that rate is fixed or a floor or go below a certain level, it's an actual accrual that is accruing and can be credited under the accrual rule.

We'll have a little more of an example in the wrap-up questions that we get out, but another point is the PPA did not provide any relief regarding the accrual rules. That is under the proposed hybrid regs. It makes it clear that a plan, post-PPA cash balance plan, may have a combination variable and fixed rate that proposed regs have three different combinations of variable and fixed rates that likely will hold up, I think, at least some version of that into the final regs. So, plans that will have larger graduations between their formulas and still pass the accrual rule. A plan that doesn't have a graduated formula where a person gets in a level of formula and stays there forever and ever automatically satisfies the accrual rules.

That's the last information that I have and Don has several questions left to answer, so back to Don. Thank you.

D. Kieffer: Thanks, Andy. In the interest of time, I'm going to just take the ones that I can read the easiest. I'll let Andy answer all the hard ones later. Whatever I can rip out really quickly, I will get out. Whatever we can't answer online, I'll send the question or an e-mail, and then we'll try to compile all them and post them up for you all to read later.

First question—please discuss multiple employer plan document process, the dates, the cycle, the time, the traditional, the open. The review process is the same as for any other plan. We review them like any other submission. The only thing is that they all come in during one single submission period Cycle B. They're respective of the EIN. I suspect the questioner doesn't want to know how we review them, but when is the timeframe to get them in or maybe are we changing that.

The first cycle period ended January 31, 2008. The second one, January 31 of next year. I don't think we will do anything significantly to change that, to be honest. Again, we review them like any other plan although multiple employers generally don't have too much unique stuff that we have to look at. There's usually just an additive language for participating employers. Multis can be quite complicated. That maybe we should do on a phone forum another day.

Next question—client submitted off cycle. It hasn't been reviewed. In two words or less, what are we going to do with it when it comes up on cycle?

Most likely what we will probably do is return it to you and refund the fee. You'll still have to make an on-cycle filing within your stipulated remedial amendment period and we can't convert one to the other. We did say we didn't really want off-cycle filings unless they were ... business needs type cases because quite frankly we may not get to them, and it's likely that we may not get to a substantial number of them.

I've got two questions here that I'm going to paraphrase. What types of changes will the IRS consider significant enough to get you in the front door, which says no 5307s allowed unless you modify, but not so significant that you've pushed all the way into an individually designed plan? The answer is I'm not going to tell you. We've tried to say we don't feel we need to review preapproved adopters unless they've got changes. Obviously, the degree to which you can permissibly change and stay on a ... submitter document, for example, is you can change them to same minor modifications or we call them deviations.

Moderator: Pardon the interruption. We have three minutes until the end of the conference.

D. Kieffer: We have three minutes left. So, you can make some minor modifications, minor deviations, but if you make major changes, you put things in that were never envisioned into the preapproved plan program, that pushes you to an individual plan. Really, it's a facts and circumstances decision. It would be impossible for me to really tell you all the different facts and circumstances. Generally, if you make minor changes, you can stay on a 5307. If you make major ones, you could go on a 5300, and beyond that, you're somewhere on your own.

I have only time for one last question. It basically asks if we have problems identifying a case or we lost the status or we can't find out where it is, who do we contact. If you look at the Employee Plan News, EP News, for December 2011, we have an article with the phone number and the fax, or you can always e-mail us at retirement.plan.questions@IRS.gov.

Sorry, we were a little bit short of time. We ran a little bit over so we didn't get to do too many more, but again, we'll try to respond to all of you individually and collectively.

In summary, on behalf of all of us at the IRS, especially John, Andy and myself, I want to thank all of you for attending today's phone forum. I hope you found the information valuable and helpful. If you ..., by all means, get in touch with us and let us know. Thank you very much. Have a nice weekend.

Moderator: That does conclude our conference for today. Thank you for your participation and for using the AT&T TeleConference Service.