



Tax Exempt & Government Entities

---

TE/GE

Advisory Committee on  
Tax Exempt and Government Entities (ACT)

# 2016 Report of Recommendations

Public Meeting  
Washington, D.C.  
June 8, 2016

This page intentionally left blank.

## REPORT TABLE OF CONTENTS

<b>2015-2016 Member Biographies</b> .....	<b><u>5</u></b>
<b>General Report of the ACT</b> .....	<b><u>17</u></b>
<b>Employee Plans</b> .....	<b><u>21</u></b>
Analysis and Recommendations Regarding Changes to the Determination Letter Program	
<b>Exempt Organizations</b> .....	<b><u>89</u></b>
Stewards of the Public Trust: Long-Range Planning for the Future of the IRS and the Exempt Community	
<b>Federal, State and Local Governments</b> .....	<b><u>157</u></b>
Revised FSLG Trainings and Communicating with Small Local Governments	
<b>Indian Tribal Governments</b> .....	<b><u>197</u></b>
Survey of Tribes Regarding IRS Effectiveness with Current Topics of Concerns and Recommendations	
<b>Tax Exempt Bonds</b> .....	<b><u>271</u></b>
Recommendations for Continuous Improvement and Enhancing Resources in the Tax Exempt Bond Market	

This page intentionally left blank.

ADVISORY COMMITTEE ON  
TAX EXEMPT AND GOVERNMENT ENTITIES  
(ACT)

**2015-2016 Member Biographies**

**EMPLOYEE PLANS**

**Susan Bernstein**, New York, New York

Susan Bernstein is special counsel in the New York office of Schulte Roth & Zabel LLP, where she has been advising employers and plan sponsors on ERISA, employee benefits and executive compensation for over 20 years. Bernstein has experience working with qualified plans, nonqualified plans, 457 plans and 403(b) plans, as well as health and welfare plans. Bernstein is co-chair of the Employee Benefit and Compensation Committee for the New York State Bar Association and serves on the Executive Compensation and Benefits Committee of the New York City Bar Association. Bernstein has written numerous articles on employee benefit plan issues in addition to being a frequent speaker on employee benefit topics. Bernstein was named one of Employee Benefit Adviser's Most Influential Women in Benefit Advising and was recognized by the New York State Bar Association as an Empire State Counsel Honoree and by WHEDco with a Pro Bono Leadership Award. Bernstein holds a J.D. from the Benjamin N. Cardozo School of Law, received her B.A. from the University of Pennsylvania and is a member of the New York Bar.

**Judith Boyette**, San Francisco, California

Judith Boyette is a partner in Hanson Bridgett LLP, a San Francisco law firm, and is the senior partner in the firm's Employee Benefits Group. Prior to joining her law firm, Boyette spent more than 10 years at the University of California as the Associate Vice President of Human Resources and Employee Benefits. Boyette's clients include single employer and multi-employer plans, 403(b) plans, church plans and governmental plans. Boyette received a J.D. from the Hastings College of the Law and is a member of the California Bar.

## MEMBER BIOGRAPHIES

### **Alison Cohen**, Atlanta, Georgia

Alison Cohen is a senior associate with the Ferenczy Benefits Law Center assisting clients with many different issues relating to qualified retirement plans and focusing her practice largely on Employee Plans Compliance Resolution System (EPCRS) corrections. Cohen has 18 years of experience working with retirement plans. From plan operations to presentations and sales, to resolution of complex legal issues, Cohen has broad experience and knowledge of the real world of retirement plan law. Cohen received a B.A. in Political Science from Rice University, Houston and a J.D. from the University of San Diego School of Law, San Diego.

### **Christopher W. Shankle**, Shreveport, Louisiana

Chris Shankle is a senior vice president with Argent Trust Company in Shreveport, Louisiana. Shankle assists his clients with a broad array of employee benefits issues, including retirement plan governance and fiduciary matters, plan design, testing and disclosure matters. Throughout his career, Shankle has been involved in numerous outreach initiatives on employee benefits issues and is a frequent speaker on the subject. Shankle has led the American Institute of Certified Public Accountants technical resource panel on employee benefit plans monitoring legislative and regulatory activity. Shankle has more than 26 years of experience in the employee benefit industry and is a member of the American Society of Pension Professionals and Actuaries, American Institute of Certified Public Accountants, Society of Louisiana Certified Public Accountants and Mississippi Society of Certified Public Accountants. Shankle received a degree from the University of Mississippi's school of Accounting and he is a licensed CPA in Mississippi and Louisiana.

### **Stuart A. Sirkin**, Washington, D.C.

Stuart Sirkin is Vice President and Deputy Practice Leader, National Retirement Compliance with The Segal Company. His prior positions include senior positions in the pension offices of the IRS, the Department of Labor and the Pension Benefit Guaranty Corporation. Sirkin also was on the staff of the Senate Finance Committee, as well as with consulting and law firms. Sirkin is active in the American Bar Association employee benefit committees and is a charter member of the American College of Employee

Benefits Counsel. Sirkin received a B.A. in Economics from George Washington University, Washington, D.C.; a Masters in Labor Economics from Cornell University, Ithaca, N.Y.; a J.D. from Columbia University Law School, New York and a Masters in Tax Law from the Georgetown University Law Center, Washington, D.C.

**Matthew I. Whitehorn**, Philadelphia, Pennsylvania

Matt Whitehorn is a partner in the Tax Department and chair of the Employee Benefits Group at Dilworth Paxson LLP in Philadelphia, Pennsylvania. Whitehorn has more than 25 years' experience working with qualified and non-qualified plans including 457(b) and (f) plans, and 403(b) plans. Whitehorn co-chairs the Philadelphia Bar Association's Employee Benefits Committee. Whitehorn has a B.A./M.A. in History from The Johns Hopkins University, a J.D. from Villanova University School of Law and an L.L.M. in Taxation from Temple University School of Law. He is an adjunct faculty member in the Tax L.L.M. program at the Temple University School of Law.

## MEMBER BIOGRAPHIES

### EXEMPT ORGANIZATIONS

#### **Natasha Cavanaugh**, Seattle, Washington

Natasha Cavanaugh is a tax attorney for the Bill & Melinda Gates Foundation. Prior to joining the Gates Foundation, Cavanaugh served as lead tax attorney at a major public research university where she managed complex tax matters, including the university's medical resident FICA tax refund claim. When in private practice, Cavanaugh represented educational organizations, museums, private foundations and other tax-exempt organizations. Cavanaugh has a J.D., University of Virginia, M.A., Sociology and a B.A., Economics, Stanford University.

#### **Virginia Gross**, Kansas City, Missouri

Virginia Gross is a shareholder with Polsinelli PC concentrating her practice on nonprofit and tax-exempt organizations law. Gross counsels nonprofit organizations on all aspects of tax-exempt organizations law, such as the formation, qualification, activities and business ventures of nonprofit organizations. Gross advises nonprofit clients on issues regarding their operations, fundraising practices, grant-making, unrelated business income planning, joint venturing and partnering, and the use of supporting organizations and for-profit subsidiaries. Clients include charitable and educational organizations, private foundations, healthcare entities, associations, supporting organizations, social welfare organizations and social clubs. Gross works with numerous nonprofit boards of directors and trustees regarding governance and best practices matters and is a frequent writer and speaker on nonprofit law topics. Gross earned a J.D. from the University of Texas and B.S. from Texas A&M University and is listed in Best Lawyers in America for Nonprofit Organizations/Charities Law for 2008-2015.

#### **Cindy Lott**, New York, New York

Cindy M. Lott serves as Interim Academic Program Director for Nonprofit Management Programs at Columbia University's School of Professional Studies. Prior to her current position, Lott served as Executive Director and Senior Counsel to the National State Attorneys General Program at Columbia Law School, and within that Program was the

developer and lead counsel to the Charities Regulation and Oversight Project from 2006-2015. Currently, Lott is also a Senior Fellow at the Center on Nonprofits and Philanthropy at the Urban Institute, working in conjunction with the Institute's Tax Policy and Charities project. Lott develops and moderates a series of national convenings on state and federal regulation of the charitable sector and is engaged in research regarding regulatory capacity and enforcement at the state level. Lott is a 1993 graduate of the Yale Law School and clerked for the United States Court of Appeals, First Circuit. Lott is admitted to practice in the District of Columbia, Indiana and Massachusetts.

**Amy Coates Madsen**, Baltimore, Maryland

Amy Coates Madsen is the director of the Standards for Excellence Institute, a program of the Maryland Association of Nonprofit Organizations where she has served for more than 20 years. Madsen specializes in nonprofit organization management and governance issues and works with organizations of all sizes and mission areas. Madsen serves as a frequent trainer and writer in the areas of nonprofit best practices, board conduct, openness/transparency, program evaluation, program replication, fundraising ethics and regulation, and nonprofit management. Madsen received her B.A. degree from Virginia Tech, and her M.A. in Policy Studies from Johns Hopkins University.

**David Moja**, Orlando, Florida

David Moja is a partner and National Director of Not-for-Profit Tax Services at Capin Crouse LLP. With 30 years of accounting experience, Moja has worked both inside not-for-profit organizations and for public accounting firms. Moja has extensive experience serving colleges and universities, associations, global missions organizations, churches, chambers of commerce, children's advocacy groups and environmental organizations. Moja has spoken extensively on tax-exempt organization issues to a wide variety of groups and conducts regular webcasts on exempt organizations issues. Moja is a licensed CPA in Florida, Georgia and Colorado and received a B.S. in Accounting from Florida State University, Tallahassee.

## **MEMBER BIOGRAPHIES**

### **Andrew Watt, Arlington, Virginia**

Andrew Watt is the president and CEO of the Association of Fundraising Professionals based in Arlington, Virginia, representing individuals and organizations that raise more than \$100 billion in charitable contributions every year around the world for countless causes. Named president in 2011, Watt has worked for the nonprofit community since the early 1990s. Watt serves on the board of directors for AFP, the AFP Foundation for Philanthropy and the AFP Foundation for Philanthropy–Canada. From 1993 to 2005, Watt was employed by a similar organization in Britain. Watt has international experience, fundraising expertise and experience with small/medium nonprofits. Watt has served on the Public Policy Committee of Independent Sector since 2012. Watt has served as both a volunteer and board member of many nonprofit organizations. Watt sits on the board of the National Philanthropic Trust – UK and is currently chair of the American Friends of Winchester College. Watt was an adjunct faculty member of St. Mary's University of Minnesota from 2007-2012 where he taught on the globalization of philanthropy. Watt received his B.A. at the University of Edinburgh.

**GOVERNMENT ENTITIES: FEDERAL, STATE AND LOCAL GOVERNMENTS**

**David P. Augustine**, San Francisco, California

David Augustine is currently serving as Tax Collector in the Office of Treasurer and Tax Collector for the City and County of San Francisco. Augustine oversees 125 employees encompassing four operating sections: Business Tax, Property Tax, Legal and the Bureau of Delinquent Revenue. Augustine has more than 12 years of professional experience, including legal experience in the municipal finance/bond arena, and is an active member of the Government Finance Officers Association and California Association of Treasurers and Tax Collectors. Augustine's office has received several awards for developing new business practices. Augustine received his J.D. from Stanford University Law School in 2002, B.A. from Swarthmore College and a certificate from the Harvard University Kennedy School of Government - Executive Education.

**Dean J. Conder**, Denver, Colorado

Dean Conder is the Deputy State Social Security Administrator for the State of Colorado and has more than 15 years of experience working with state and local governments on FICA tax compliance matters and related training. Conder is a member of the National Conference of State Social Security Administrators and serves as its training and succession-planning chairperson. Conder co-authored an article on "Common Errors in State and Local Government FICA and Public Retirement System Compliance," which was published in the Government Finance Review (GFOA) in August 2009. Conder has also served as a state level board member for the state's Section 457 retirement plan. Conder previously served on the IRS Taxpayer Advocacy Panel and is a past president of the National Association of State Social Security Administrators. Conder holds an M.S. degree from the University of Denver College of Law.

**Vandee V. DeVore**, Jefferson City, Missouri

Vandee DeVore is the Deputy State Social Security Administrator for the State of Missouri and has more than 27 years of government experience, including experience as an accountant, tax auditor, payroll manager and Assistant Director, Division of Accounting. As the Assistant Director, Division of Accounting, DeVore oversaw and

## **MEMBER BIOGRAPHIES**

managed statewide payroll and policy, including tax withholding, reporting and reconciliations, Social Security administration and statewide employee benefit budget preparation. As the Deputy State Social Security Administrator, DeVore acts for the state with respect to its responsibilities for maintaining and administering the provisions of the state's Section 218 agreement/modifications and the proper application of Social Security and Medicare coverage. DeVore is an active member of the Association of Government Accountants, having served in several roles in the local chapter and the national organization. DeVore currently serves as the past-president on the Executive Committee of the National Conference of State Social Security Administrators. DeVore is also an adjunct instructor of managerial, governmental and non-profit accounting at Columbia College in Missouri. DeVore holds a CGFM and has a B.A. degree in accounting from William Woods College in Missouri and an M.B.A. from Columbia College.

**GOVERNMENT ENTITIES: INDIAN TRIBAL GOVERNMENTS**

**Tino Batt**, Fort Hall, Idaho

Tino Batt is an enrolled member and employee of the Shoshone-Bannock Tribes of Fort Hall, Idaho. Batt had served on the Fort Hall Business Council, the governing body of the Shoshone-Bannock Tribes of Idaho. Batt has served in the position as tribal treasurer from 2009 to 2015. In this position, he was involved in monitoring the financial management and accounting practices of all tribal entities operating within the tribal government structure. Batt serves on the Board of Directors for the Native American Bancorporation Co. and volunteers with the local AARP Foundation Tax Aide program and Volunteer Income Tax Assistance (VITA) program on the reservation. In addition, Batt continues to serve on various advisory committees under the Department of Health and Human Services with Administration for Children and Families Tribal Advisory Committee, and the Alternate for the Northwest Region for the Secretary Tribal Advisory Committee. In the past, Batt has represented the Shoshone-Bannock Tribes at the Tribal Interior Budget Council with the Department of Interior. Batt has a B.S. degree in Human Resource/Corporate Training and Development from Idaho State University.

**Stefani A. Dalrymple**, Fairbanks, Alaska

Stefani Dalrymple is a CPA and owner of Yukon Accounting & Consulting in Fairbanks. For the past 10 years, Dalrymple has worked primarily with the Native Alaskan villages and organizations in rural Alaska to ensure compliance with federal and state tax and accounting requirements. Dalrymple has also served directly as a tribal government employee in the capacities of both Fiscal Officer and Payroll Manager. Dalrymple earned her B.S. degree in Accounting at the University of Alaska Fairbanks.

**Marcelino Gomez**, Phoenix, Arizona

Marcelino Gomez served as the Assistant Attorney General (Tax and Finance) at the Navajo Nation Department of Justice for 26 years and as an Assistant General Counsel at the Salt River Pima-Maricopa Indian Community. Gomez represented the tribal governments on matters related to federal and state taxes including the risk management, employee benefit and retirement programs. Gomez is now in private

## **MEMBER BIOGRAPHIES**

practice in Phoenix, Arizona. Gomez received a B.B.A. in Accounting from New Mexico State University and J.D. from the University of Texas School of Law. Gomez is a member of the State Bars of Arizona, New Mexico and Texas, the Navajo Nation Bar Association, the ABA Tax Section and is a USSF Soccer referee and instructor.

**GOVERNMENT ENTITIES: TAX EXEMPT BONDS**

**David Danenfelzer**, Austin, Texas

David Danenfelzer is a community development professional committed to advancing the fields of nonprofit management, community planning and public finance. His current employer, Texas State Affordable Housing Corporation, is a statewide nonprofit housing finance corporation. Danenfelzer has helped Texas State Affordable to increase investment in affordable housing, redesigned its multifamily bond finance programs and created the first statewide affordable housing land bank. Danenfelzer is an alumnus of the University of Wisconsin at Madison and received his MSCRP at the University of Texas at Austin.

**William Johnson**, Dallas, Texas

Bill Johnson is the senior vice president for First Southwest. Johnson is responsible for managing, mentoring and strategic planning for 22 rebate professionals. Client relationship responsibility includes rebate liability planning and implementation of tax changes for tax-exempt bond clients. Johnson is responsible for developing and implementing the current internal arbitrage compliance and maintains a list of arbitrage clients from state and local governments. Johnson earned a B.B.A. in Accounting from Southern Methodist University and an M.S. degree in Accounting from Texas Tech University. Johnson is a member of the AICPA, Texas Society of CPAs and is a licensed CPA in Texas.

**Floyd Newton III**, Atlanta, Georgia

Floyd Newton III is a partner at King & Spalding in Atlanta in the public finance practice. Newton has more than 30 years of broad experience with tax-exempt bonds. Newton is an active member of the ABA Tax Section 103 Committee and the National Association of Bond Lawyers. He was President of NABL in 1998-1999 and served on NABL's Board of Directors from 1994-2000. Newton received a Bachelor's degree, magna cum laude, from Princeton University and a J.D., magna cum laude, from the University of Georgia Law School.

This page intentionally left blank.

**GENERAL REPORT  
OF THE ADVISORY COMMITTEE ON  
TAX EXEMPT AND GOVERNMENT ENTITIES (ACT)**

This General Report is presented in connection with the 15th annual public meeting of the IRS Advisory Committee on Tax Exempt and Government Entities (ACT).

As described in its Charter, the ACT's purpose is to provide an organized public forum for discussion between IRS officials and representatives of the five areas within the jurisdiction of the Tax Exempt and Government Entities Division (TE/GE): Employee Plans (EP), Exempt Organizations (EO), Federal, State and Local Governments (FSLG), Indian Tribal Governments (ITG) and Tax Exempt Bonds (TEB). This year, of the 21 members of the ACT, six represent EP, six represent EO, three represent FSLG, three represent ITG and three represent TEB.

Under the Charter, the ACT reports to the Commissioner, TE/GE Division, and the ACT members work respectively with the Directors of EP, EO, FSLG, ITG and TEB to identify and research the issues that the ACT will be address and report to the Commissioner at the public meeting scheduled for June 8, 2016. This year the ACT will present:

- **Employee Plans:** Analysis and Recommendations Regarding Changes to the Determination Letter Program
- **Exempt Organizations:** Stewards of the Public Trust: Long-Range Planning for the Future of the IRS and the Exempt Community
- **Federal, State and Local Governments:** Revised FSLG Trainings and Communicating with Small Local Governments
- **Indian Tribal Governments:** Survey of Tribes Regarding IRS Effectiveness with Current Topics of Concerns and Recommendations
- **Tax Exempt Bonds:** Recommendations for Continuous Improvement and Enhancing Resources in the Tax Exempt Bond Market

In the face of ongoing significant budget and staffing reductions, this year's recommendations address current issues facing EP, EO, FSLG, ITG and TEB with a view toward maximizing internal and external knowledge management, cooperative and

## **GENERAL REPORT**

respectful interaction with their respective communities, outreach and training while prioritizing and balancing resources. The ACT hopes that these recommendations will prove helpful to TE/GE personnel and the communities with which they interact.

### **Acknowledgements and Recognition**

ACT members are appointed for a two-year term that may be extended by an additional year. This year will end the term of:

- Virginia Gross, Polsinelli PC, (EO)
- David Moja, Capin Crouse LLP, (EO)
- Alison Cohen, Ferenczy Benefits Law Center, (EP)
- Stuart Sirkin, The Segal Company, (EP)
- David Augustine, City and County of San Francisco, (FSLG)
- Stefani Dalrymple, Yukon Accounting and Consulting, (ITG)

I believe I speak for all members of the ACT that it has been a pleasure and a privilege to know and work with them.

The ACT thanks Commissioner John Koskinen; TE/GE's Leadership, Commissioner Sunita Lough, Deputy Commissioner Donna Hansberry and Assistant Deputy Commissioner, Government Entities/Shared Services Nan Downing; the TE/GE Division Directors, Rob Choi, Tammy Ripperda, Christie Jacobs, Paul Marmolejo and Rebecca Harrigan; and all the TE/GE staff for the support and assistance you've provided to the ACT throughout the year. Special thanks to Mark O'Donnell, the Designated Federal Officer to the ACT and TE/GE's Communications & Liaison Director and his team, Melaney Partner, Brenda Smith Custer and Nicole Swire for handling the logistics for our meetings, conference calls and technology needs for surveys and other information-gathering activities. Special thanks, as well, to all those who participated in the surveys, focus groups and other information gathering critical to the analysis and recommendations made in the reports.

For me, serving on the ACT has been a rewarding personal and professional experience. I am fortunate to have had the opportunity to work with and learn from all of

TE/GE's leadership and the other ACT members who have served during the past three years. Thank you to everyone and congratulations to Matt Whitehorn, the incoming Chair.

I hope that our input is helpful to the IRS and to the constituent groups we serve.

**Alison Cohen**

Chair, June 2015 to 2016

This page intentionally left blank.

**ADVISORY COMMITTEE ON  
TAX EXEMPT AND GOVERNMENT ENTITIES  
(ACT)**

**Employee Plans:**

**Analysis and Recommendations Regarding  
Changes to the Determination Letter Program**

Susan E. Bernstein, Esq.

Judith W. Boyette, Esq.

Alison J. Cohen, Esq.

Chris W. Shankle, CPA, CGMA

Stuart A. Sirkin, Esq.

Matthew I. Whitehorn, Esq.

**June 8, 2016**

This page intentionally left blank.

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY .....[25](#)

II. INTRODUCTION .....[28](#)

III. HISTORY .....[28](#)

IV. DUE DILIGENCE .....[32](#)

V. CONCLUSION .....[42](#)

**Appendix A:** Survey Results – EP Subcommittee Survey on Employee Plans  
Community Opinion on Proposed Changes to the IRS Determination Letter  
Program .....[55](#)

This page intentionally left blank.

## I. EXECUTIVE SUMMARY

The Employee Plans Subcommittee (EP Subcommittee) of the Advisory Committee on Tax Exempt and Government Entities (ACT) has chosen as the topic of its 2015-2016 report (Report) an examination of the major restructuring of the Internal Revenue Service determination letter program for qualified plans (the Determination Letter Program), and the resulting impact. These changes were detailed in part in Announcement 2015-19<sup>1</sup> (the Announcement) issued in July 2015. Specifically, the EP Subcommittee has attempted to identify viable approaches that the IRS could take to minimize the impact on the employee plans community (EP Community), while respecting the challenges faced by Employee Plans (EP) (the part of the Tax Exempt and Government Entities Division (TE/GE) of the IRS responsible for qualified pension plans) due to budgetary shortfalls and personnel reductions.

The IRS has received numerous letters (the Comment Letters) from the EP Community in response to the request for comments in the Announcement. The Comment Letters were resoundingly negative toward the change. In Section IV.B., the EP Subcommittee provides a summary of the valid concerns and positive suggestions set forth in the Comment Letters.

As part of the EP Subcommittee's research and analysis, and to obtain a broader range of opinions than those provided with the Comment Letters, the EP Subcommittee also prepared a public survey (the Survey) requesting input on the announced changes to the Determination Letter Program. The complete Survey and the results are included as Appendix A and, where relevant, are referred to throughout the Report.

The EP Subcommittee makes three recommendations.

The first recommendation is not to generally eliminate periodic determination letters under the Determination Letter Program. The EP Subcommittee recognizes that the IRS

---

<sup>1</sup> Announcement 2015-19, IRB 2015-32, 157.

## EMPLOYEE PLANS

is not likely to accept this recommendation, but it is a recommendation with which all members of the EP Subcommittee strongly concur.

The second recommendation is to proceed as the IRS has so far, but only as a transition measure while it discusses the matter further with the EP Community. This would address IRS's immediate workload problem concerning a backlog of determination letter applications, while providing time for a real interactive dialogue with the EP community.

The third recommendation, which consists of ten points, assumes there will be no IRS change of heart. The points made are based on the EP Subcommittee's review of the public comments, the Survey results, discussions with the EP Community and the members' own experiences and analyses. The EP Subcommittee recognizes that many of the points require difficult choices as to how best to allocate limited resources and that is why the EP Subcommittee would recommend the transitional approach set forth in the second recommendation.

The key points of the third recommendation are as follows:

- The IRS should provide certainty of the availability of determination letters to as much of the EP Community as is feasible. The EP Subcommittee has provided several possible ways to accomplish this.
- The IRS should look for ways to make the pre-approved program more flexible.
- The IRS should reduce the user fees for document sponsors of pre-approved plans.
- The IRS should modify EPCRS so it can be used without a plan sponsor having a current determination letter and for issues identified on audit.
- The IRS should expand the plan provisions that can be incorporated by reference to the Internal Revenue Code of 1986, as amended (the Code) or regulations to simplify plan documents.
- The IRS should allow leniency for "immaterial" flaws in plan document language found on IRS examination.

- The IRS should immediately confirm that protection under Code Section 7805(b) continues for any plan document language that remains unchanged from issuance of a prior determination letter and further consider the feasibility of accepting an independent private review as "good faith" compliance extending Code Section 7805(b) protection.
- The IRS should provide sponsors with a safe harbor approach for converting an individually designed plan into a pre-approved plan or establish a program to review and approve such conversions.
- The IRS should publish model amendments along with the Cumulative Lists and List of Required Modifications (LRMs).
- The IRS should provide adequate time to adopt all interim amendments.
- The IRS should ask Congress to increase and dedicate user fees for the Determination Letter Program and dedicate such amounts for use by, and on behalf of, the Determination Letter Program.

These recommendations touch on all aspects of EP's domain, including modifications to the audit process and Employee Plans Compliance Resolution System (EPCRS), as well as guidance recommendations that will need to be referred to the IRS Office of Chief Counsel or the Department of Treasury (Treasury) for consideration. These recommendations are designed to aid the IRS in the transition process to a new system.

The EP Subcommittee would like to thank EP Director, Robert Choi, and his staff for their time, energy, responsiveness and support as the EP Subcommittee developed this Report.<sup>2</sup> The openness of dialogue and the ability for the EP Subcommittee to work closely with the EP staff has always proven invaluable. It remains, in large part, the reason that the EP Subcommittee can, and wishes to, provide helpful analysis to EP. Despite the uncertainty surrounding the IRS's budgetary climate, it is the EP Subcommittee's fervent hope that this collaborative relationship will remain strong.

---

<sup>2</sup> The recommendations in this Report are solely those of the EP Subcommittee. The information provided by Director Choi and his staff was strictly background in nature.

## EMPLOYEE PLANS

### II. INTRODUCTION

The IRS issued the Announcement on July 21, 2015. The Announcement officially specified that the staggered five-year remedial amendment cycle system (the Cycle System) for determination letters will end at the conclusion of the Cycle A submission period (January 31, 2017). After that date, except for limited to-be-specified exceptions, sponsors of individually designed plans will only be able to submit requests for determination letters upon initial qualification or termination of a plan.<sup>3</sup>

The current Cycle System for individually designed plans has only been in effect since 2006. Prior to the Cycle System, a plan sponsor could obtain a determination letter on a plan amendment on an ad hoc basis.<sup>4</sup> As one would expect, this change in the IRS longstanding policy of plan sponsors being able to receive determination letters on plan amendments has been a shock to the EP Community, and has caused much concern. In light of the significance of the change and the concern it has generated, the EP Subcommittee chose to examine this change in policy. This Report addresses the perceived possible repercussions of the change and makes recommendations as to how the IRS could best minimize the disruption to the EP Community, while still accomplishing its goal of eliminating most periodic determination letters.

### III. HISTORY

The process for obtaining a determination letter for individually designed plans changed significantly in 2007 pursuant to IRS Rev. Proc. 2005-66,<sup>5</sup> which created the Cycle System. The Cycle System allows plan sponsors to file for a determination letter every five years to cover plan amendments made since the issuance of the prior determination letter. Plan sponsors are assigned to a Cycle, lettered sequentially as Cycle "A" through "E," based on the last digit of the plan sponsor's federal employer identification number (EIN), with special submission cycles for governmental, multiple employer and multiemployer plans. A prior IRS favorable determination letter expires on

---

<sup>3</sup> By contrast, a six-year remedial amendment cycle will continue to apply with respect to pre-approved master and prototype and volume submitter plans under Rev. Proc. 2007-44, 2007-28 IRB 54.

<sup>4</sup> This right predates the 1974 adoption of the Employee Retirement Income Security Act (ERISA).

<sup>5</sup> Rev. Proc. 2005-66, 2005-2 C.B. 509, August 26, 2005.

the final day of the plan's five-year remedial amendment period unless the plan sponsor submits a new determination letter request before the last day of its subsequent Cycle.

A favorable IRS determination letter verifies that the sponsor has timely amended its plan document to incorporate all required law and regulatory changes since the issuance of the immediately preceding determination letter and that all of the discretionary amendments made to the plan were timely and meet substantive requirements.<sup>6</sup> The determination letter only addresses the plan document requirements of the Code. It does not address operation of the plan. Nevertheless, because of the protection it offers from disqualification on the account of document failures, its availability has been viewed as integral to a plan sponsor's decision to offer and maintain a plan.<sup>7</sup>

The IRS points to workload, staff turnover and the unlikelihood of resources increasing as fundamental reasons for eliminating periodic determination letters. The IRS notes that because it can devote a median review time of only 3 hours per letter, which is far from sufficient for a thorough review, the IRS is bearing an unacceptable risk that the plan does not satisfy the tax-qualification requirements. The IRS also questioned whether providing determination letters goes beyond the proper role of the IRS and points to the fact that no other part of the IRS runs a parallel program. At this time, the EP Subcommittee, like the rest of the EP Community, has only limited information on how the new system will be implemented. What is known is that the IRS will eliminate the Cycle System at the completion of the current Cycle A and that, in the future, the IRS will primarily issue to retirement plan sponsors a determination letter on initial establishment and upon plan termination.

---

<sup>6</sup> A determination letter "may not be relied upon after a change in material fact or the effective date of a change in law, except as provided." See Rev. Proc. 2016-6, 2016-1 IRB 200, Section 21.01(1).

<sup>7</sup> If a plan is tax-qualified, employer contributions and earnings on contributions are not included in the employee's taxable income until such amounts are distributed (even though the arrangement is funded and even if benefits are vested). Additionally, if tax-qualified, many plan distributions can be rolled over to another type of retirement plan or IRA for further deferral of income inclusion. In the case of a taxable employer, the employer is entitled to a current deduction (within certain limits) for contributions even though the contributions are not currently included in employees' income. The contributions and earnings are held in a tax-exempt trust, which enables the plan's assets to grow on a tax-free basis until distribution.

## EMPLOYEE PLANS

While the Announcement states that the IRS is contemplating allowing individually designed plans to apply for determination letters in certain other limited situations, the IRS has not yet specified the parameters for such submissions. IRS staff has said that the IRS is not likely to establish those parameters in the immediate future; rather, the IRS will wait to consider various factors including its workload and then announce annually the opening of the modified Determination Letter Program for certain types of plans and/or certain situations.

The Announcement also states that Treasury and the IRS are considering ways to make it "easier for plan sponsors to comply with the qualified plan document requirements." The Announcement includes, as examples, the IRS promulgating model amendments, not requiring amendments where the law change is irrelevant to the particular type of plan, and expanding the scope of incorporation by reference with respect to plan documents.<sup>8</sup> The IRS requested comments from the public about the changes proposed in the Announcement be submitted by no later than October 1, 2015. The EP Subcommittee has reviewed the Comment Letters (which are summarized below) in conjunction with preparation of this Report.

On January 4, 2016, the IRS released additional guidance on the changes to the Determination Letter Program in the form of IRS Notice 2016-03 (the Notice).<sup>9</sup> The Notice provides some general guidelines concerning how the IRS will proceed administratively in light of the changes. For example, the Notice states that expiration dates included in determination letters issued prior to January 4, 2016 will no longer be operative.<sup>10</sup> In separate guidance, the IRS provides that determination letters issued after January 4, 2016 will no longer include expiration dates.<sup>11</sup>

---

<sup>8</sup> The EP Subcommittee believes that implementation of all the steps described in the examples would be useful.

<sup>9</sup> IRS Notice 2016-3 IRB 278 (Jan. 19, 2016).

<sup>10</sup> Notice 2016-3 also provides that controlled groups and affiliated service groups that made joint filings during remedial amendment Cycle A by January 1, 2012 (the final day of the prior Cycle A submission period) may again make such a submission by January 31, 2017. Further, the Notice allows an individually designed defined contribution plan that a plan sponsor wishes to convert to a pre-approved plan format has until April 30, 2017 to adopt such a plan and apply to the IRS for a determination letter.

<sup>11</sup> See Rev. Proc. 2016-6, [https://www.irs.gov/irb/2016-01\\_IRB/ar12.html](https://www.irs.gov/irb/2016-01_IRB/ar12.html).

The user fees associated with various programs of EP have historically been published annually as the "08" Revenue Procedure (currently, Rev. Proc. 2016-08). As the use of these IRS services is not needed by every taxpayer, the Independent Offices Appropriation Act of 1952 (IOAA)<sup>12</sup> generally requires that a user fee be established. These fees are reviewed biennially under the process set out in Internal Revenue Manual Section 1.32.19. TE/GE is required to submit information regarding the costs associated with the various programs based on reported time tracked by individuals working on the projects in order to reflect the full cost to the IRS. The user fees must reflect the full cost unless the IRS has determined to seek a waiver of the full fee from OMB based on reasons set forth in the Internal Revenue Manual (IRM), including the potential effect on tax administration.<sup>13</sup> In a review of the 2015 report of the Taxpayer Advocate to Congress, user fees were considered in general and a recommendation was made that the IRM be updated to require IRS departments to avoid fees that would have significant negative effect on a taxpayer's burden, the IRS's mission, voluntary compliance or taxpayer rights.<sup>14</sup>

The most recent plan sponsor filing for pre-approved defined contribution plans (the Pension Protection Act of 2006 (PPA)<sup>15</sup> cycle), required document filers to pay a user fee of \$12,000 for the basic plan document and one adoption agreement plus an additional \$1,000 for each adoption agreement submitted. For the next submission cycle, on the current user fee schedule, filers would incur a cost of \$16,000 for the basic plan document and one adoption agreement plus an additional \$11,000 per additional adoption agreement. For purposes of comparison, one should consider the impact on a full suite of adoption agreements. Such a full suite might include the standardized and non-standardized versions of profit sharing, money purchase pension, 401(k) and target benefit formats. Along with this, the suite would likely include the SIMPLE 401(k), new comparability versions of the profit sharing and 401(k) formats and possibly Davis-

---

<sup>12</sup> 31 U.S.C. 9701.

<sup>13</sup> See IRM Section 1.32.19.9.1; 1.32.19.18; 1.32.19.19.

<sup>14</sup> See the Taxpayer Advocate's report for your reference and consideration at <http://www.taxpayeradvocate.irs.gov/reports/2015-annual-report-to-congress>.

<sup>15</sup> The term "PPA" refers to the Pension Protection Act of 2006, Pub. L. 109-280.

## **EMPLOYEE PLANS**

Bacon Act<sup>16</sup> compliant versions of each of the profit sharing, money purchase pension and 401(k) formats – for a total of 14 adoption agreements. In this scenario, the cost of filing the PPA documents would go from \$25,000 to \$143,000 – a 472 percent increase in cost to provide continuity with the present pre-approved document package. Volume submitter documents face similar increased costs.

### **IV. DUE DILIGENCE**

The EP Subcommittee took multiple steps to determine the views of the EP Community and to develop our recommendations to soften the impact of the change. The steps included conducting a public survey for the EP Community using SurveyMonkey®, a review of the Comment Letters, and discussions with pre-approved plan providers and various interested groups within the EP Community.

Finally, the EP Subcommittee solicited background information from EP personnel. Rob Choi, Director of EP, generously made himself and his staff available so that the EP Subcommittee was able to conduct in-depth telephone interviews with, among others, senior members of the EP leadership team and other EP staff, including those who work in the pre-approved plans area. The EP Subcommittee was also provided with pertinent statistical data by EP, which provided valuable insight into the nature and volume of determination letter application filings, the various types of plans submitted, the status of the IRS case processing under the current Cycle System and other related statistical information.

#### **A. The Survey**

A link to the Survey conducted by the EP Subcommittee was made available through numerous channels in an attempt to reach a very broad cross-section of the EP Community. The EP Subcommittee received 440 responses, of which 65 percent were from lawyers (in-house and external). Other responses were from auditors, actuaries, administrators and benefit consultants. The results of this broad survey are shown in Appendix A and are referenced to, as appropriate, throughout this Report.

---

<sup>16</sup> Davis-Bacon Act of 1931, 40 U.S.C. 3141, et. seq.

Virtually all Survey respondents (Survey Respondents) advise, or consult with, sponsors of single-employer plans. The number of Survey Respondents who advise or consult on specialty plans – such as governmental plans, church plans, multiple employer plans and multiemployer plans – is much more limited. However, the EP Subcommittee found considerable consistency in responses among the Survey Respondents who practice in each of these narrower areas.

The Survey was not designed for statistical purposes but rather was intended to gauge the immediate reaction of the EP Community to the Announcement. Survey Respondents self-selected, which naturally led to bias in that those who responded most likely were those practitioners most concerned about the changes. Therefore, it is not surprising that Survey Respondents believe overwhelmingly in the importance of determination letters on amendment. In fact, of the Survey Respondents who responded that the initial determination letter is extremely important or very important (94 percent of Survey Respondents) almost 90 percent also responded that the subsequent determination letter on amendment is also extremely important or very important.

Also notable is the current uncertainty among practitioners as to how they will respond to the IRS change. Ninety percent of the Survey Respondents are still assessing how they will react to the IRS elimination of most periodic determination letters from the longstanding Determination Letter Program.

## **B. Summary of Comment Letters**

In addition to conducting the Survey, the EP Subcommittee analyzed the Comment Letters that the IRS received in response to the Announcement. The IRS solicited comments on four specific issues, which, in summary form, are:

1. What changes should be made to the remedial amendment period that would otherwise apply to individually designed plans under Code Section 401(b)?

## EMPLOYEE PLANS

2. In view of the changes being made to the Determination Letter Program, what additional considerations should be taken into account in connection with the current interim amendment requirement?
3. What guidance should be issued to assist plan sponsors that wish to convert an individually designed plan into a pre-approved plan?
4. What changes should be made to other IRS programs to facilitate the changes described in this announcement, including revisions to the EPCRS?<sup>17</sup>

The IRS only requested comments on the above listed issues. Individuals in the EP Community (Commenters) submitted concerns and suggestions regarding the IRS's listed questions. Many Commenters, however, did not limit their comments to the listed topics, nor did they accept the elimination of most periodic determination letters as a *fait accompli*.

Among the Commenters, there was almost unanimous agreement that the availability of periodic determination letters should not be limited as announced by the IRS. This view in opposition to the elimination of periodic determination letters is best summed up by one Commenter who cited the following language from the 2014 EP Subcommittee's ACT Report:

"The determination letter program continues to be an invaluable resource for employers sponsoring individually designed plans to ensure that plan documents are compliant with the applicable tax qualification requirements. Because of the myriad of qualification requirements and the differing views as to what should be contained in a plan document for compliance purposes, determination letters provide reasonable assurance to diligent plan sponsors that the tax qualification of the submitted plan documents will pass muster upon audit or other IRS compliance review. At the same time, the ability of the IRS to review and approve individually designed plan documents

---

<sup>17</sup> Announcement 2015-19, IRB 2015-32, 157.

on an ongoing basis plays a critical role in overseeing and policing qualification compliance, as these documents are central to plan administration and operations. While up-front review does not assure operational compliance, plan documents that follow the requirements of the Code increase the likelihood that the sponsor will operate the plan in accordance with those requirements. The EP Subcommittee believes that a well-run determination letter program is a key element to an efficient compliance program. . . ."<sup>18</sup>

That Commenter and others identified the important role that the determination letter plays in a broad range of circumstances, including:

- In protecting participants and beneficiaries benefits;
- In business transactions (e.g., encouraging a new sponsor to assume the plan of a prior sponsor rather than having it terminated before acquisition);
- In bankruptcy court proceedings;
- In plan mergers;
- In application of tax treaties and dual qualification in Puerto Rico;
- To validate the IRS's approval of the plan in opening financial and banking accounts with respect to the USA Patriot Act of 2001<sup>19</sup> and other federal laws aimed at countering the funding of terrorism or laundering of money;
- For purposes of investment vehicles that need to limit eligibility of investors to qualified plans;
- For record keepers and custodians;
- For SEC disclosures and registrations, PBGC terminations and guarantees and DOL investigations;
- For auditors conducting annual audits for purposes of the Form 5500;
- In easing the anxiety that comes with the IRS's operational audits by assuring that the plan was reviewed on a regular basis and contained appropriate language;

---

<sup>18</sup> 2014 ACT Report, p. 47, [https://www.irs.gov/pub/irs-tege/tege\\_act\\_rpt13.pdf](https://www.irs.gov/pub/irs-tege/tege_act_rpt13.pdf).

<sup>19</sup> Pub. L. 107-56.

## EMPLOYEE PLANS

- For accepting rollovers from other plans;
- In triggering a regular, careful review of the plan document and operation; and
- In enticing employers to continue to sponsor plans and to create new designs.

Commenters did not believe that there was a good substitute for a determination letter upon plan amendment with respect to most of these situations.

### **1. Suggestions for Maintaining, but Varying, the Determination Letter Program**

Commenters had numerous suggestions as how to maintain, but modify, the existing Determination Letter Program in order to allow the IRS to attain some of its principal goals. These included:

- Change each staggered cycle to a longer period than five years (i.e., anywhere from seven to 10 years was suggested);
- Ask Congress to increase EP user fees and dedicate such fees directly back to EP's budget/cost center;
- Maintain determination letters on amendment for certain types of plans that cover a large number of participants:
  - Very large plans (e.g., those holding assets in excess of \$500 million);
  - Large governmental plans; and
  - Large multiple employer plans.
- Maintain the program for plans that cannot use the pre-approved program:
  - Multiemployer plans;
  - Governmental plans with statutory requirements; and
  - Complicated employee stock ownership plans (ESOPs).
- Maintain the program for certain events:
  - Plan sponsor mergers and acquisitions;
  - New plan designs;
  - Changes in a plan's basic design (e.g., moving from a final average pay formula to a cash balance formula); and
  - Major legislative changes.

## **2. Suggestions for Changes to Increase Reliance on Prior Determination Letters**

Commenters also suggested ways that the IRS could expand the benefits of existing determination letters in light of the changes to the Determination Letter Program such as:

- Provide protection for any language that was unchanged from a prior determination letter; and
- Provide protection for amendments adopted in "good faith," even if flawed language was inadvertently used.

## **3. Suggestions for Creation of a Third-Party Certification Process**

Some Commenters suggested a third-party certification process. Others worried that any certification or opinion letter by a third party would have to include numerous caveats, rendering it virtually useless, and thought it would be very expensive for the plan sponsor to obtain a certification from legal counsel.

## **4. Suggestions for Changes to Increase Availability of Interim and Model Amendments**

Commenters made numerous suggestions about how the IRS and Treasury should address a plan sponsor's need to periodically amend plan documents. These include:

- If an amendment is needed, the IRS should issue sample or model amendments and should not require adoption of such amendments until after such sample or model is released (e.g., one year after);
- The IRS should release model/sample language for public comment before issuing such guidance in final form;
- When issued, any regulations and to the extent possible legislation, should contain precise language specifying the deadline to adopt amendments and should provide sufficient time for model amendment language to be released by the IRS and adopted by the plan sponsor;

## EMPLOYEE PLANS

- The IRS should provide a specific list of provisions that require an amendment (unlike the annually released Cumulative List of Changes in Plan Qualification Requirements (Cumulative List), which merely recites which laws and regulations are effective for a given cycle);
- The IRS should institute a uniform date for all amendments (e.g., once every three or five years) and allow amendments to be retroactively effective;
- The IRS should require immediate plan amendments only for core amendments (i.e., those protected by the anti-cutback rules of Code Section 411(d)(6));
- The IRS should allow greater incorporation by reference of relevant statutes and regulations wherever possible;
- The IRS should allow plans to be drafted less specifically (e.g., allow the plan to quote the statutory language and incorporate related regulations and other guidance by reference as opposed to creating customized provisions);
- The IRS should extend the end-of-the-plan-year period for adopting discretionary amendments (that do not raise anti-cutback issues under Code Section 411(d)(6)) as long as plans operate in accordance with such amendment and the participants are notified about the change;
- The IRS should allow sponsors of individually designed plans to rely on any language included in the IRS published LRMs for pre-approved plans; and
- The IRS should require amendment of individually designed plans only when new LRMs are issued.

### 5. Suggested Changes to EPCRS

Commenters suggested several changes to EPCRS in light of the Announcement:

- The IRS should allow self-correction under the EPCRS Self-Correction Program (SCP) or a simplified, low-fee EPCRS Voluntary Correction Program (VCP) submission for plan document failures;
- The IRS should allow self-correction under SCP even if the IRS discovers the plan document failure on audit (perhaps, with slightly higher penalties);

- If the IRS won't expand SCP for all plan document failures, it should provide a more generous period for correcting mistakes with respect to new laws or regulations, as long as the plan sponsor acted in good faith;
- If the IRS won't expand SCP for all plan document failures, it should expand it where the plan sponsor made a good faith effort to have the plan document reviewed by an independent third-party professional (perhaps, one that is certified, or recognized, as qualified by the IRS); and
- The IRS should allow for the initial determination letter to be the only IRS approval letter needed to satisfy the requirements of EPCRS.

## **6. Suggested Changes to Modify EP Examinations**

Commenters made the following suggestions concerning IRS plan examinations in the wake of the Announcement:

- The IRS should apply lower sanctions (such as the VCP sanctions) rather than the sanctions currently provided for under the Audit Closing Agreement Program under EPCRS (Audit CAP) for plan document defects that did not result in operational problems (e.g., omitting top-heavy rules in plans that are not likely to be top-heavy or omitting Code Section 436 benefit restrictions in plans where the plan's Adjusted Funding Target Attainment Percentage (AFTAP) under the PPA has never been below 80 percent);
- The IRS should modify Audit CAP to provide a fixed penalty structure for plan document failures; and
- The IRS should focus its audit efforts on operational issues rather than plan document language adopted in good faith.

## **7. Suggested Changes to EP's Pre-Approved Plans Program**

Commenters expressed a desire to have the IRS issue detailed and flexible guidance on the steps necessary to convert an individually designed plan to a pre-approved plan. Most Commenters felt that some individually designed plans would find the pre-approved program more usable if the IRS expressly stated that such a plan could

## EMPLOYEE PLANS

feature certain unique provisions, even if the pre-approved opinion letter did not cover such provisions. For example, some Commenters thought that pre-approved plan provisions should always be available as a base for a plan document and be protected even though the plan sponsor adopted other provisions that did not specifically fit within the pre-approved program. This would provide such adopters more flexibility in the pre-approved program and was viewed as especially important for plans that had legacy provisions and formulas (either when frozen or if continuing for a limited number of participants).

Commenters also suggested opening the pre-approved program to plan types that are not allowed in the pre-approved program currently, such as multiemployer plans, plans with 401(h) accounts, pension equity plans (PEPs), contributory defined benefit plans, non-electing church plans, 401(k) plans that include non-safe harbor hardship provisions and governmental plans with DROP features.<sup>20</sup> The Commenters recognized that this would require a rethinking of pre-approved plans and a willingness on the part of the IRS not to restrict the use of various plan options such as provisions that could affect nondiscrimination testing.

Other ideas that were repeated in Comment Letters included allowing more modifications between pre-approved cycles, and providing more flexibility to make changes covered by ERISA and not the Code (such as rules governing fiduciaries and statutes of limitations for claims).

There were also suggestions that the IRS look at the period of time available to convert a current individually designed plan to a pre-approved document, especially if the plan sponsor is making modifications to broaden its plan language that was based on existing LRMs. Many plans will not be able to make a decision on converting to a pre-approved plan document option until all elements of the new Determination Letter

---

<sup>20</sup> A "DROP," or deferred retirement option program, is an arrangement pursuant to which a governmental employee agrees to retire at a certain date and freezes his or her future accruals under the employer's defined benefit pension plan in exchange for the establishment of an individual account into which the annuity payments he or she would have otherwise received during the DROP period are deposited and credited with earnings. The account is distributed in a single sum when the designated date of retirement occurs.

Program are finalized. Thus, Commenters asked for the ability to use IRS Form 8905 to express the intent to adopt a pre-approved plan in the interim period until the scope and breadth of the new process becomes clear.

### **C. Interviews of Pre-Approved Program Providers**

In interviewing stakeholders, the EP Subcommittee learned that several document providers are currently considering reducing the number of adoption agreements that they sponsor in their product offering due to the change in user fees contained in Rev. Proc. 2016-08. The providers told the EP Subcommittee that they could not understand the increase because the inclusion of multiple adoption agreements or versions of the same basic plan document do not require additional review or necessitate the exponential increase in user fees as reflected in the current revenue procedure.

At present, the pre-approved program has been expanded to include additional document types to reduce the necessity of sponsors of these plans using individually designed plans. Cash balance plans have been included in plan sponsor submissions for October 30, 2015 and the defined contribution cycle opening February 1, 2017 has been expanded to include ESOPs. Although the addition of ESOPs to the pre-approved plan program seems to suggest a single addition to the document offering, practical application of this could likely create the need for multiple versions of the document to consider a standardized and non-standardized version and the need to have a leveraged and a non-leveraged version.

Although these new designs may be included in the pre-approved programs, the sponsors of these documents told the EP Subcommittee that they will need to consider the financial impact of their inclusion as well as which of the prior plan types to include in their product offerings with the next submission cycle. A business decision will be made by these providers as to how many and which of the necessary adoption agreements to include in their offerings. This will most likely limit the number of distinct adoption agreements filed in an effort to control costs. They advised that there is a very real possibility that instead of expanding the pre-approved program, the result of the increase in fees may in fact create a larger demand for individually designed plans as

## EMPLOYEE PLANS

less frequently used adoption agreements will be eliminated or not included in a sponsor's offering package due to cost considerations.

## V. CONCLUSION

### **Recommendation 1: Do Not Eliminate Interim Determination Letters as the IRS has Announced.**

As employee benefit practitioners, the members of the EP Subcommittee join with the EP Community in the prevailing belief that the IRS is making a mistake in eliminating most periodic determination letters. The EP Subcommittee believes that periodic determination letters serve as an important adjunct to the audit program, and play a major role in encouraging plan sponsors to regularly review not only their plan documents, but also plan operations, in preparation for periodic IRS filings.

While the EP Subcommittee understands and appreciates the IRS's need to address its budget and staffing shortages, the EP Subcommittee believes that the elimination of periodic determination letters is shortsighted. EP has always approached its regulated community in a different manner than other parts of the IRS. This may be because EP always recognized that establishing a pension plan was voluntary and that the tax-qualification rules relating to retirement plans play a major role in protecting participants and beneficiaries. One of the reasons a separate Commissioner for EP/EO was established under ERISA was a belief that the EP function was unique.<sup>21</sup> As summarized in Senate Report 93-383, "In creating the office, Congress explicitly acknowledged that the regulatory oversight responsibilities delegated to EP/EO differ from the core revenue collection and enforcement functions of the IRS."<sup>22</sup> On the EP side, many of the Code requirements are included to encourage the voluntary establishment of plans and to guarantee that rank and file employees will receive the benefits being promised to them (in return for the special tax treatment given employers and highly compensated employees). The deeper concern as to whether participants

---

<sup>21</sup> See Joint Committee Report, S. 1096 and H.R. 2676 at <https://www.gpo.gov/fdsys/pkg/CPRT-105JPRT45842/html/CPRT-105JPRT45842.htm>.

<sup>22</sup> *Ibid.*

will receive the required and accrued benefits is very different from the role the IRS generally plays in other areas.

One of the Commenters cited several paragraphs addressing the value of the Determination Letter Program from the ACT's 2014 Report. These paragraphs are cited previously in the section of this Report summarizing Comment Letters. The EP Subcommittee affirms its support of the statement in the 2014 ACT Report regarding the importance of determination letters. The current EP Subcommittee believes those earlier statements remain even more relevant today in light of the Announcement.

**Recommendation 2: Adopt the IRS's Current Position as a Transition Rule While Opening and Having Discussions with the EP Community.**

The EP Subcommittee sympathizes with the resource problems that EP faces, and recognizes that changes are needed immediately. The 2014 EP Subcommittee made a recommendation that EP look at suspending the Cycle System for a few years while it catches up on its backlog of determination letter applications. This recommendation builds on that recommendation and the EP Subcommittee's 2014 recommendation about the importance of the Determination Letter Program. For the next two or three years, EP could limit determination letters to new plans, terminating plans and critical situations. During that time, EP should enter into detailed conversations with pre-approved plan providers and other practitioners with respect to how the pre-approved program could better fit the needs of those sponsors who cannot legally, or practically, use it today, and could consider some of the points raised in our third recommendation below.

EP has already said that it will decide in the future, once it determines its workload, whether it will allow certain types of plans to apply for determination letters in accordance with a non-cycle, ad hoc system. Ad hoc systems do not work very well for plan sponsor budgeting and planning. This recommendation would accept the fact that the existing Five-year Cycle System is ending with the current Cycle A. It would not immediately address what will replace it. Instead, EP would take the approach it has

## EMPLOYEE PLANS

always taken in the past when making major decisions that affect the EP Community, i.e., discuss the options and trade-offs with the EP Community.

### **Recommendation 3: Implement the Change in the Least Harmful Manner.**

The EP Subcommittee members recognize that it is highly unlikely that the IRS will change its basic decision as set forth in the Announcement. Therefore, the EP Subcommittee in undertaking this project set as its goal to help EP understand how it can implement the change in the least harmful manner. The points below are aimed at providing constructive feedback to the IRS that would minimize harm to plan sponsors and participants while allowing the IRS to accomplish its stated purpose.

**Point 1. The IRS should provide certainty as to the future availability of determination letters to as much of the EP Community as is feasible. There are several possible ways to accomplish this.**<sup>23</sup>

**Point 1A. Adopt an extended Cycle System.** Knowing if, and when, a determination letter is available makes planning and budgeting possible for plan

---

<sup>23</sup> **Survey Results Relating to Point 1.** Survey Respondents indicated that a 10-year cycle would still be better than having an unknown time period that may or may not allow a plan to come into the IRS for a new determination letter. Fifty-six percent of Survey Respondents considered federal law changes as one of their top two situations where a periodic determination letter would be useful. The EP Subcommittee asked Survey Respondents for which types of plans and situations it is important to have periodic determination letters be available. Results from Survey Respondents were as follows:

- Very large plans (e.g., those holding assets in excess of \$500 million or at least 15,000 participants)
  - (86.05 percent of Survey Respondents said large plans based on number of participants was most or very important);
  - (71.78 percent of Survey Respondents said large plans based on amounts of assets was most or very important);
- In mergers and acquisitions (35.55 percent of Survey Respondents said this was most important);
- To lessen the risk that more plans will be terminated (51.55 percent of Survey Respondents said they were still trying to evaluate what their response to these changes would be awaiting future IRS guidance, which could include deciding to terminate the plan now or in the future based on their concern of the risks of retroactive disqualification);
- To encourage new plan designs (68.89 percent of Survey Respondents said this situation was most or very important);
- To safely incorporate significant changes in federal law (56.13 percent of Survey Respondents said that this situation was most or very important);
- To deal with plan type changes (22.70 percent of Survey Respondents said that situation was most or very important); and
- To accommodate state law changes for governmental plans (9.62 percent of Survey Respondents said this situation was most or very important).

sponsors, practitioners and the IRS. The EP Subcommittee recognizes the current Five-year Cycle System is not working for the IRS and would hope that the IRS will give consideration to addressing the problems with the current Five-year Cycle System by changing to cycles that last seven, eight, nine or 10 years. Because the EP Subcommittee recognizes that a Cycle System of any length might be inconsistent with IRS's approach, Points 1B, 1C and 1D are hereby offered (to be implemented either together or separately).

**Point 1B. If the IRS does not adopt an extended Cycle System, the IRS should announce that the Determination Letter Program will be opened periodically as needed to address significant federal law changes.** Major law changes generated by legislation like GUST,<sup>24</sup> EGTRRA,<sup>25</sup> PPA, etc. drive the major restructuring of plans. These major law changes do not happen often, but it would be reassuring to plan sponsors and practitioners to know in advance that the IRS will reopen the Determination Letter Program for approval of amendments when this does happen.

**Point 1C. If the IRS does not adopt an extended Cycle System, the IRS should announce that it will allow specific types of plans such as large, complex defined benefit plans, multiemployer defined benefit plans and all governmental plans to apply for determination letters from time to time (without specifying when).** The IRS has already said that it will open the Determination Letter Program from time to time for certain plans, but it has not specified which types of plans will be granted admission. That the IRS will open the Determination Letter Program is welcome news, but it does not allow sponsors to manage their plans effectively and cost-efficiently absent more details. A plan sponsor that knows it will be able to apply to the IRS for a determination letter, even if it does not know when, will be better able to make business decisions as how best to function in the interim. Likewise, more

---

<sup>24</sup> The term "GUST" refers to the following: the Uruguay Round Agreements Act, Pub. L. 103-465; the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353; the Small Business Job Protection Act of 1996, Pub. L. 104-188; the Taxpayer Relief Act of 1997, Pub. L. 105-34; the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 and the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554.

<sup>25</sup> The term "EGTRRA" refers to the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16.

## EMPLOYEE PLANS

specificity as to the timing of the program will benefit IRS managers and practitioners in managing their staff and workload.

**Point 1D. The IRS should allow plans to submit major design changes and major business transactions for determination letters.** New plan designs – such as the switching from a final pay plan design to a cash balance or career average plan design – are vital to a thriving retirement system, but they also pose risks to the plan sponsor and to the IRS. Plan sponsors need the ability to seek the IRS review of these structures in the context of periodic determination letters to continue to maintain and promote retirement readiness for America's workforce. In addition, many large employers are heavily involved in mergers and acquisitions and need the ability to obtain a determination letter as they redesign their plans to address new personnel.

**Point 2. The IRS needs to be more flexible and user friendly.**

**Point 2A. The IRS should look for ways to make the pre-approved program more flexible.**<sup>26</sup> Many practitioners do not find that the current pre-approved

---

<sup>26</sup> **Survey Results Relating to Point 2A.** The EP Subcommittee asked Survey Respondents for which types of situations it is important to have modifications made to the pre-approved program. Results from Survey Respondents indicated that the IRS needs to:

- Modify the pre-approved plan program to allow legacy formulas and prior benefit structures to be included as an addendum (81.70 percent of Survey Respondents selected this response); and
- Allow multiple eligibility and benefit formulas to be permitted within a single pre-approved plan document (74.27 percent of Survey Respondents selected this response).

Other aspects of the pre-approved program that Survey Respondents believe require change in light of the Announcement include the following:

- Modification of the pre-approved plan program to broaden the minor modifications permitted (for example, a change from five-year vesting to three-year vesting (69.5 percent of Survey Respondents selected this response);
- Modification of the pre-approved plan program to allow frozen plan provisions to be included in an addendum (68.17 percent of Survey Respondents selected this response);
- Modification of the pre-approved plan program to allow ERISA provisions (loan procedures, QDRO procedures, claims procedures, trust or custodial account procedures, fiduciary provisions) to be included as addenda, rather than a mandatory part of the main pre-approved plan document (59.42 percent of Survey Respondents selected this response);
- Modification of the pre-approved plan program to allow separate trust documents (53.05 percent of Survey Respondents selected this response);
- Modification of the pre-approved plan program to allow more than six flexible provisions within a volume submitter plan document (28.65 percent of Survey Respondents selected this response); and

program options are flexible enough to fit certain plan formats even if they wished to switch from an individually designed format. There are different understandings within and among the EP Community about how flexible pre-approved documents can be. The EP Subcommittee found this difference in understanding even within the IRS. The one consistent theme, however, that has emerged is that the more flexible the pre-approved program is made, the more plan sponsors would be open to utilizing a pre-approved plan format in lieu of maintaining individually designed plans.

**Point 2B. Reduce user fees for document sponsors of pre-approved plans.**

As referenced within this and previous reports of the ACT, the continued expansion of the pre-approved plan document program is vital to all stakeholders of the EP Community. With the Announcement, the ability to use pre-approved plans becomes even more important as employers are encouraged to utilize these plans as opposed to individually designed plans. The IRS has made a variety of statements that it wishes to continue to expand the pre-approved program to include additional designs and features. Unfortunately, the recent fee increases imposed on sponsors of pre-approved plans threaten to not only limit this expansion, but to effectively contract it.

- 
- Modification of the pre-approved plan program to reduce the requirement from 15 employer clients to a lesser number to receive approval for sponsoring a volume submitter plan document from the IRS (26.79 percent of Survey Respondents selected this response).

With respect to the expansion of the pre-approved program to allow more types of plans to utilize the pre-approved plan program, Survey Respondents suggested:

- Modification of the pre-approved plan program to allow more fill-in-the-blank options (57.75 percent of Survey Respondents selected this response);
- Modification of the pre-approved plan program to allow non-safe harbor hardship withdrawals (44.79 percent of Survey Respondents selected this response);
- Modification of the pre-approved plan program to allow fail-safe provisions for 401(a)(4) testing failures (44.51 percent of Survey Respondents selected this response);
- Opening the pre-approved program to plan types that are not allowed in the pre-approved program currently, such as cash balance plans and statutory hybrid plans (40.56 percent of Survey Respondents selected this response);
- Modification of the pre-approved plan program to allow multiemployer plans to use the pre-approved plan program (27.32 percent of Survey Respondents selected this response);
- Modification of the pre-approved plan program to allow church plans (23.385 percent of Survey Respondents selected this response); and
- Modification of the pre-approved plan program to allow 401(h) accounts (16.06 percent of Survey Respondents selected this response).

## EMPLOYEE PLANS

The IRS should act quickly to propose a revision to the pre-approved program user fees well in advance of the February 1, 2017 filing window for the next defined contribution cycle submissions of pre-approved plan documents. The IRS could request that the fees be lowered to less-than-full-cost under the procedure described in IRM Section 1.32.19.9.1.5. EP should also explore whether the tracking of time by individuals working on the pre-approved program accurately reflects what the EP Subcommittee believes is minimal additional effort that IRS personnel would need to expend in reviewing plan types that contain similar provisions or merely repeat base language. Reducing the fees for approval of additional designs would support the policy need of expanding the use of pre-approved plans.

**Point 3. EPCRS needs to be changed so it can be used without a plan sponsor having a current determination letter and even for issues identified on audit.**<sup>27</sup> EPCRS has provided a way for the IRS to promote correction without having to disqualify the plan. Obviously, if there are no longer ongoing periodic determination letters, some changes in the EPCRS requirements are also necessary. While voluntary correction should be encouraged and rewarded (which is why we believe that self-correction should be expanded), the current audit penalties are too large compared to VCP. The IRS should consider reducing the Audit CAP penalties and focus on the correction. This is especially necessary with respect to plan language flaws that cause no operational problems. Consequently, EPCRS should be modified or supplemented to:

- Allow self-correction at a reduced fee schedule lower than Audit CAP for good faith plan document failures (even if found on IRS examination) in contrast to the instance where a plan sponsor completely ignores

---

<sup>27</sup> **Survey Results Related to Point 3.** In the absence of periodic determination letters, 46.3 percent of Survey Respondents were very concerned that new problems will be found on review at plan termination and over 80 percent of Survey Respondents identified this issue as one of their most pressing concerns on plan termination.

amendments that are required by law changes like those made under the PPA, HEART<sup>28</sup> or WRERA<sup>29</sup> legislation;

- Permit a plan sponsor to correct a plan document failure under SCP;
- Confirm that the initial IRS determination letter is the only letter needed to satisfy the requirements of EPCRS;
- Provide that no sanctions (or that VCP sanctions rather than Audit CAP sanctions apply) for immaterial plan language defects that do not cause operational problems (e.g., omission of top-heavy rules in plans not likely to be top-heavy or failure to include Code Section 436 benefit restrictions where the plan's AFTAP has never been below 80 percent); and
- Provide that plan document flaws found during an IRS determination letter review on plan termination will be eligible for EPCRS relief rather than Audit CAP to accommodate plans that may not have had a determination letter issued for a very long period of time. If a qualified plan operated for years with defects in plan language (e.g., bad lump sum language, bad ESOP language, failure to incorporate new regulations, etc.), the process of receiving a determination letter upon plan termination will now be more costly and difficult than under the prior Cycle System where problems would have been detected and addressed earlier.

**Point 4. The IRS should expand the plan provisions that can be incorporated by reference to the Code or regulations.** According to IRS Announcement 75-110,<sup>30</sup> incorporation by reference of the Code and regulations is not permitted unless specifically authorized by the Code, regulations or other authority. Currently the IRS allows certain requirements of Code Sections 401(a)(9), 401(a)(17), 401(a)(30), 401(k), 401(m), 410(a)(3), 411(a)(5), DOL Reg. Section 2530.200-b(2)(b) and (c), and Code Sections 414(u), 415 and 416

<sup>28</sup> The term "HEART" refers to the Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. 110-245.

<sup>29</sup> The term "WRERA" refers to the Worker, Retiree and Employer Recovery Act of 2008, Pub. L. 110-458.

<sup>30</sup> 1975-43, I.R.B. 20 (Oct. 28, 1975).

## EMPLOYEE PLANS

to be incorporated by reference.<sup>31</sup> Given the inability of plan sponsors to obtain determination letters on plan language intended to respond to law changes in the future, the EP Subcommittee recommends that the IRS expand the current list of permitted provisions that can be incorporated by reference.<sup>32</sup> Particularly in situations where there are extensive regulations, such as under the Code Section 401(a)(9) minimum distribution rules and Code Section 416 top-heavy rules, plans should be allowed to use incorporation by reference, except where an administrator or plan sponsor is required to make an election. Every effort should be made to limit requirements to reiterate regulatory guidance language in all current and future situations in which there is no choice involved in the application of the terms of the Code or regulations.

Accordingly, the EP Subcommittee recommends that the IRS allow qualified plans to be drafted with additional references to the statute and to incorporate related regulations and other guidance by reference.

**Point 5. The IRS should allow leniency for "immaterial" flaws in plan document language found on IRS examination.** There is great concern that, without periodic determination letters, certain immaterial issues concerning plan language that do not impact the calculation of benefits or proper payment (which would ordinarily be addressed under the Determination Letter Program) will now be identified on IRS examination without reasonable recourse. On examination, plan sponsors have the right to appeal legal issues, but minor flaws, which admittedly are flaws, often are left to the good will of the IRS plan auditor with respect to required remediation. The EP Subcommittee recommends that instructions be given to IRS plan auditors on a nationwide level to not apply retroactive penalties for "immaterial" flaws in plan document language. The EP Subcommittee also recommends that the IRS provide remedial amendment-like protection for any plan amendments that were made in "good faith."

---

<sup>31</sup> See [https://www.irs.gov/pub/irs-tege/qab\\_120709.pdf](https://www.irs.gov/pub/irs-tege/qab_120709.pdf) for 2009 IRS statutory and regulatory guidance on provisions that currently can be incorporated by reference.

<sup>32</sup> *Id.*

**Point 6. The IRS should immediately confirm Code Section 7805(b) protection continues for any plan document language that remains unchanged from issuance of a prior determination letter and further consider feasibility of independent review as "good faith" compliance extending Code Section 7805(b) protection.** A determination letter provides the plan sponsor with protection pursuant to Code Section 7805(b); that is, the plan will not be disqualified retroactively if the sponsor makes required retroactive corrections. In order to provide certainty to the EP Community in the current situation, the IRS should immediately confirm that Code Section 7805(b) protection will prevent a plan with a favorable determination letter from being disqualified retroactively as a result of mistakes that the IRS may later identify in the plan language if such language was covered by an existing IRS determination letter, provided that the plan sponsor makes any appropriate retroactive corrections for the identified mistakes within the specified time allowed by the IRS. Because the IRS has announced that the expiration date will no longer apply to current determination letters that have been or will be issued, the IRS simply needs to officially confirm that relief under Code Section 7805(b) will continue to apply.

The EP Subcommittee notes that the IRS has raised the possibility of plans obtaining private opinion letters. There has also been discussion in the EP Community of the potential value of a third-party certification in lieu of determination letters; others have suggested opinion letters from legal counsel could be viewed as a good faith source of reliance by the IRS. The EP Subcommittee believes that opinion letters from legal counsel may be too costly an option in most cases and will have to contain too many caveats. This concept is only practical if the IRS considers a way to attach Code Section 7805(b) protection to a private opinion letter, which would be a critical measure in making such opinion letters useful. If the IRS believes that a review tied to a standard such as "more likely than not" or some stronger standard may be appropriate in some cases, then the IRS could provide protection under Code Section 7805(b) if a plan receives such an opinion. The IRS would need to establish standards for

## EMPLOYEE PLANS

who, or what, has sufficient expertise in the qualification requirements to provide such an independent private review.

**Point 7. The IRS should provide a safe harbor approach to convert an individually designed plan into a pre-approved plan or a process to review and approve such conversions on a one-time basis.**<sup>33</sup> The IRS can facilitate the process of moving more individually designed plans to a pre-approved plan format by agreeing to review such plan conversions and provide a determination letter as if it was an initial determination letter (even though it would be on a pre-approved plan). At a minimum, the IRS should provide guidelines as to what provisions can be included in the conversion plan document.

**Point 8. The IRS should publish model amendments along with the Cumulative Lists and a List of Required Amendments.** In addition to the current annual Cumulative List, the IRS should publish (at least a year in advance to the extent possible) a list of provisions that require plan language changes together with model language. On the list, the IRS should specify what plan amendments are necessary for each type of plan. To the extent possible, the IRS should provide model amendments. The EP Subcommittee recognizes that the IRS has limited resources and staff shortages that make it difficult for the IRS to provide model language, especially model language that will fit all plans; however, the availability of such language will soften the blow of not having periodic determination letters available in the future. Any regulations or, to the extent possible, legislation should be clear on when an amendment is needed and provide sufficient time for that amendment language to be released by the IRS and adopted by the plan sponsor.

---

<sup>33</sup> **Survey Results Relating to Point 7.** In looking at what issues are obstacles for plan sponsors to convert individually designed plans to a pre-approved plan document format, almost half of the Survey Respondents ranked concerns over problems that might arise during a plan document conversion as their largest concern, and almost 90 percent of Survey Respondents ranked this potential measure as one of the top priorities in light of the Announcement.

**Point 9. The IRS should provide adequate time to adopt all amendments and coordinate amendment dates.**<sup>34</sup> The EP Subcommittee believes that more time should be provided for the plan amendment process. There were multiple references to this issue raised by the comments from Survey Respondents as well as in the Comment Letters. The general theme of all these comments is that plans have to be formally amended far too often and at different times. Accordingly, the EP Subcommittee recommends that the IRS create a uniform date for all amendments much in the way it worked in the past for GUST, EGTRRA and PPA required amendments (e.g., once every three or five years) and allow amendments to be made retroactively effective as well. In a case where the IRS does not issue model amendments, the IRS should extend the deadline until, at least, the end of the plan year following the second anniversary of the announced required law change.

**Point 10. The IRS should encourage Treasury to ask Congress to increase and dedicate user fees for the Determination Letter Program.** The EP Subcommittee recommends that the IRS encourage Treasury to ask Congress to increase user fees for the periodic Determination Letter Program and dedicate the user fees directly back to EP's budget/cost center. Plan sponsors would generally rather pay an increased fee and have the ability to apply for a periodic determination letter than to go without such a letter.

## Summary

The EP Subcommittee, like the majority of the EP Community, was distressed by the Announcement and the corresponding general elimination of periodic determination letters. It is the EP Subcommittee's position that such a decision is shortsighted. The EP Community has historically had an open and collaborative working relationship with EP. This productive working relationship is reflected by the incorporation of prior EP

---

<sup>34</sup> **Survey Results Related to Point 9.** There were multiple references to this issue raised by the comments from Survey Respondents as well as in the Comment Letters that were submitted to the IRS regarding the Announcement. The general theme of all these comments is that plans have to be formally amended far too often and at different times.

## EMPLOYEE PLANS

Subcommittee recommendations into both the Determination Letter Program and the EPCRS.

This longstanding unique working relationship with EP has been diminishing from the perspective of the EP Community and, apparently, not solely because of EP's limited staff and resources. IRS officials have recently said publicly that EP should be operated no differently than other units of the IRS. This change in the relationship is troubling for the EP Community. It appears that the elimination of periodic determination letters is merely the first step in restructuring the EP Community's relationship with the IRS.

The announced elimination of subcommittees on the ACT can also be reasonably viewed as a second step in the restructuring the EP Community's relationship with the IRS. The EP Subcommittee hopes that the EP Community will be able to continue to work with the IRS in the future in the same mutually productive way as it has in the past. The EP Subcommittee would be happy to discuss these recommendations with any interested parties.

If the IRS believes that it has no choice but to go forward with the announced changes to the Determination Letter Program, the EP Subcommittee would urge the IRS to adopt the EP Subcommittee's second recommendation: make it a transition approach while holding further discussions with the EP Community. EP would receive significantly more "buy-in" if the EP Community felt it was made part of the discussions and process of altering the Determination Letter Program (as it has been in the past). No interested party denies the IRS budget and staffing problems. That is a problem that affects the entire EP Community. It is clear that the Comment Letters and Survey results discussed above reflect the desire of the EP Community (and, of course, the EP Subcommittee) to work with EP in addressing how best to redesign the Determination Letter Program.

**Appendix A**  
**EP Subcommittee Survey on Employee Plans Community Opinion on Proposed**  
**Changes**  
**to the IRS Determination Letter Program**

**Attach Survey Results**

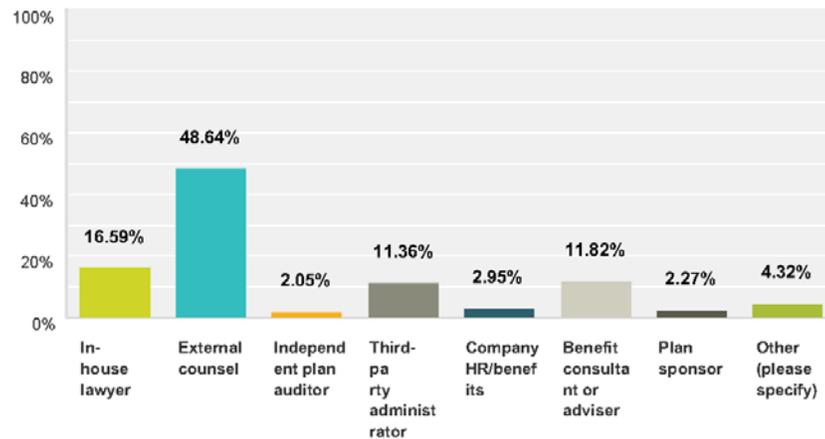
Please note that the responses to Survey questions #4, 7 and 12 are difficult to read essentially because they were formatted in a multidimensional array, which cannot be displayed effectively in two dimensions. These questions were designed to provide insight into the perspectives of the Survey Respondents and were not incorporated into any recommendations made in this Report.

**EMPLOYEE PLANS – APPENDIX A**

ACT Employee Plans 2016

**Q1 What is your primary role?**

Answered: 440 Skipped: 0

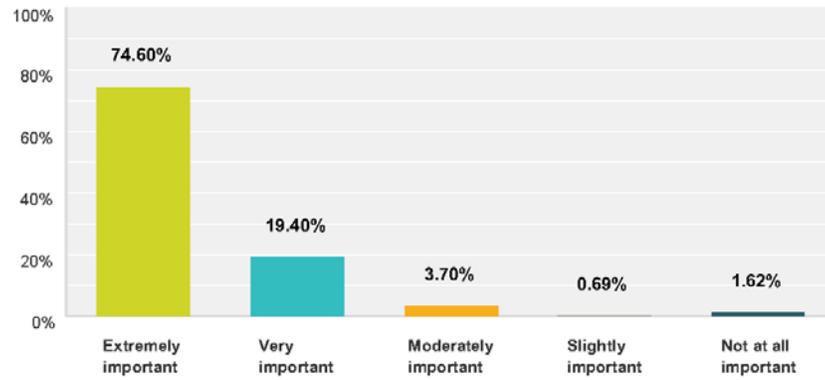


Answer Choices	Responses	
In-house lawyer	16.59%	73
External counsel	48.64%	214
Independent plan auditor	2.05%	9
Third-party administrator	11.36%	50
Company HR/benefits	2.95%	13
Benefit consultant or adviser	11.82%	52
Plan sponsor	2.27%	10
Other (please specify)	4.32%	19
<b>Total</b>		<b>440</b>

ACT Employee Plans 2016

**Q2 How important is receipt of an initial determination letter for plan sponsors when making decisions about sponsoring an individually designed plan?**

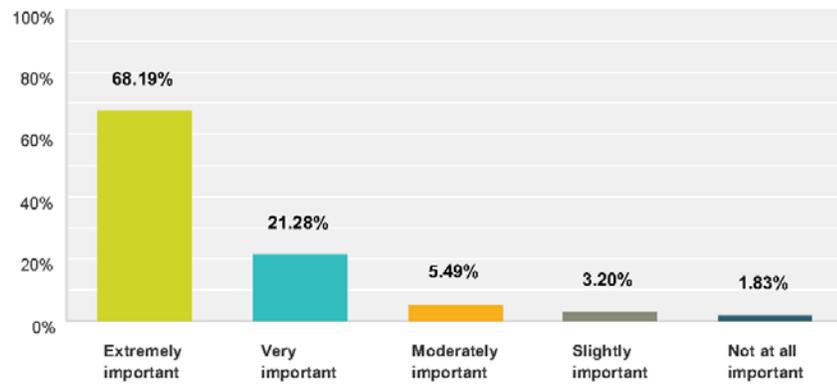
Answered: 433 Skipped: 7



ACT Employee Plans 2016

**Q3 How important for individually designed plan sponsors is the ability to obtain an updated determination letter when making decisions to adopt significant amendments?**

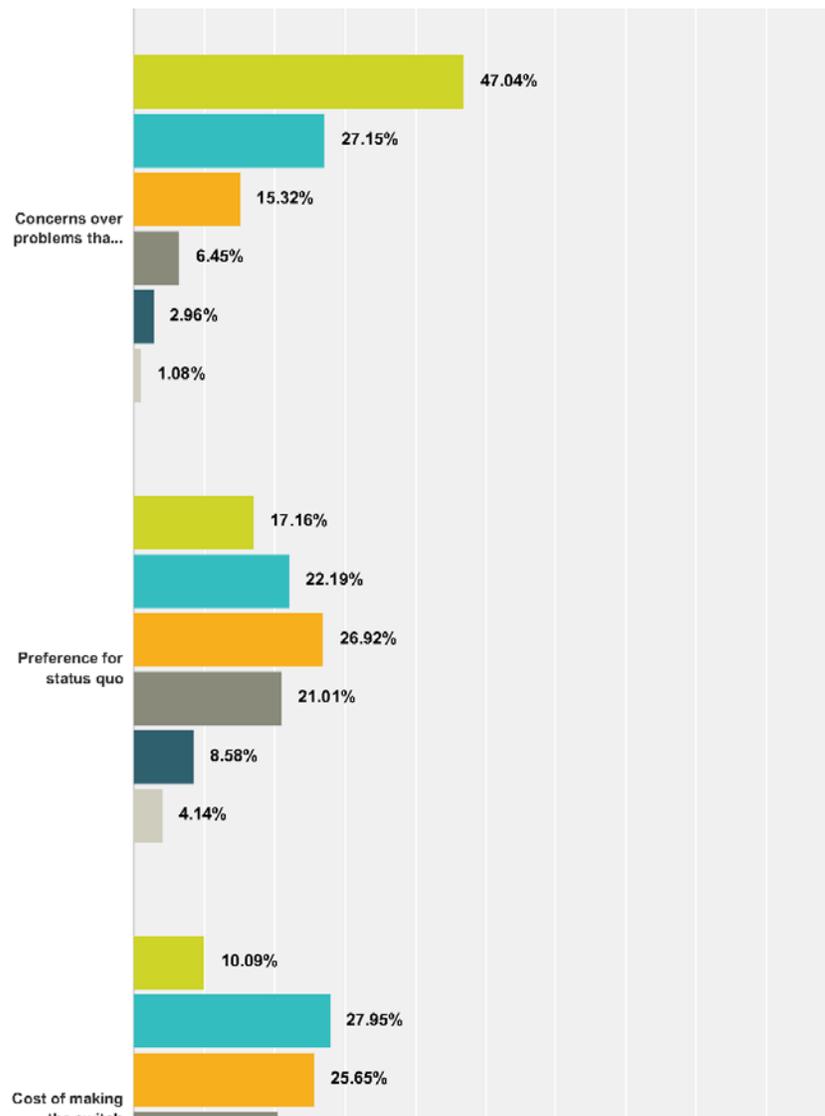
Answered: 437 Skipped: 3



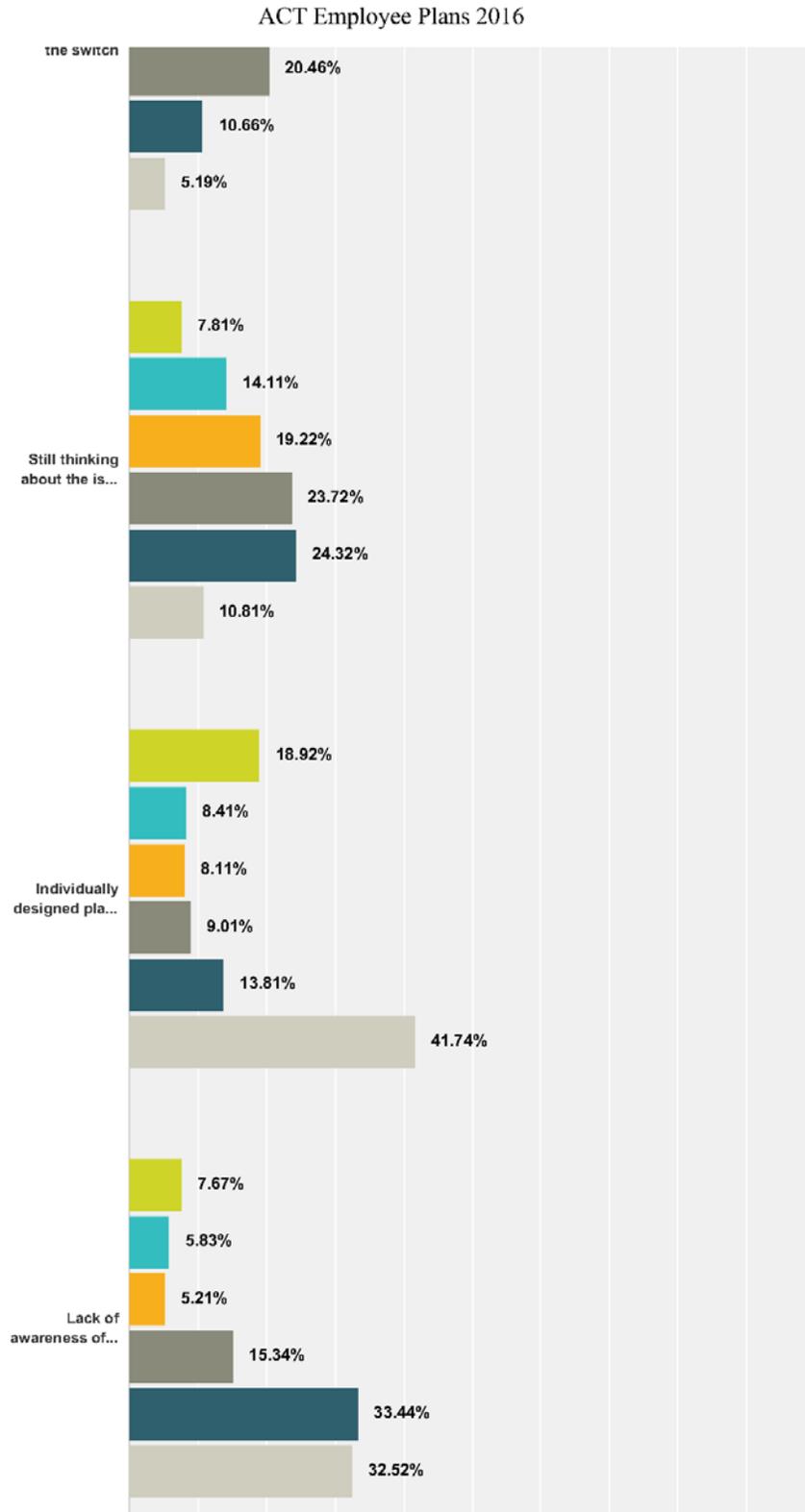
ACT Employee Plans 2016

**Q4 For plan sponsors not currently considering a switch to the pre-approved plan document format despite having individually designed plans that would fit a pre-approved plan document format, why will plan sponsors continue with an individually designed plan? (Please rank in the order of importance with 1 being the most important.)**

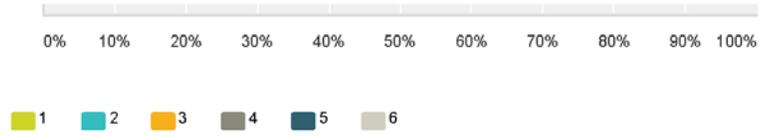
Answered: 386 Skipped: 54



**EMPLOYEE PLANS – APPENDIX A**



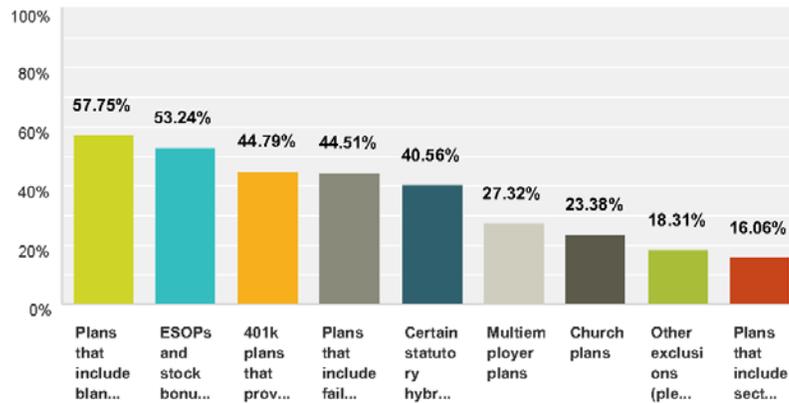
ACT Employee Plans 2016



ACT Employee Plans 2016

**Q5 For individually designed plans that do not currently fit a pre-approved plan document format, would it make a difference if any of the areas currently not covered became covered under the pre-approved plan program? (Select all that apply.)**

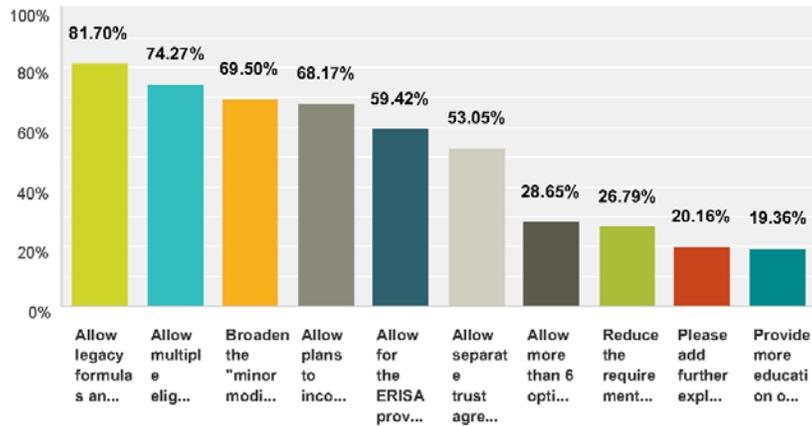
Answered: 355 Skipped: 85



ACT Employee Plans 2016

**Q6 For individually designed plans that do not currently fit a pre-approved plan document format, would any of the following additional changes facilitate plans moving to the pre-approved plan program? (Select all that apply.)**

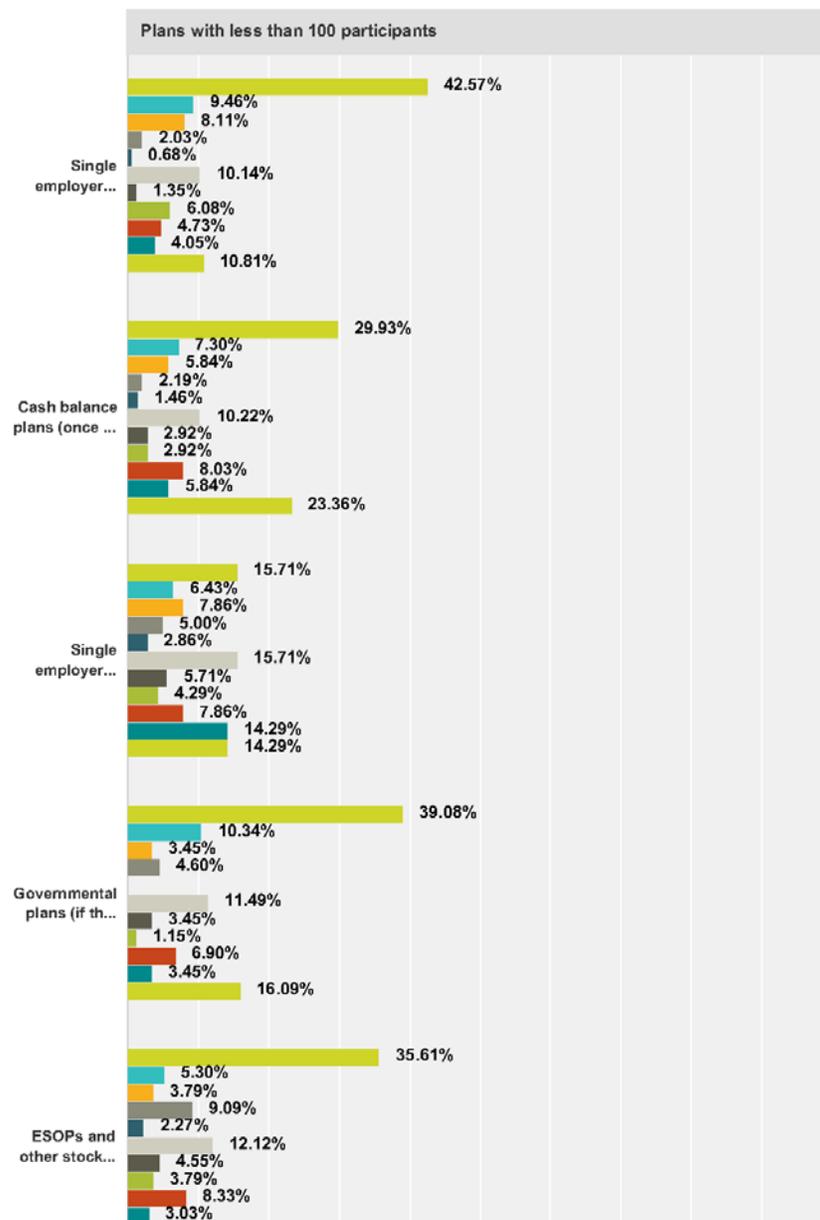
Answered: 377 Skipped: 63



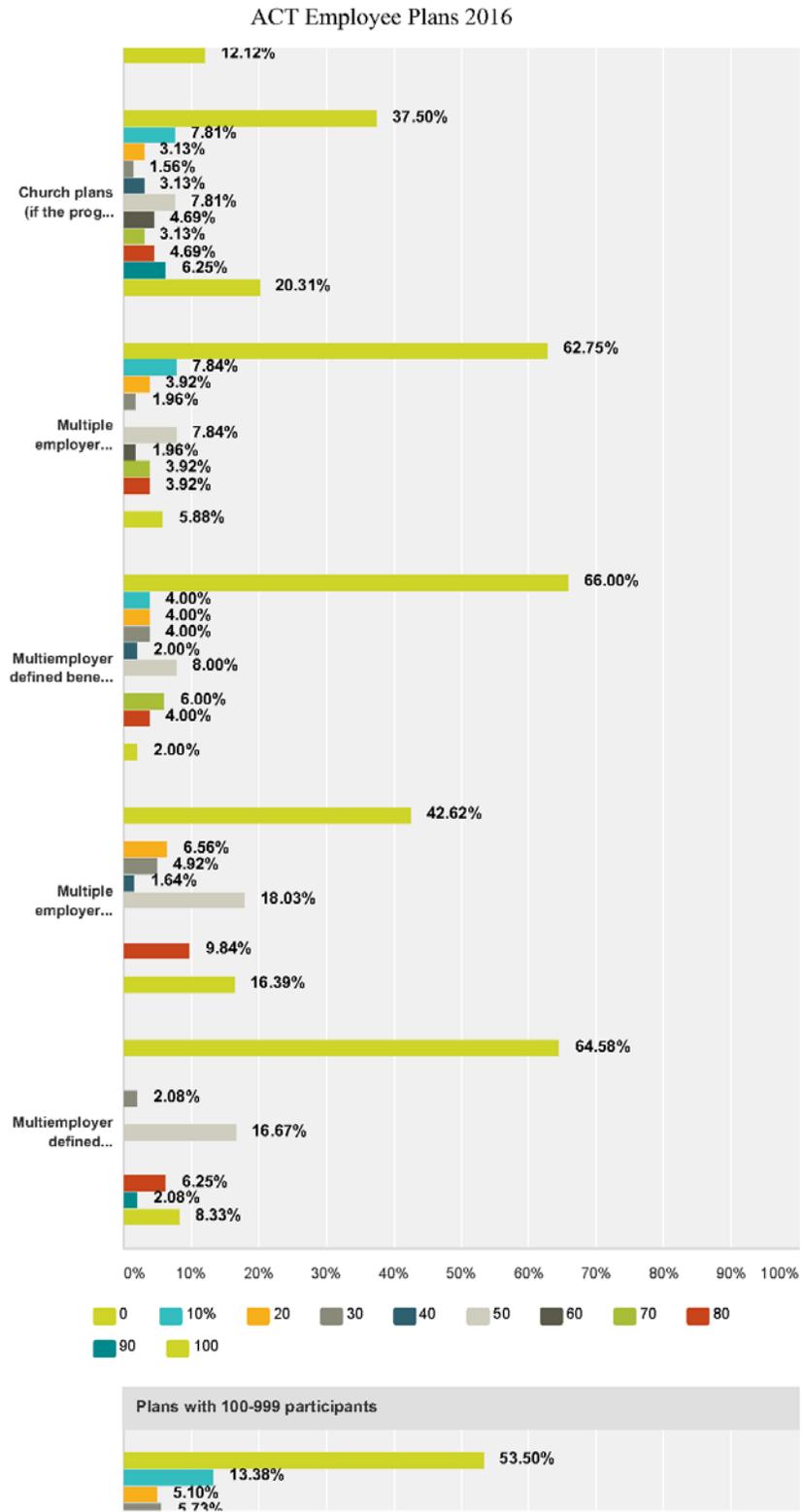
ACT Employee Plans 2016

**Q7 Please estimate the percentage of individually designed plans you work with that are likely to move to the pre-approved plan program? (If you do not have any plans in a specific category, choose zero or leave it blank.)**

Answered: 312 Skipped: 128

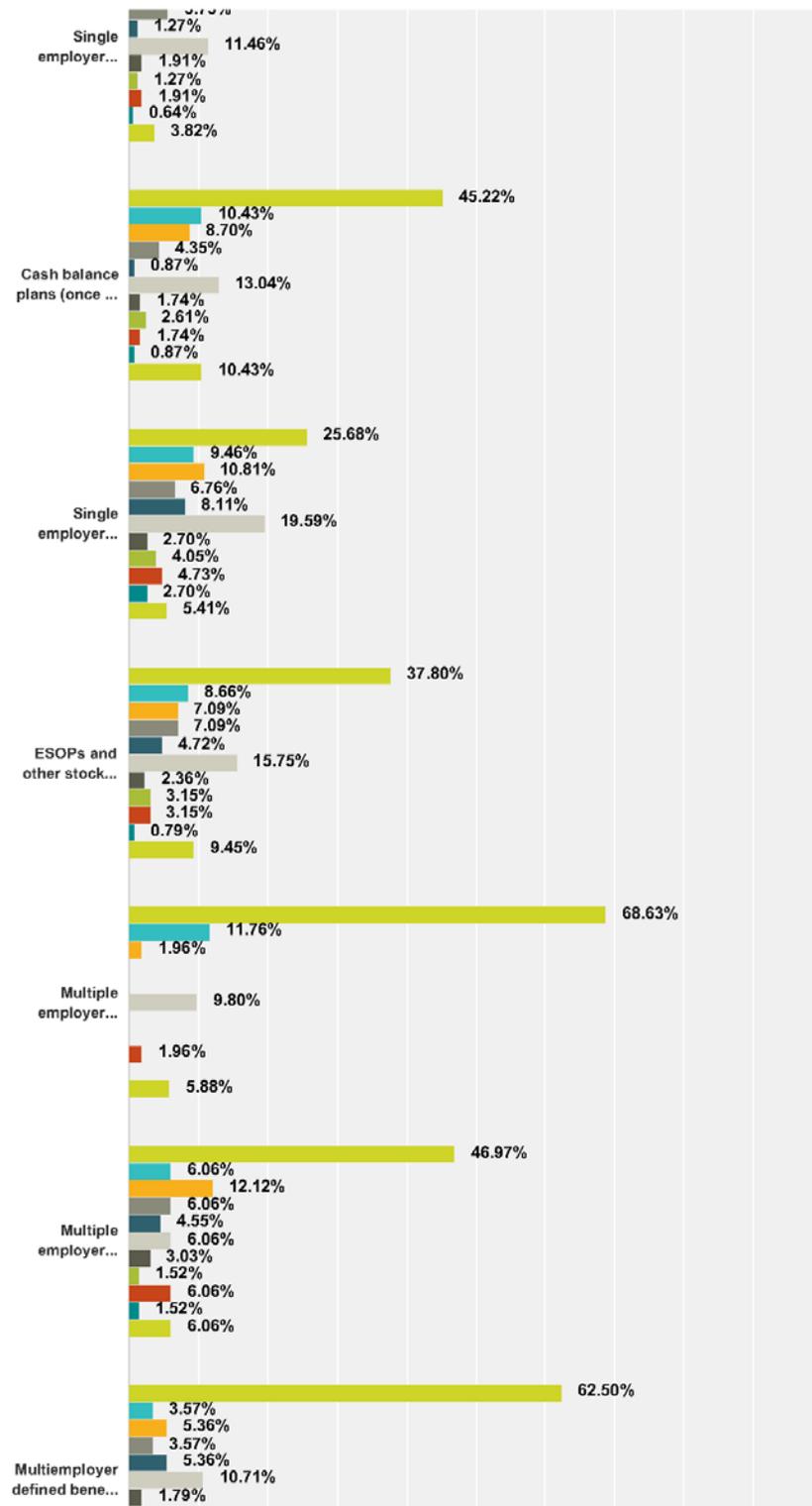


EMPLOYEE PLANS – APPENDIX A

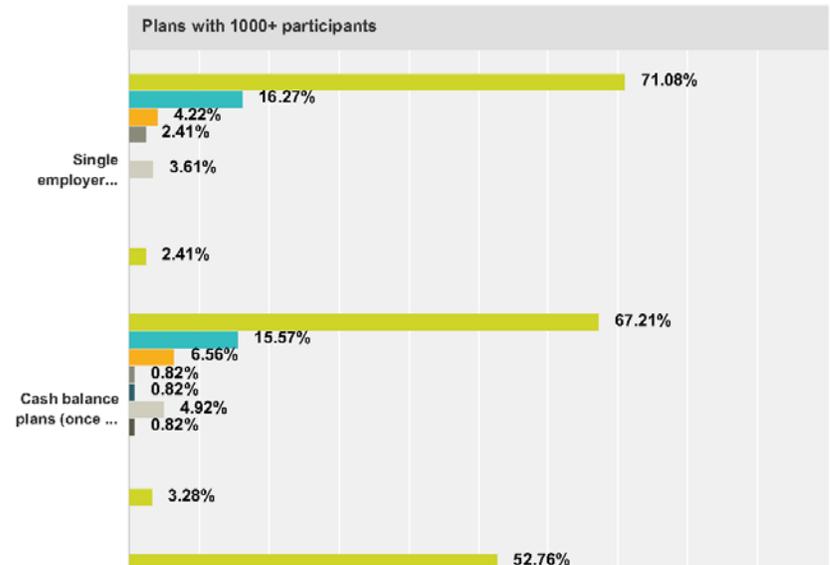
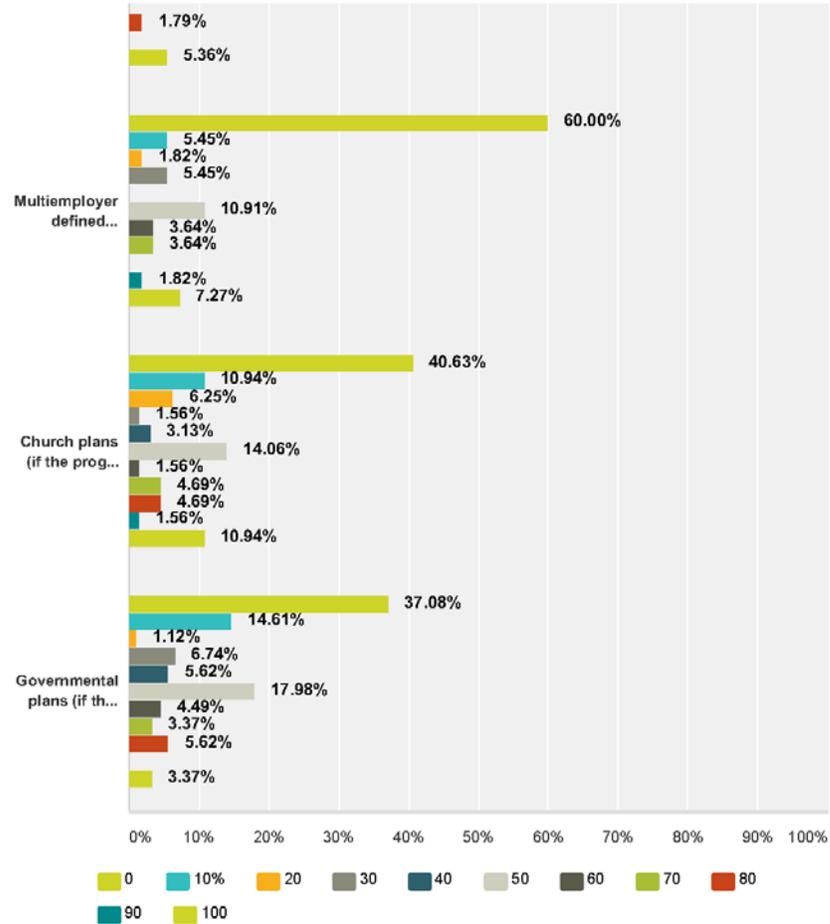


EMPLOYEE PLANS – APPENDIX A

ACT Employee Plans 2016

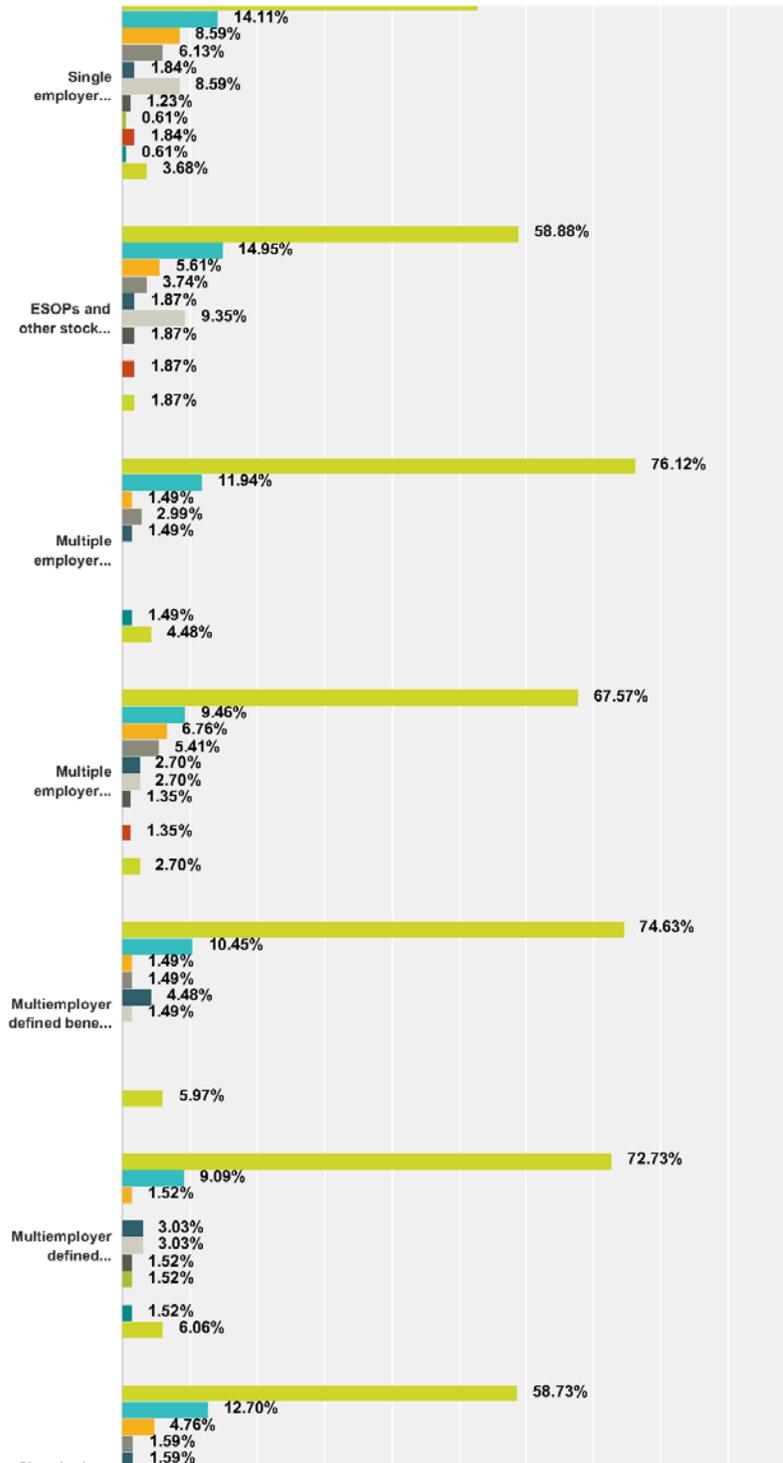


ACT Employee Plans 2016

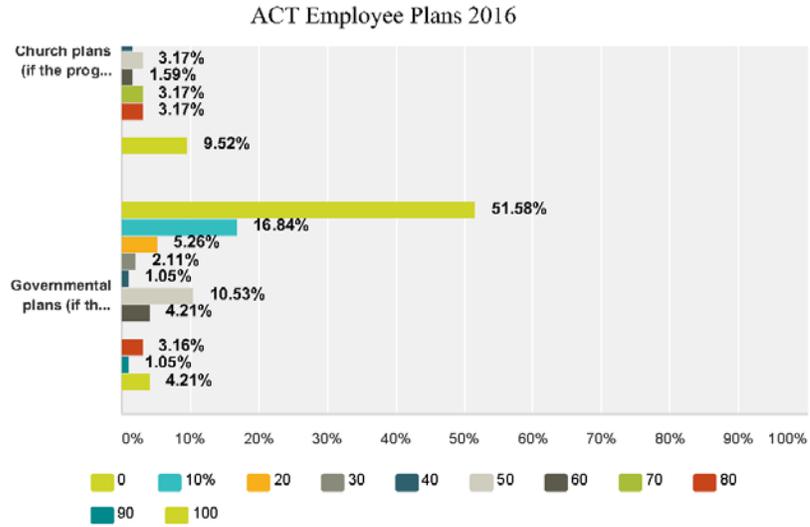


**EMPLOYEE PLANS – APPENDIX A**

ACT Employee Plans 2016



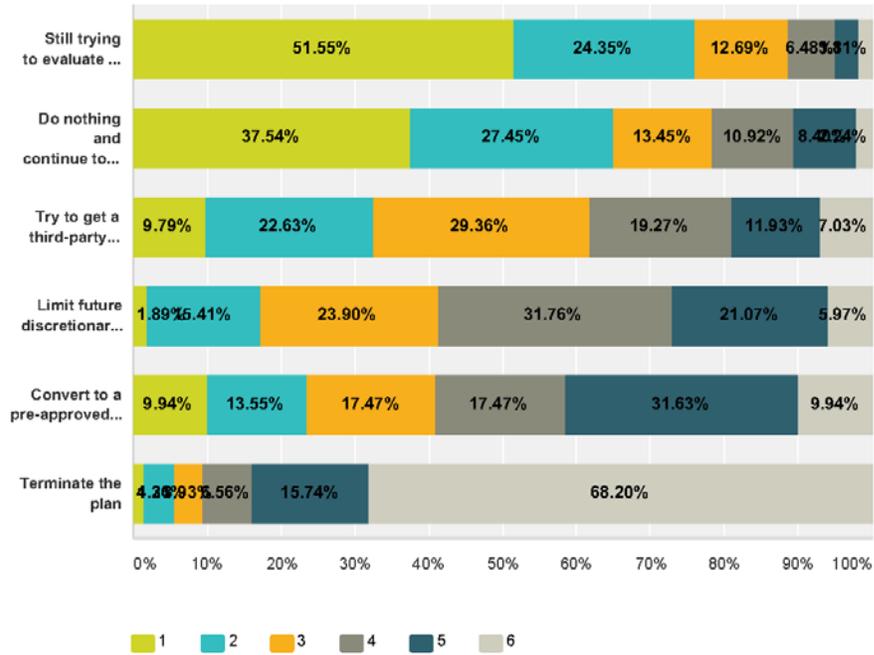
EMPLOYEE PLANS – APPENDIX A



ACT Employee Plans 2016

**Q8 What are sponsors of individually designed plans thinking about doing?  
(Rank in order of importance with 1 being the most important.)**

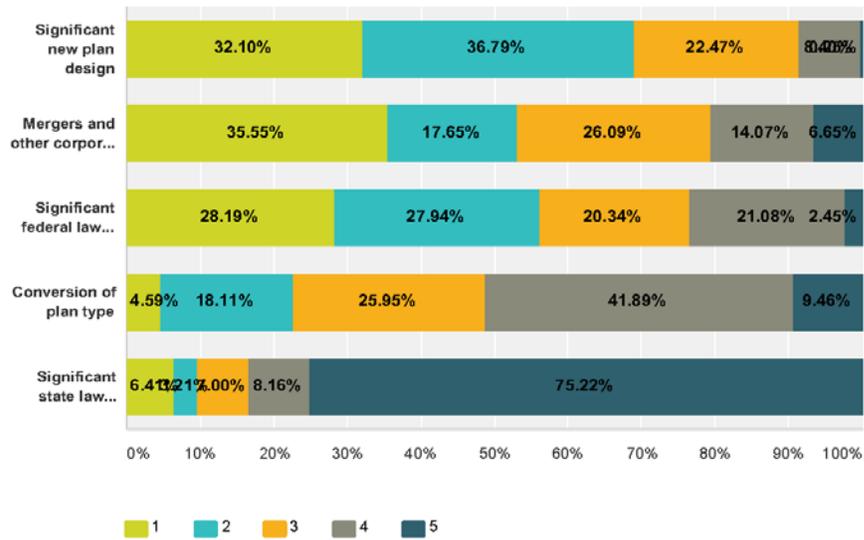
Answered: 410 Skipped: 30



ACT Employee Plans 2016

**Q9 If the IRS were to consider opening the determination letter program for certain events that may occur between the adoption and termination of a plan, what are the most important events? (Please rank in order of importance with 1 being the most important.)**

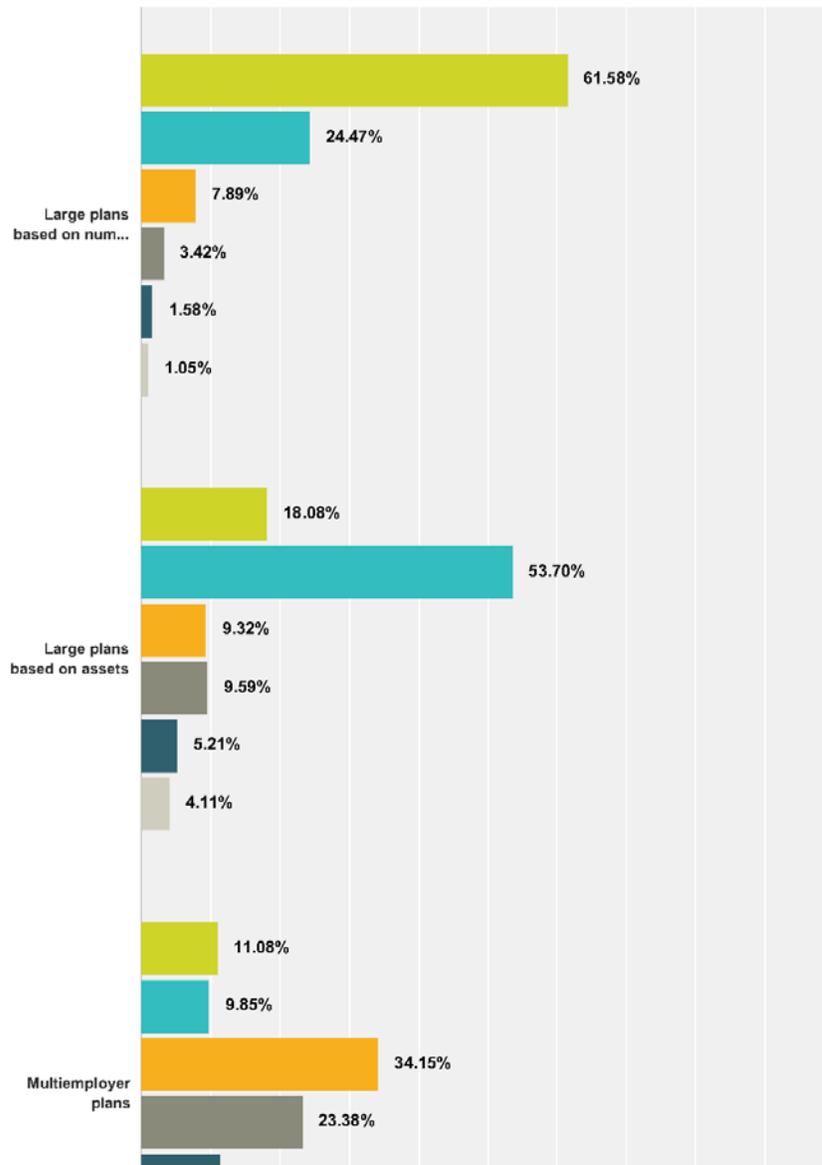
Answered: 426 Skipped: 14

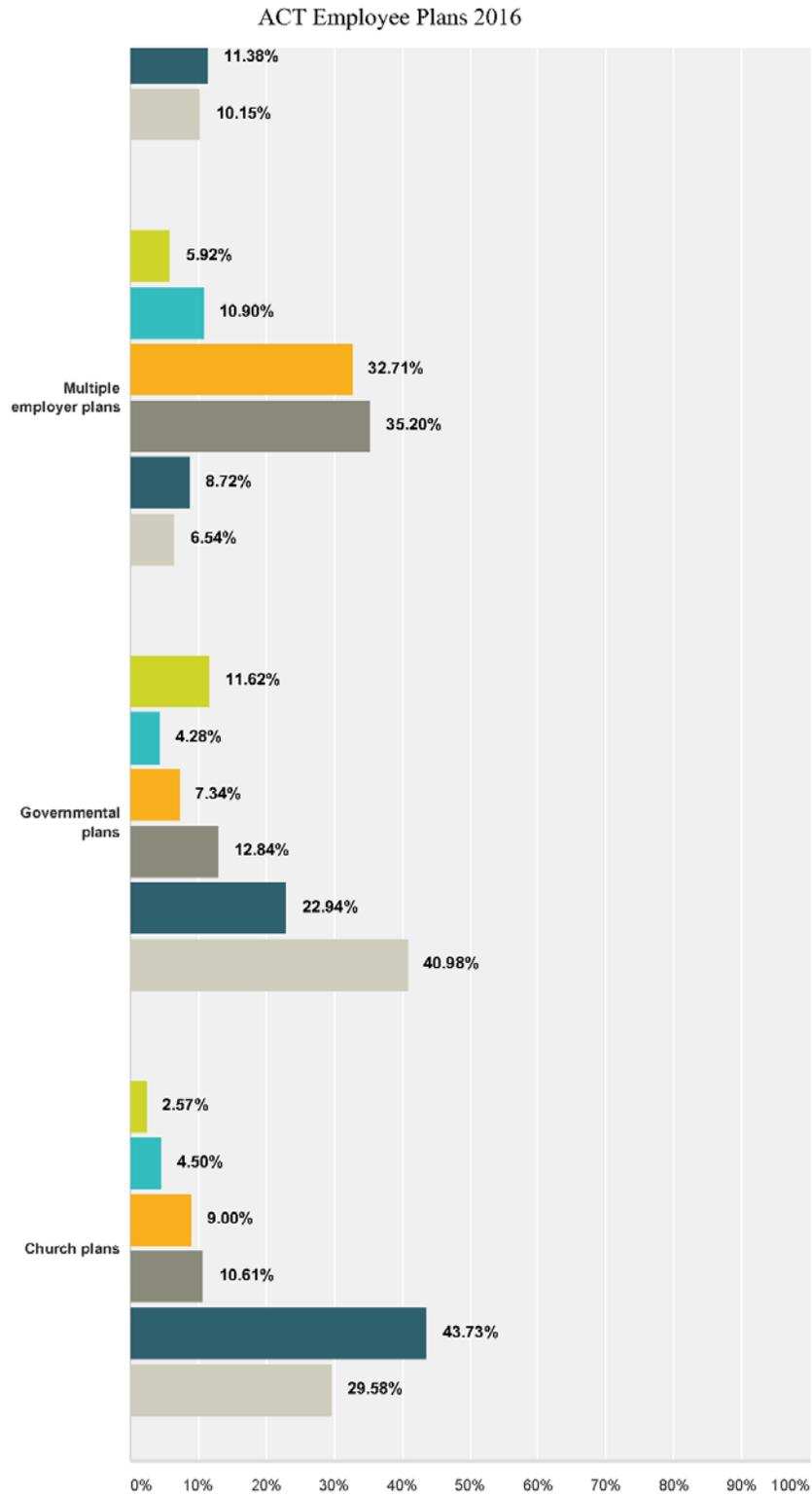


ACT Employee Plans 2016

**Q10 If the IRS were to consider making exceptions to allow certain types of individually designed plans to request updated determination letters, which types of plans are the most important? (Please rank in the order of importance with 1 being the most important.)**

Answered: 403 Skipped: 37





**EMPLOYEE PLANS – APPENDIX A**

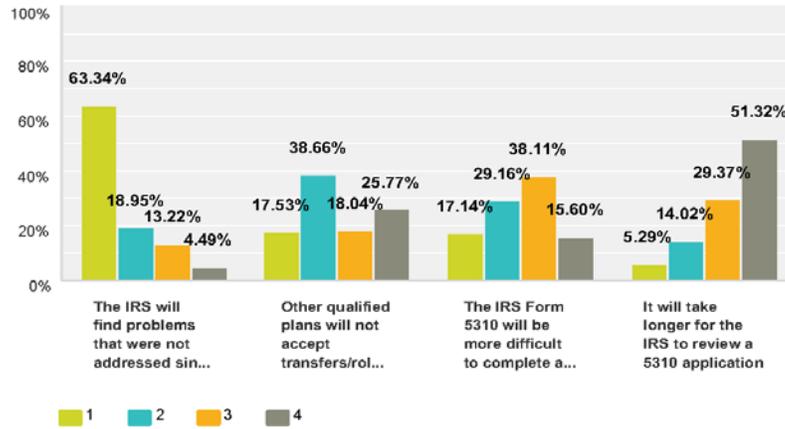
ACT Employee Plans 2016



ACT Employee Plans 2016

**Q11 What concerns will plan sponsors have when terminating an individually designed plan that has not received a determination letter in a long time? (Please rank in the order of importance with 1 being the most important.)**

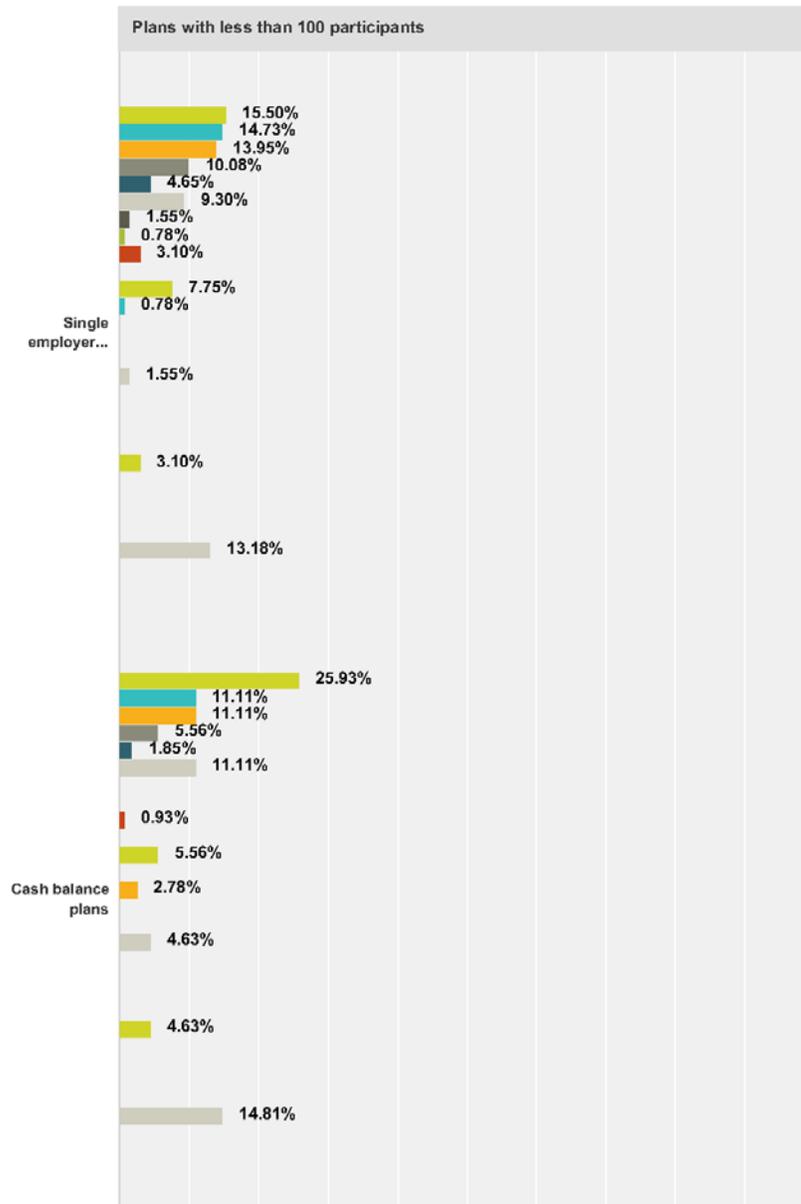
Answered: 411 Skipped: 29



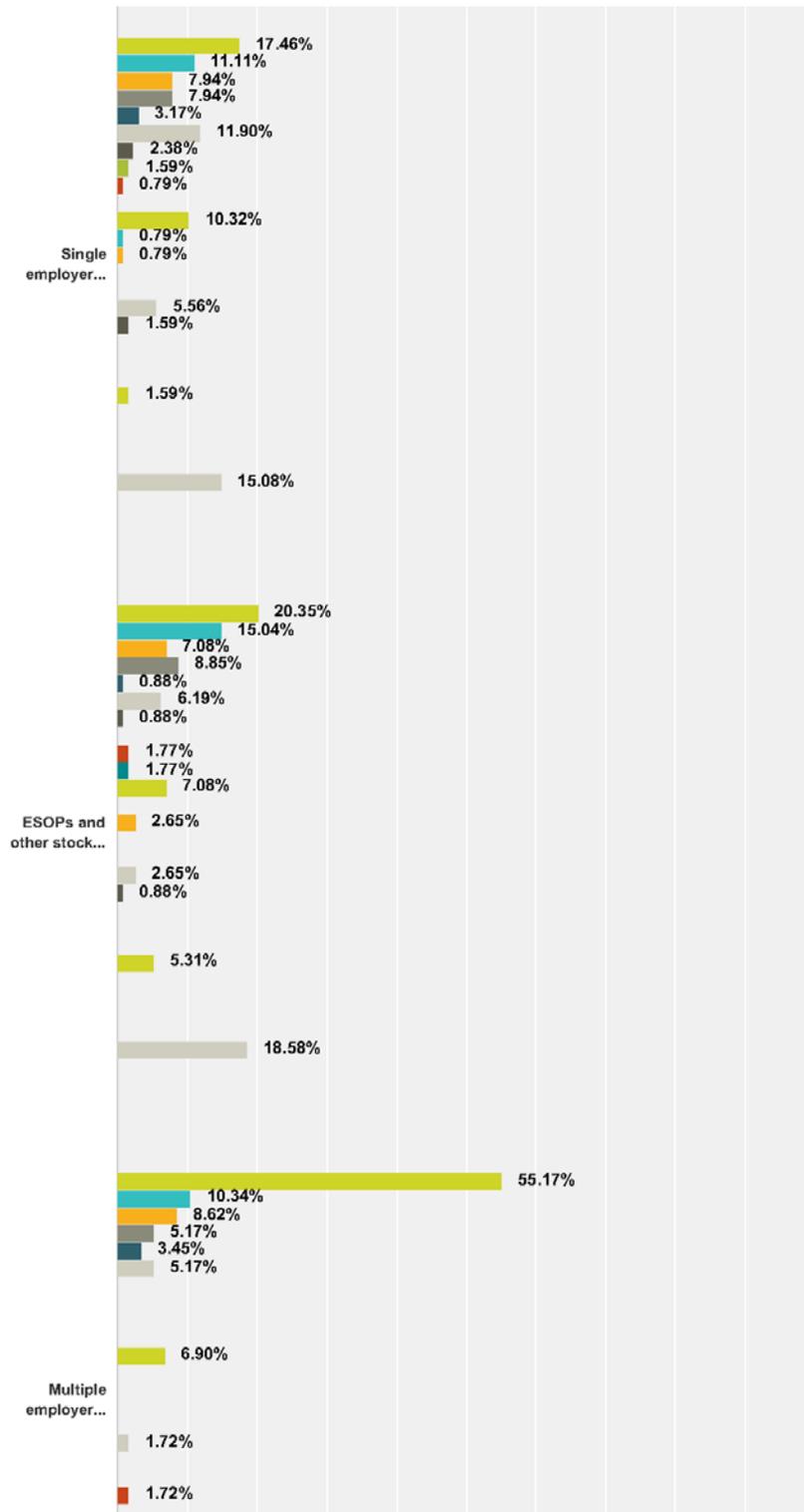
ACT Employee Plans 2016

**Q12 In the last IRS determination letter cycles A-E, approximately how many individually designed plans with which you work requested determination letters? (If you do not have any plans in a specific category, select zero or leave blank.)**

Answered: 340 Skipped: 100

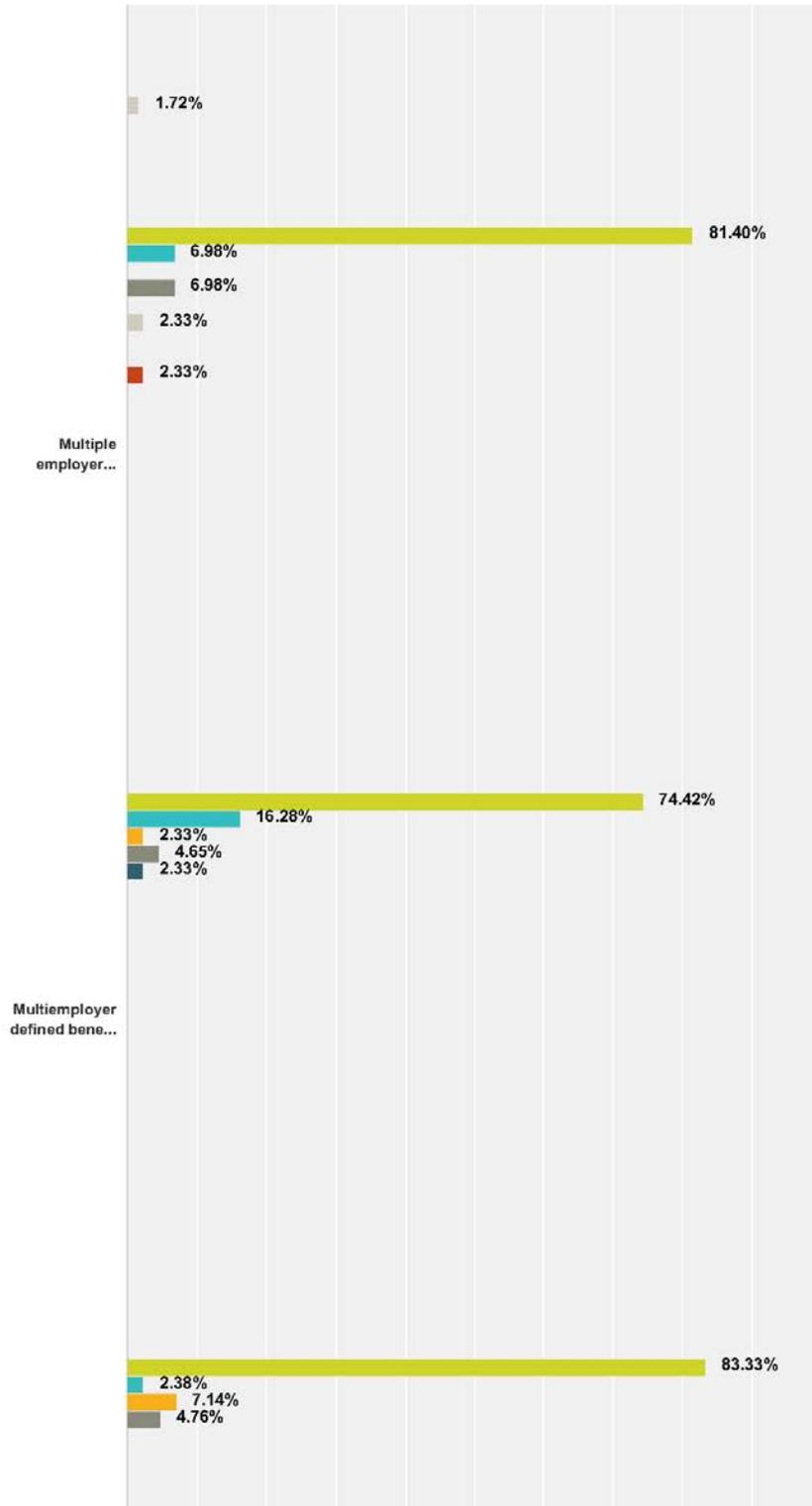


ACT Employee Plans 2016

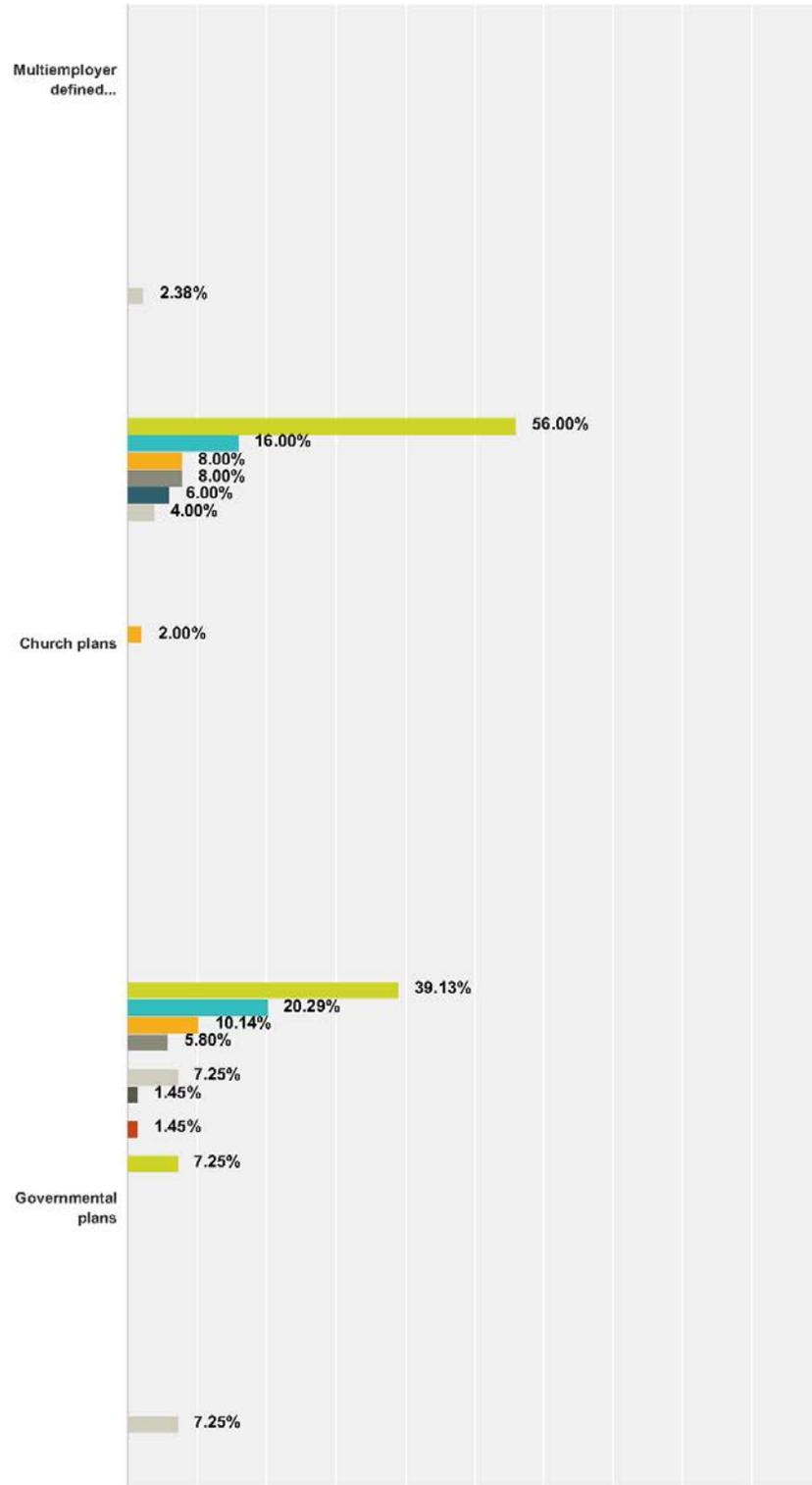


EMPLOYEE PLANS – APPENDIX A

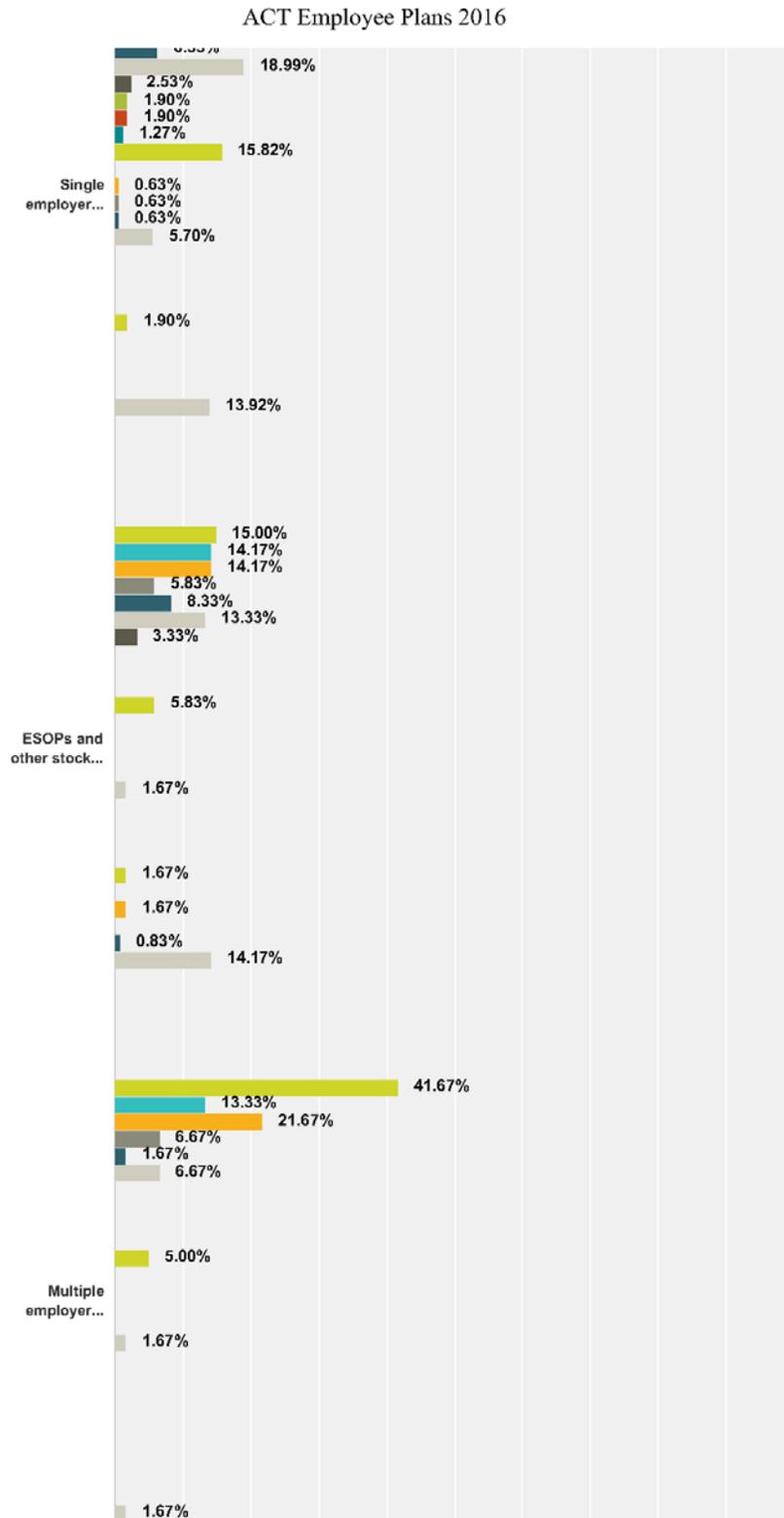
ACT Employee Plans 2016



ACT Employee Plans 2016

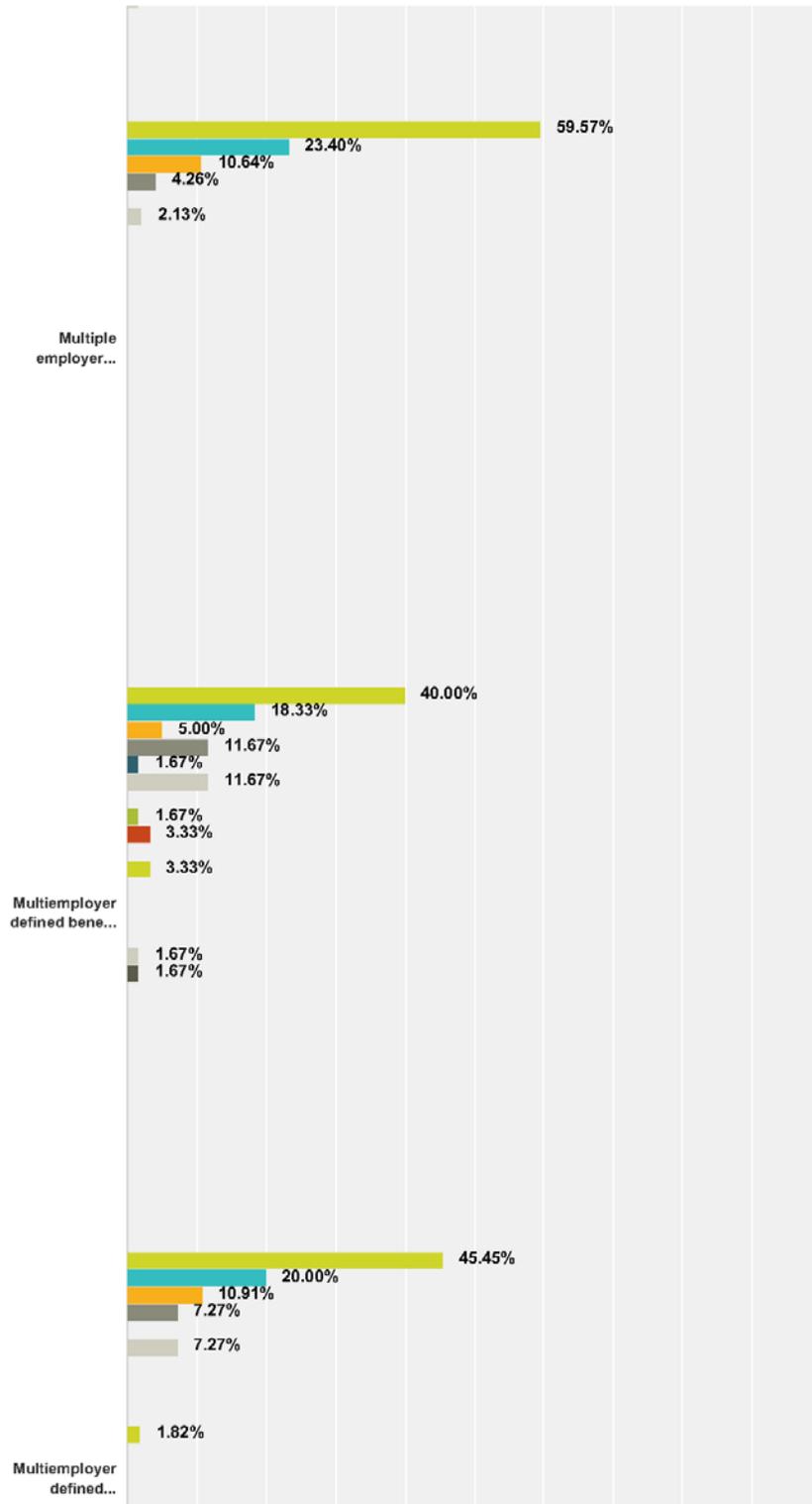


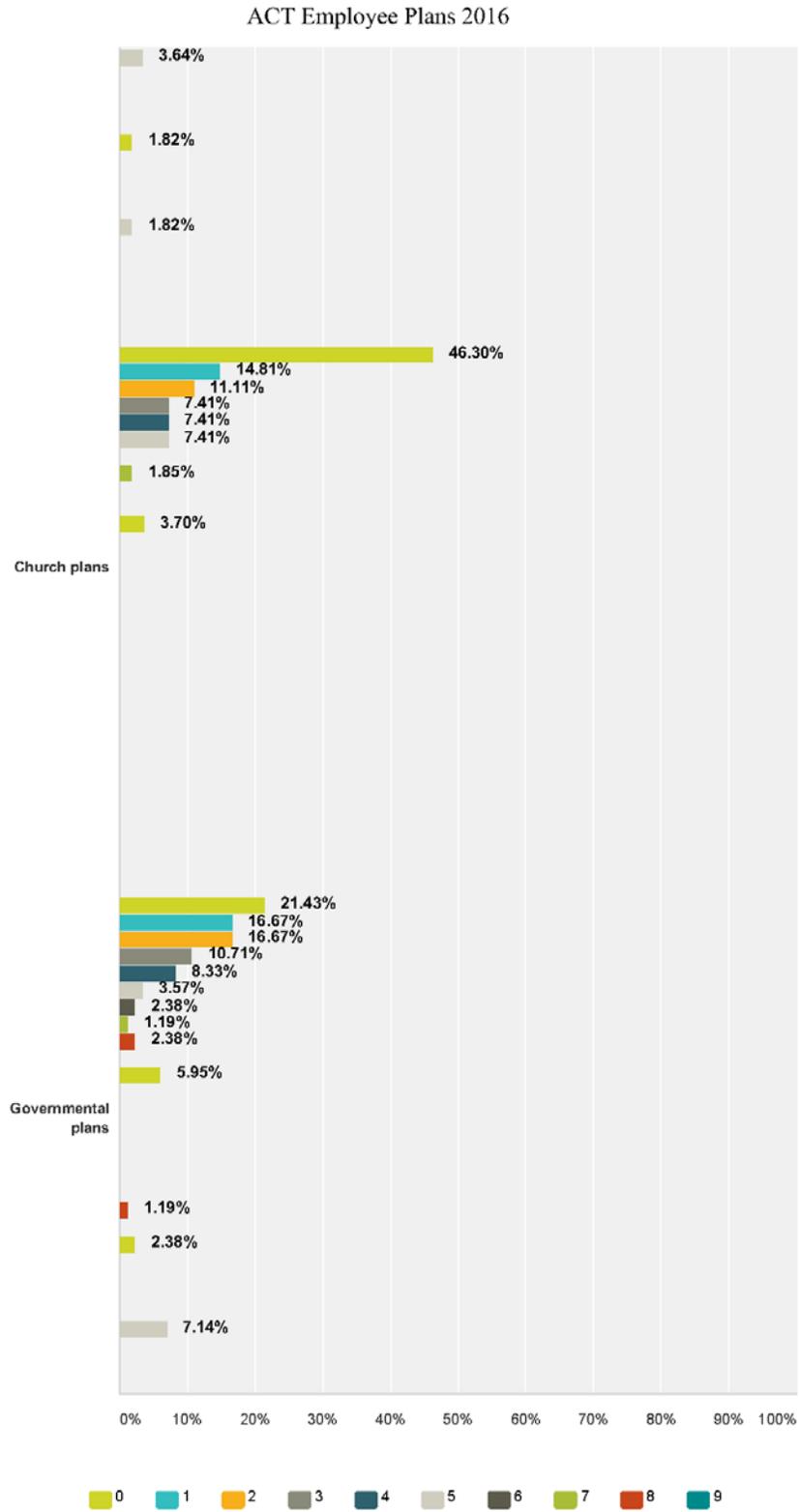




EMPLOYEE PLANS – APPENDIX A

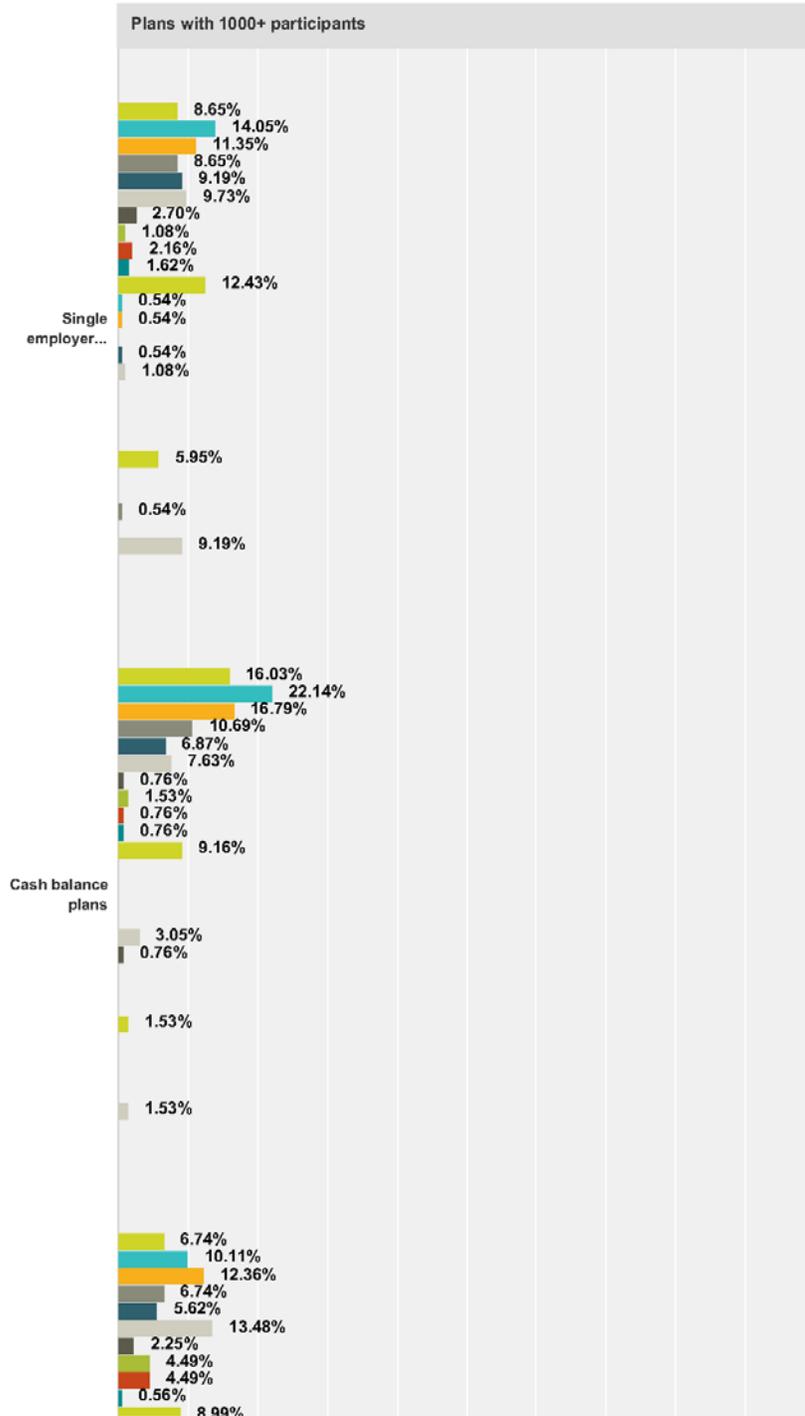
ACT Employee Plans 2016



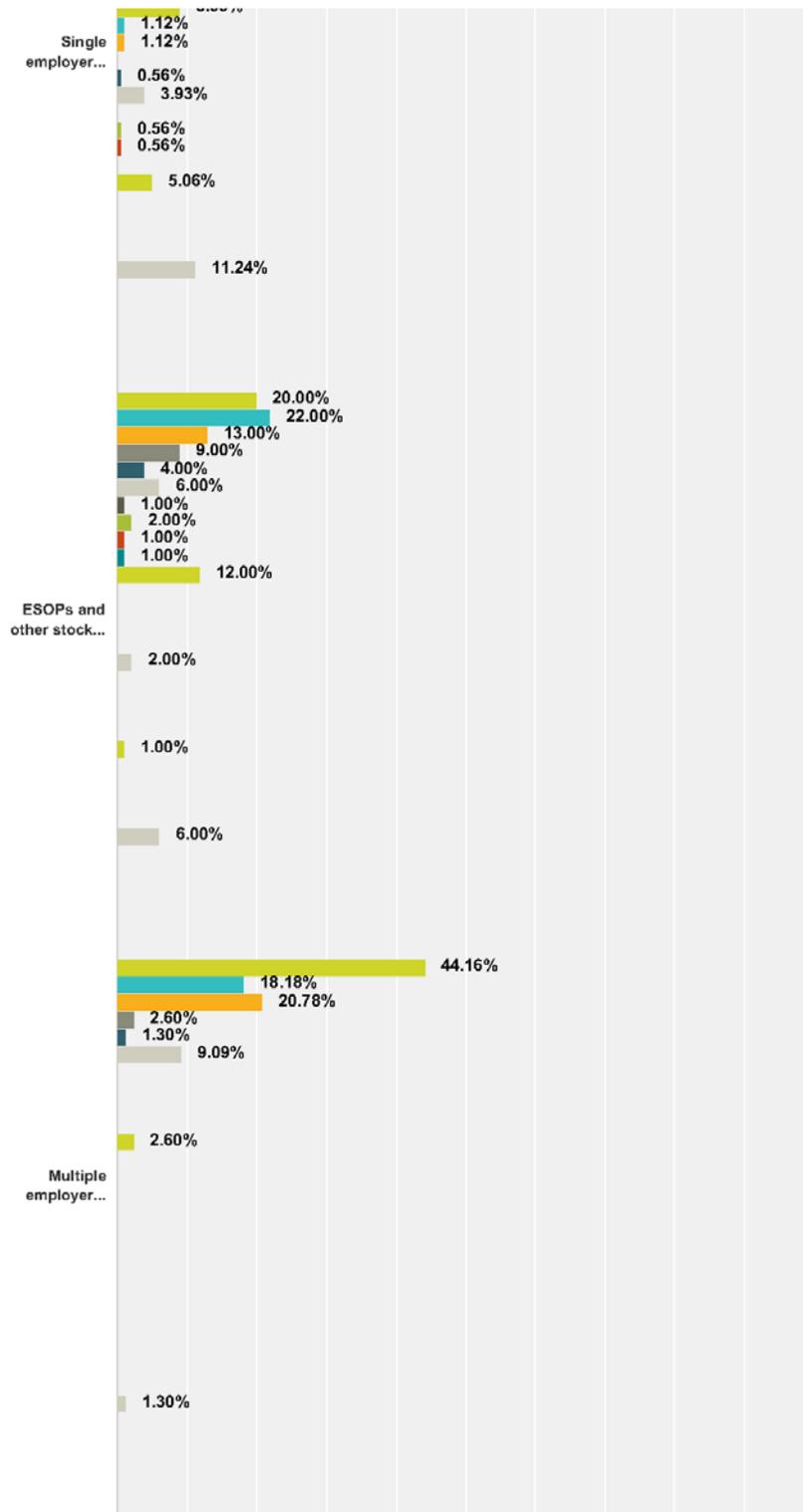


EMPLOYEE PLANS – APPENDIX A

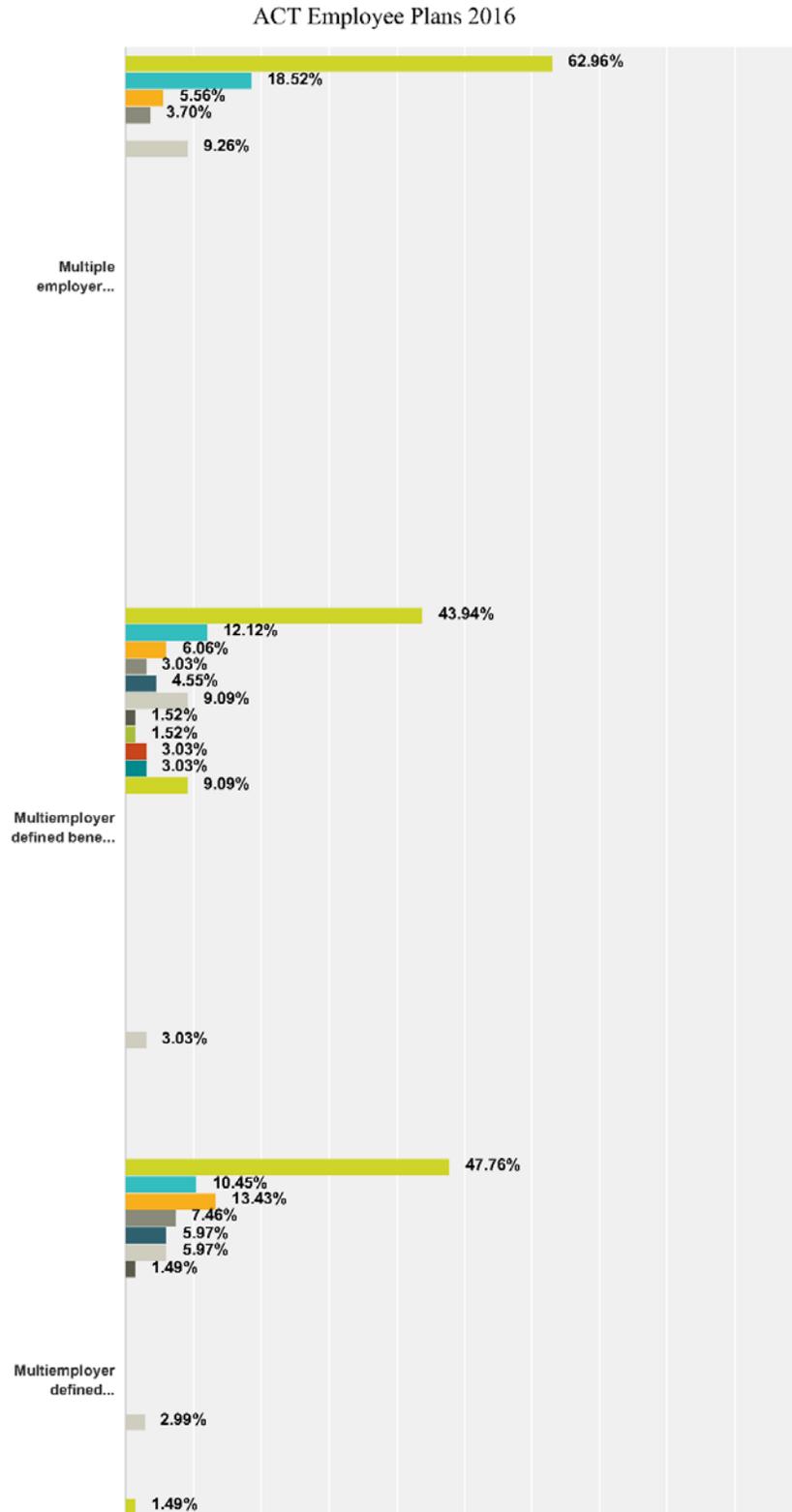
ACT Employee Plans 2016



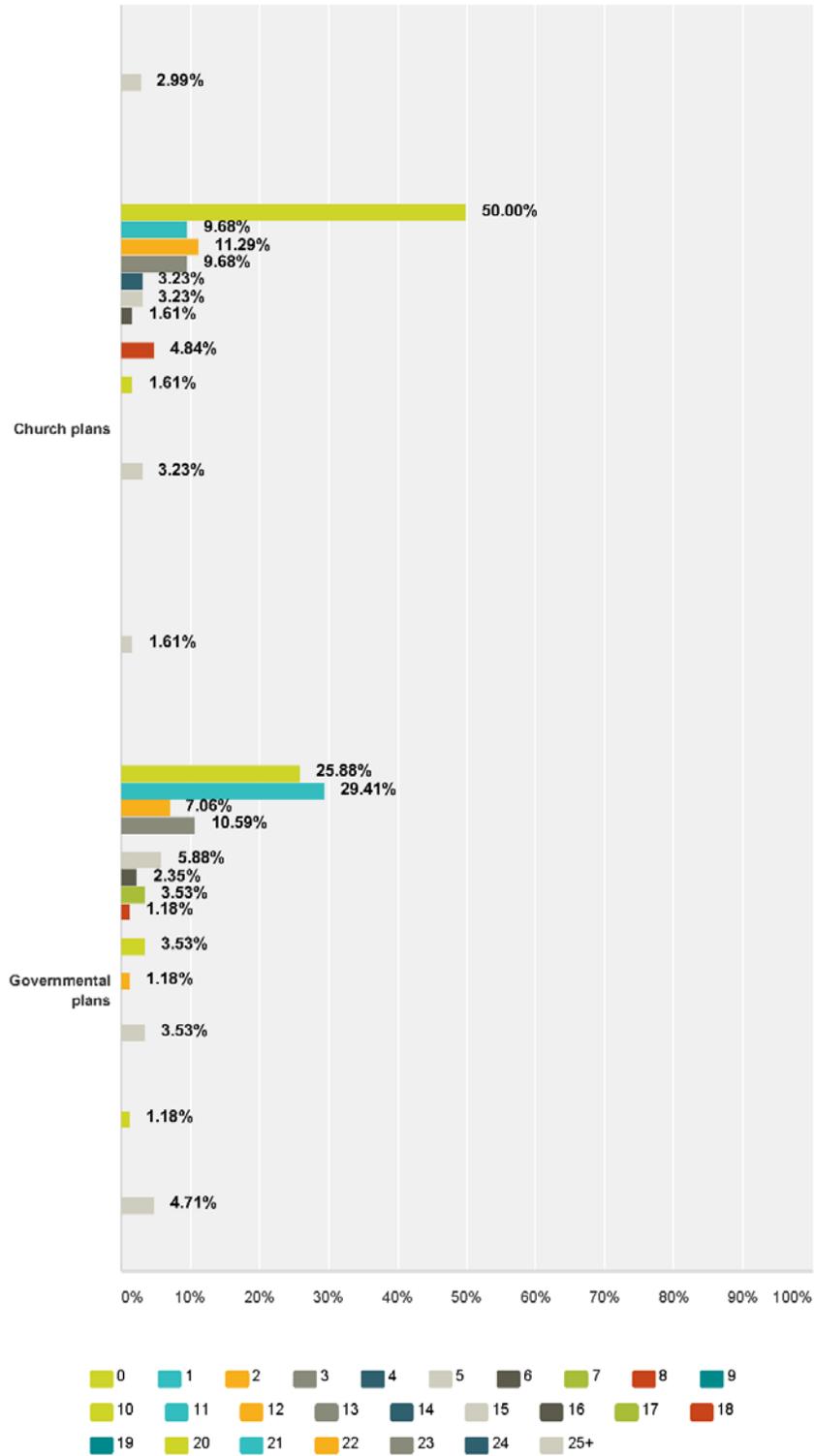
ACT Employee Plans 2016



EMPLOYEE PLANS – APPENDIX A



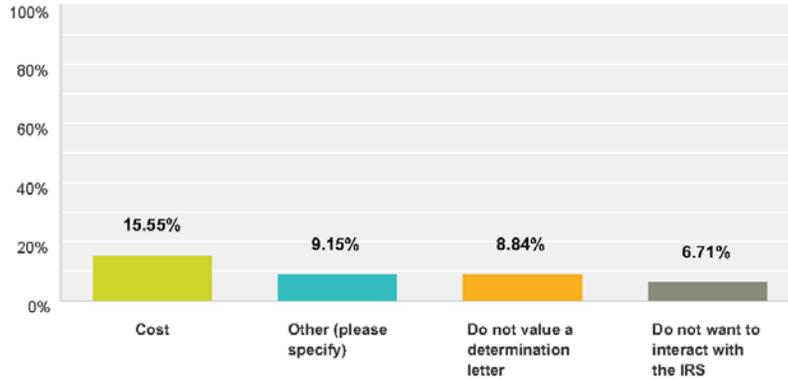
ACT Employee Plans 2016



ACT Employee Plans 2016

**Q13 If you work with individually designed plans that did not file for an IRS determination letter in the last Cycle A-E, why did the plan sponsors not apply? (Please select all that apply.)**

Answered: 328 Skipped: 112



**ADVISORY COMMITTEE ON  
TAX EXEMPT AND GOVERNMENT ENTITIES  
(ACT)**

**Exempt Organizations:**

**Stewards of the Public Trust: Long-Range Planning for the Future of  
the IRS and the Exempt Community**

Amy Coates Madsen, Project Leader

Andrew Watt, Project Leader

Natasha Cavanaugh

Virginia C. Gross

Cindy M. Lott

Dave Moja

**June 8, 2016**

This page intentionally left blank.

TABLE OF CONTENTS

**I. EXECUTIVE SUMMARY .....[93](#)**

**II. INTRODUCTION .....[95](#)**

**III. BACKGROUND .....[98](#)**

**IV. DUE DILIGENCE .....[104](#)**

**V. RECOMMENDATIONS .....[105](#)**

**VI. CONCLUSIONS .....[139](#)**

**Acknowledgements.....[141](#)**

**Appendix A: Proposed New Determination Letter.....[142](#)**

**Appendix B: Proposed Outline of International Activities Fact Sheet.....[147](#)**

**Appendix C: List of Individuals Interviewed.....[150](#)**

**Appendix D: List of International Resources .....[153](#)**

This page intentionally left blank.

**I. EXECUTIVE SUMMARY**

Over one million organizations are tax exempt in the United States and subject to regulation by the Internal Revenue Service. Each time that the IRS recognizes exempt status, the public has delegated its trust to the IRS. All exempt organizations are required to operate within their stated exempt purpose. All charitable organizations are required to provide public benefit. In doing so, they add immeasurably to the richness of our lives. Many of these organizations help to meet society's aspiration that every individual can flourish in an environment that supports their human rights and needs. Exempt organizations are often complex; they vary from the smallest grassroots organizations to the very largest international NGOs, each with a unique set of needs, each with a unique mission and role to play. The complexity of the exempt sector, its growth trajectory and the shift in IRS priorities have all contributed to the public's perception of the current and future role of the IRS.

This year's report of the Exempt Organizations Subcommittee of the IRS Advisory Committee on Tax Exempt and Government Entities focuses on planning for the future - big picture areas the Exempt Organizations function should consider in planning for the next two to three decades in overseeing exempt organizations.

The ACT conducted extensive conversations with regulators, nationally and internationally, as well as with individuals and organizations possessing a deep familiarity with regulatory issues and challenges. Not surprisingly, common themes quickly emerged: a need for coordinated action among regulators; better communication between regulators and those regulated entities; efficient and effective platforms for communication and dissemination of information; the need for transparency, particularly around enforcement; and, above all, the need to be user-focused throughout the regulatory and enforcement cycle.

## EXEMPT ORGANIZATIONS

Our specific recommendations are as follows:

1. Ensure that EO staff are equipped to carry out the responsibilities of EO.
2. Provide leadership and guidance on major issues impacting the exempt organizations sector, both current and those anticipated in the near future.
3. Give exempt organizations the tools they need to be tax compliant:
  - a. Detailed audit data.
  - b. Relevant, user-focused guidance, akin to former CPE text.
  - c. An easily navigated website.
4. Assure cyber integrity through technology tools, data collection and secured cyber storage.
5. Release and share data where appropriate for public use.
  - a. IRS information sharing with state charities officials.
  - b. Electronic filing and dissemination of IRS information.
6. Foster two-way communication between the IRS Exempt Organizations division and the nonprofit sector.
  - a. Find ways to solicit input from a greater number of voices (including small nonprofits) and provide open channels for stakeholders to take issues to the IRS.
  - b. Revise the Determination Letter to educate exempt organizations on their tax obligations and responsibilities.
  - c. Use current technology to communicate with exempt organizations.
  - d. Increase the availability of strong expert resources through IRS TE/GE phone customer service.

Together, these recommendations will help TE/GE tackle the challenges and environment of the future. In addition, our final, overarching recommendation is for the EO division of TE/GE, in serving our exempt sector, to help convene and act as a focal point for its various partners in the nonprofit community.

## II. INTRODUCTION

The environment in which the tax-exempt community operates is changing at an exponential rate. The speed of communication and decision-making, the openness of the environment and the operating requirements the virtual world dictates are all forcing changes in practice and strategy on the part of the exempt community; the IRS, as the regulator of that community, has no choice but to try to keep pace. In addition to the requirement of the IRS to regulate and enforce laws, this transitional period requires more IRS guidance<sup>35</sup> and leadership as exempt organizations navigate the many changes that are rapidly impacting our sector. The ACT's goal with this year's report was to provide the most frequently heard recommendations from the field. The field was clear and unanimous. The IRS must prepare today to be ready for tomorrow. This ACT report focuses on improvements that the EO division of TE/GE can make to be better prepared for issues on the horizon. We recognize that EO does not operate in isolation. The scope and recommendations of this report are intended to speak to the broad community of federal and state regulators, Congress, as well as the IRS itself.

As we prepared to write the 2016 report, we reached out to exempt organizations nationally and across the globe. The conversations held by the ACT were with regulators, nationally and internationally, including the IRS, as well as with individuals and organizations possessing a deep familiarity with regulatory issues and challenges. We conducted an extensive series of interviews regarding issues on the horizon and further into the future, focusing on areas for which the IRS should lay groundwork now. These thought leaders included nonprofit association leaders, in-house counsel at leading nonprofit institutions, academics, leading practitioners in the fields of nonprofit law, fundraising and accounting and a number of experts from the international nonprofit community.

Not surprisingly, common themes quickly emerged: a need for coordinated action among regulators; better communication between regulators and regulated entities;

---

<sup>35</sup> We understand that in EO, formal guidance is considered precedential authorities such as revenue rulings, revenue procedures and Department of Treasury regulations, while informal guidance includes private letter rulings and technical advice memoranda. For purposes of this report, however, we are using the term guidance to mean any written or oral communication with the public on exempt organization matters.

## EXEMPT ORGANIZATIONS

efficient and effective platforms for communication and dissemination of information; the need for transparency, particularly around enforcement; and, above all, the need to be user-focused throughout the regulatory and enforcement cycle.

We offer this report with the benefit of these interviews, internal conversations among the ACT committee members, who represent various perspectives from the sector, and many conversations with IRS staff members. We make specific recommendations for addressing current and future issues for which the IRS must plan.

A common theme, reflected in the ACT's many interviews this year, is the stark perception by sector stakeholders that the role and function of the IRS vis-à-vis exempt organizations has been fundamentally impacted by certain critical factors: dwindling resources, declining budgets, loss of historic knowledge and personnel and antiquated technological platforms. Taken together, these critical factors contribute to a widely held perception that the IRS is not able to regulate our tax-exempt community consistently and effectively. There is also an increasing risk that as the number of tax-exempt organizations rises, the oversight by the IRS will not be sufficient. Whether grounded in fact or perception, this attitude toward the IRS was pervasive in our many interviews with sector leaders. At the same time, these stakeholders and leaders recognize that the IRS is not completely isolated; it sits within a larger regulatory network of state and federal regulators and is a significant member of the international community of charity regulators. It is clear that our society both values the work of the nonprofit sector and sees its work as something to be encouraged. We believe Congress could build on this by investing in the IRS EO division, enabling it to support and encourage social investment in our communities.

The good news is that experience, models of successful practice and shared understanding of the criteria underpinning regulation abound. Many of the environmental issues currently faced by the IRS are common to other regulators and environments. We believe that the shared learning of the community of regulators is one of the greatest assets at the disposal of the IRS as it looks to the future in a rapidly changing environment.

The TE/GE Division of the IRS has a mission statement, like many of the organizations that it oversees. TE/GE's articulated mission is "to provide our customers top quality service by helping them understand and comply with applicable tax laws and to protect the public interest by applying the tax law with integrity and fairness to all." In preparing this report, the ACT was mindful of this mission statement at all times.

To achieve its mission, TE/GE must be responsive, consistent and fair. Above all, TE/GE, as with the organizations it regulates, must act as steward of the public trust. Those of us who have devoted our professional lives to serving the public in this field understand that this trust is our most precious asset. We also understand that it is an organization's most vulnerable and most fragile asset and the hardest to retrieve once lost.

Stewardship is a fundamental concept for the nonprofit and charitable sector, and EO is held to the same standards of good governance as those entities it regulates, including excellent stewardship of its resources. Just as nonprofit organizations are required to protect and apply their resources on behalf of their stakeholders, so, too, must the IRS utilize resources effectively and ensure that appropriate stakeholder interests are met. In this context, the government's function is to act as steward of the public's trust: no greater stakeholders exist than the citizens on whose behalf government acts. It is imperative that the IRS maintains its integrity and transparency in order to preserve that trust, particularly at a time when it sits under the microscope of public scrutiny.

Clearly, then, it is not enough for the Department of Treasury and the Office of Chief Counsel to determine and institute regulations and for the IRS to implement them. As federal regulators, the Department of Treasury and IRS also have a responsibility to initiate policy directives, to consult and to generate new concepts that allow the regulator to offer support and guidance proactively, and to provide a framework within which exempt organizations can flourish and grow. The IRS today, more than ever, has to be an active participant in the field. A lack of visibility on the part of the EO is not a neutral position—it is detrimental to the sector it regulates. A lack of responsiveness or guidance inexorably leads to an undermining of the public trust.

## EXEMPT ORGANIZATIONS

### III. BACKGROUND

The IRS is at a turning point. This is especially true in EO. The stark shift from EO as a regulator of tax-exempt organizations to its nearly exclusive focus on tax administration is reflected in recent organizational changes, including the following:

- **EO does not have the “pen” on guidance.** Since January 2015, all responsibility for formal guidance for EO resides with the Office of Chief Counsel.
- **Decreased focus on sector oversight.** As evidenced by the adoption of Form 1023-EZ, EO is keenly focused on processing efficiencies and undertaking risk analysis, which is laudable. However, when coupled with the incredibly low EO audit rates, this decreased upfront due diligence has diminished TE/GE’s role as an exempt sector gatekeeper.
- **Reconfiguration of the Advisory Committee on Tax Exempt and Government Entities.** On January 19, 2016, the IRS announced a reduction in the number of individuals serving on the ACT and a revision to its focus. As currently constituted, the ACT provides an essential window for the IRS into the needs and concerns of the exempt community. Beginning in June 2016, instead of focusing on recommendations related to the five TE/GE functions,<sup>36</sup> including EO, the ACT will focus exclusively on tax administration, such as continuous improvement and data-driven decision-making. As acknowledged by the IRS, this change reflects a shift in priorities of TE/GE.<sup>37</sup>

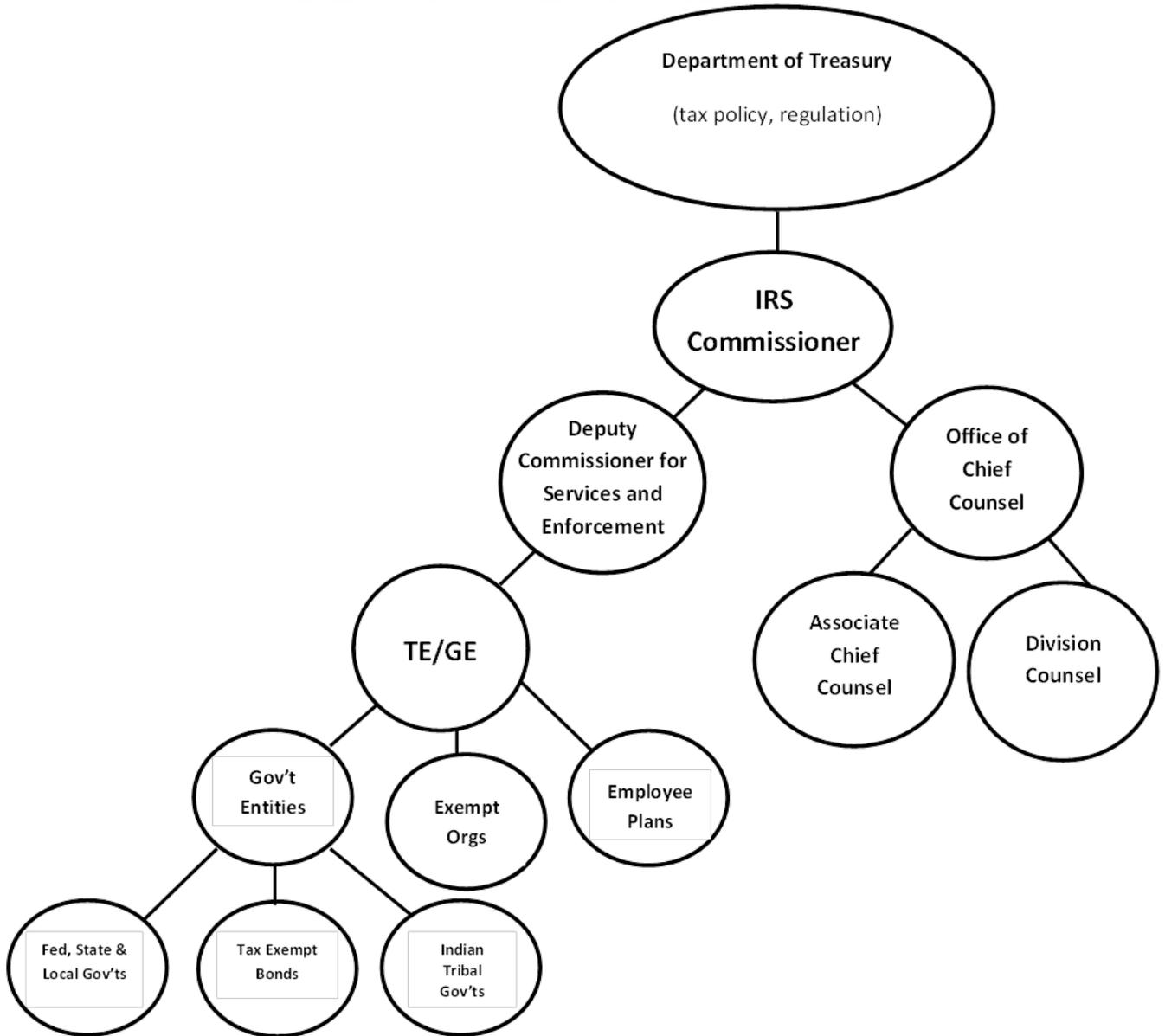
---

<sup>36</sup> The five TE/GE functional areas are: Exempt Organizations (EO), Employee Plans (EP), Federal, State and Local Government (FSLG), Tax Exempt Bonds (TEB) and Indian Tribal Governments (ITG).

<sup>37</sup> <https://www.irs.gov/Government-Entities/IRS-Makes-Changes-to-Its-Advisory-Committee-on-Tax-Exempt-and-Government-Entities-ACT>.

For purposes of this report, the ACT developed a graphic to illustrate EO's position within the federal regulatory environment.

**FEDERAL REGULATORY ENVIRONMENT FOR THE EXEMPT ORGANIZATIONS SECTOR**



## EXEMPT ORGANIZATIONS

In January 2015, EO underwent a realignment of its staff and responsibilities. Certain functions that were formerly part of EO, such as private letter rulings (PLRs) and technical advice memoranda (TAMs), were transferred to TE/GE Office of Chief Counsel. Following the realignment, EO administers (a) Rulings and Agreements (R&A), which includes determinations and knowledge management, (b) Program Management and (c) Examinations. According to the IRS website, the EO realignment was driven by the need to operate EO more effectively and to make processing of applications and guidance consistent.<sup>38</sup>

Despite the changing environment, TE/GE remains committed to providing quality service and helping taxpayers understand and comply with the law. This commitment is reflected in the IRS Taxpayer Bill of Rights (TBOR) and is further reinforced by the TE/GE mission statement. On June 10, 2014, the IRS unveiled TBOR, which delineates the existing rights in the tax code and groups them into 10 broad categories. According to IRS Commissioner John Koskinen, “Respecting taxpayer rights continues to be a top priority for IRS employees, and the new Taxpayer Bill of Rights summarizes these important protections in a clearer, more understandable format than ever before.”<sup>39</sup> The government’s commitment to TBOR was reinforced by the PATH Act of 2015, which requires IRS employees to be familiar with and act in accord with TBOR.<sup>40</sup>

The TE/GE mission includes two key components: 1) providing customers top quality service by helping them understand and comply with applicable tax laws; and 2) protecting the public interest by applying the tax law with integrity and fairness to all.<sup>41</sup>

<b>The TE/GE Division Mission</b>	To provide our customers top quality service by helping them understand and comply with applicable tax laws and to protect the public interest by applying the tax law with integrity and fairness to all.
-----------------------------------	--

<sup>38</sup> <https://www.irs.gov/Charities-&-Non-Profits/About-IRS-Exempt-Organizations>.

<sup>39</sup> IR-2014-72 (June 10, 2014) <https://www.irs.gov/uac/Newsroom/IRS-Adopts-Taxpayer-Bill-of-Rights;-10-Provisions-to-be-Highlighted-on-IRSGov,-in-Publication-1>.

<sup>40</sup> Protecting Americans from Tax Hikes Act of 2015 § 401.

<sup>41</sup> [https://www.irs.gov/irm/part1/irm\\_01-001-023.html](https://www.irs.gov/irm/part1/irm_01-001-023.html).

TBOR is in perfect alignment with the TE/GE mission statement.

<b>The Taxpayer Bill of Rights</b>	
1. Be Informed	6. Finality
2. Quality Service	7. Privacy
3. Pay No More than the Correct Amount of Tax	8. Confidentiality
4. Challenge the IRS's Position and Be Heard	9. Retain Representation
5. Appeal an IRS Decision in an Independent Forum	10. Fair and Just Tax System

As with the entities it regulates, TE/GE should and will be held accountable for executing its mission statement. Accordingly, this ACT report takes as its framework TE/GE's own articulated mission statement and the delineated rights of taxpayers. All of the ACT's 2016 recommendations flow from the goals of:

- 1) Helping the sector understand the law;
- 2) Providing resources to help the sector comply with the law; and
- 3) Protecting the public interest.

**Responsiveness: Educating tax-exempt organizations about tax law**

TE/GE is striving to be responsive. Because of current resource constraints within the IRS, and in TE/GE in particular, TE/GE is placing greater emphasis on providing more and improved educational tools to enable exempt organizations to become more self-sufficient in complying with their tax responsibilities. This theme of "self-sufficiency" was highlighted by TE/GE Commissioner Sunita Lough in the Priorities Letter for FY 2016, which outlines TE/GE's priorities and key areas of focus for the coming year.<sup>42</sup> The

<sup>42</sup> [https://www.irs.gov/pub/irs-tege/TEGE\\_Priorities\\_for\\_FY2016.pdf](https://www.irs.gov/pub/irs-tege/TEGE_Priorities_for_FY2016.pdf).

## EXEMPT ORGANIZATIONS

letter confirms that TE/GE's future state requires it to be an organization that serves "self-sufficient" taxpayers.

Although TE/GE is focused on self-sufficiency, ACT interviewees consistently noted TE/GE's backslide on providing *useful* educational resources, which are necessary to promote a more self-sufficient EO community. Our qualitative interviews consistently reflected the IRS's poor customer service as reflected by the frequent inability to receive helpful service through the telephone assistance hotline for exempt organizations.<sup>43</sup> Cost-effective tools that improve EO responsiveness will become increasingly important as EO continues to be under-resourced and the number of exempt organizations continues to climb post adoption of Form 1023-EZ.

### Stewarding the public trust: Protecting the public interest

"[Rebuilding public trust is] going to take all our mettle and we know deeds speak louder than words." ~ *IRS Commissioner John Koskinen*

When John Koskinen took the reigns as IRS Commissioner in December 2013, he vowed to rebuild public trust in the IRS.<sup>44</sup> In early 2013, allegations arose that the IRS was engaging in impermissible selective scrutiny of organizations applying for recognition of Section 501(c)(4) exempt status. Subsequent investigations found no intentional wrongdoing by the IRS. Then, in May 2013, the IRS announced that hackers used taxpayer-specific data acquired from non-IRS sources to gain unauthorized access to information on approximately 100,000 tax accounts through the IRS "Get Transcript" application. The number of tax accounts accessed was later increased to more than 334,000.<sup>45</sup> The data retrieved by hackers included Social Security information, dates of birth and street addresses.<sup>46</sup> In February 2015, the Urban Institute's National Center for Charitable Statistics (NCCS) reported that electronic

---

<sup>43</sup> Congress appropriated \$290 million to the IRS for fiscal year 2016 that was earmarked for cyber security, identity theft and customer service.

<sup>44</sup> <http://www.cincinnati.com/story/news/2014/01/09/irs-chief-rebuilding-public-trust-will-take-all-our-mettle/4396361/>.

<sup>45</sup> <https://www.irs.gov/uac/Newsroom/IRS-Statement-On-Get-Transcript>.

<sup>46</sup> <https://www.irs.gov/uac/Newsroom/IRS-Statement-on-the-Get-Transcript-Application>.

hackers tapped into its online filing system for Forms 990, 990-EZ, 990-N and 8868 (Application for Extension), as well as state filings for Hawaii, Michigan and New York.<sup>47</sup> Together, the IRS targeting controversy and data breaches may have contributed to the erosion of the public trust.<sup>48</sup>

Some critics have suggested that the adoption of the new short form 1023-EZ has further eroded public trust. Form 1023-EZ, for use by some smaller organizations in applying for Section 501(c)(3) exemption, largely eliminates any possible upfront scrutiny of organizations by the public.<sup>49</sup> Arguably, by obtaining very little information from 1023-EZ applicants, governmental and public oversight of the sector is likely to diminish, further eroding the public's trust in the IRS and the tax-exempt sector. We recognize that prior to adopting the 1023-EZ, EO undertook a risk analysis, solicited public comments and incorporated risk mitigation measures; nevertheless, the National Taxpayer Advocate has stated that the IRS has taken the idea to develop a Form 1023-EZ and run with it to "the point of absurdity."<sup>50</sup>

In addition, to protect the public interest and rebuild public trust in the IRS, TE/GE must be transparent and publicly release, in a form that is relevant and usable, data and information regarding the EO sector. At the same time, TE/GE must ensure that sensitive, non-public information is protected.

TE/GE also recognizes the need to engage in future planning. TE/GE is developing a Concept of Operations (CONOPS) or "future state vision" to help communicate the TE/GE vision over the next five years and outline a path forward that includes guiding principles, a business architecture, capabilities, initiatives and work areas. TE/GE has

---

<sup>47</sup> <http://webarchive.urban.org/publications/904643.html>.

<sup>48</sup> In a recent study, the IRS received one of the lowest favorability ratings (42 percent) of the 17 federal agencies and departments surveyed. Pew Research Center, "Beyond Distrust: How Americans View Their Government" (November 23, 2015). <http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf>.

<sup>49</sup> George K. Yin, "The IRS's Misuse of Scarce Compliance Resources in the Exempt Organization Area" (December 5, 2014). *Virginia Public Law and Legal Theory Research Paper* No. 72. available at SSRN: <http://ssrn.com/abstract=2534474>.

<sup>50</sup> Taxpayer Advocate Service, *Annual Report to Congress* – v. 1, p. 39 (2015).

## EXEMPT ORGANIZATIONS

only provided a high-level overview of CONOPS.<sup>51</sup> Many of our recommendations align with the action items listed in the CONOPS Overview, such as:

- Provide timely support to the taxpayer community
- Build a more flexible workforce to meet taxpayer expectations
- Continually collect and act upon operational and taxpayer community feedback

In many respects, this ACT report serves as the future state vision from the sector's perspective. As TE/GE continues to refine its future state vision, the ACT hopes it considers ideas from the sector, including the recommendations that follow.

## IV. DUE DILIGENCE

After consulting with EO staff about current issues and issues on the horizon for the IRS, the ACT decided to focus this year's report on *Long-Range Planning for the Future of the IRS and the Exempt Community*. The ACT decided to conduct a series of conference call interviews with nonprofit sector thought leaders nationally and throughout the globe to receive input from a diverse cross section of stakeholders.

The interviewees were selected based on their knowledge of tax policy and nonprofit governance. They included nonprofit association leaders, in-house counsel at leading nonprofit institutions, academics, leading practitioners in the fields of nonprofit law, fundraising and accounting and a significant number of experts in the international nonprofit community. Appendix C of this report lists the individuals outside of the federal government with whom we consulted.

Based on those interviews, the ACT prepared a summary of the themes that emerged, and used those themes as a guide for developing the structure and recommendations of this report.

---

<sup>51</sup> The Texas Society of Certified Public Accountants has urged the IRS to expose its CONOPS plan for general public review and comment, as parts are in development. See Luca Gattoni-Celli, "CPAs Want Public, Practitioner Access to IRS CONOPS Work", Tax Notes, March 10, 2016. The National Taxpayer Advocate also has urged the IRS to discuss the implications of the decisions and actions outlined in CONOPS publicly *before* the IRS implements them. Taxpayer Advocate Service, *Annual Report to Congress*, vol 1, p. viii (2015).

## V. RECOMMENDATIONS

The ACT provides the following recommendations to help TE/GE tackle the challenges and environment of the future.

### A. Ensure that EO Staff are Equipped to Carry Out the Responsibilities of EO.

#### Reduction in EO staff has created critical gaps

The responsibility for serving and regulating the nation's exempt organizations is borne by EO staff. The number of EO staff, however, is dwindling. From 2009 to 2015, EO suffered a 13.5 percent decline in its staff – falling from 891 staff strong in 2009 to only 771 at the end of fiscal year 2015.<sup>52</sup> This decline was even more pronounced following the January 2015 realignment, which shifted responsibility for guidance and technical advice from EO and Employee Plans to the IRS Office of Chief Counsel.<sup>53</sup> This shift resulted in the departure of 21 tax law specialists and managers formerly working within EO and EP to the Office of Chief Counsel. For more information on staffing trends in EO see below, *Detailed audit data*.

There are many reasons for the overall decline in EO staff, including but not limited to:

- EO staff members transferring to other divisions in the IRS and other parts of the federal government
- Attrition, due in large part to an aging workforce<sup>54</sup>
- Hiring freezes that preclude replacing staff members that leave for the above reasons
- A significant number of attorneys being transferred from EO to the Office of Chief Counsel

<sup>52</sup> "EO's On-Rolls Examinations and Rulings and Agreements Staffing," FY historical data identified in *TE/GE Hiring Plans and HR Reports* in the HR Reporting Center.

<sup>53</sup> Technical assistance on determinations and examinations is provided by TE/GE Division Counsel. Informal guidance and formal guidance such as PLRs, TAMs, Revenue Rulings and Procedures are provided by the Office of Chief Counsel.

<sup>54</sup> According to the *IRS Quarterly Diversity Report from the 4<sup>th</sup> Quarter FY2015*, as of the end of fiscal year 2015, 86.1 percent of TE/GE's workforce was over 40 years old compared to 78.8 percent of the IRS workforce over 40 years old.

## EXEMPT ORGANIZATIONS

A reduced EO staff is not a value neutral proposition. This reduction is a major impediment to effective regulation of the sector. For example, in the absence of sufficient staff, the percentage of exempt organization returns subject to audit is strikingly low - roughly 0.4 percent.

The overall decline in EO staff has led to a corresponding reduction in the availability of expertise to address questions and issues related to EO tax administration.

Special initiatives to strengthen the expertise of remaining staff members through EO internal continuing education training programs, and the development of Knowledge Management Networks, as described in the section below entitled *Relevant, user-focused guidance, akin to former CPE text*, are important programs for fostering and maintaining this expertise.

### **EO staff members can benefit from attending professional development programming outside of the federal government**

In addition to participation in events with the public and nonprofit sector where the IRS staff person serves as an expert speaker, IRS EO staff can benefit professionally from getting out into the field and hearing from those working in the sector. For instance, all EO staff (not only the most senior staff) should be able to reap benefits and be visible to the public by participating in professional development opportunities (such as conferences, symposia, formal continuing education programming) offered by entities outside the IRS, such as professional associations, trade associations, think tanks and academic centers. This exposure is particularly useful for staff members with assignments for knowledge management initiatives and individuals charged with developing educational outreach materials to encourage tax compliance.

We encourage TE/GE leadership to find ways to enable staff to participate in educational opportunities and interactions with the sector itself. As TE/GE looks toward the future, it is important that its staff learn directly from those on the ground about current issues and those issues on the horizon.

**B. Provide Leadership and Guidance on Major Issues Impacting the Exempt Organizations Sector, Both Current and Those Anticipated in Near Future.**

The IRS must lead on issues of increasing complexity in the sector. The public needs its federal regulators to provide leadership on issues that are inherently difficult either through historical significance, legal precedent, evolving circumstances or simply major controversies of the current age. When the IRS doesn't demystify these types of issues, public trust in the institution invariably deteriorates. There are several areas in which the IRS may be compromising its relevancy by not helping clarify what may be perceived as "institutional inconsistencies" in enforcing the tax code; these areas cry out for leadership from the IRS. Some of these areas have been on the Priority Guidance Plan for years, such as 7611 regulations regarding churches and donor-advised funds.

Examples of these areas can be found in the unrelated business income (UBI) arena; church (or church-related entity) status and the treatment of these organizations; political activities of Section 501(c)(4) organizations that must be organized and operated primarily for social welfare purposes; religious organizations and their continuing qualification for tax-exempt status in the wake of the Supreme Court's decision in *Obergefell v. Hodges*; and the policy issues implicated by donor-advised funds. In addition, there are other instances where the guidance is not necessarily vague, but where guidance and resources supporting a particular issue area are scattered in many different forms in various places, see, e.g., those requirements and filings for international tax compliance.<sup>55</sup> In the 2016 Consolidated Appropriations Act, Congress prohibited the IRS from issuing or revising any guidance (including revenue rulings, regulations, etc.) regarding the definition of social welfare and primarily furthering social welfare.

When the regulators of the sector suffer from a lack of public trust, the sector itself inevitably suffers the same fate. As the exempt organization sector continues its trajectory toward greater complexity in the next decades, the IRS must be given, and

---

<sup>55</sup> See Appendix B for an outline of a proposed International Activities Fact Sheet that could provide a "one-stop reference" for nonprofits with respect to potential required filings and compliance in the international tax arena.

## EXEMPT ORGANIZATIONS

take, the opportunity to exercise effective regulatory and enforcement leadership. The failure to do so could hamper the sector's ability to thrive.

### **C. Give Exempt Organizations the Tools They Need to be Tax Compliant.**

The IRS states in its TBOR that helping entities comply with tax law is one of its fundamental functions. As described in Sunita Lough's TE/GE Priorities Letter for 2016, "EO's overarching compliance strategy is to ensure organizations enjoying tax-exempt status comply with the requirements for exemption and adhere to all applicable tax laws."<sup>56</sup> This letter also focuses on serving "self-sufficient and compliant taxpayers."<sup>57</sup> The ACT interviews revealed that exempt organizations and their leaders and advisors are striving to comply with the tax laws, but they need resources and assistance to do so.

ACT interviewees urged EO to provide more resources and responsive assistance. To be prepared to provide responsive service to the sector over the coming decades, EO must focus on 1) providing clear communications to the sector; 2) providing more, useful guidance; and 3) ensuring that there is an "ease of use" in all that it does.

There exists a host of educational materials, online resources, phone lines, determination letters, rulings, opinions, reports, instructions and interactions with EO staff and leadership on which leaders of exempt organizations depend to fulfill their desire to fully comply with the federal tax law. Additionally, many nonprofits and their advisors rely upon the assistance and insights of private individuals, firms, specialized subscription services and associations in their efforts to fully comply with the U.S. tax laws.

### **Tools must be accessible to all sizes and types of organizations**

Additionally, the resources and advice for tax compliance must be accessible to organizations of all sizes, types and areas of focus. Although the nonprofit sector is large (with over 1.5 million organizations recognized as tax exempt by the IRS), most of

---

<sup>56</sup> TE/GE Priorities for FY2016, Message from the TE/GE Commissioner, Sunita Lough, undated.

<sup>57</sup> *Ibid.*

the organizations in this huge sector are quite small. In July 2015, 90 percent of exempt organizations had revenues of \$500,000 or less and 86 percent of exempt organizations had assets of less than \$500,000.<sup>58</sup> This is a sector dominated in sheer numbers by small- and medium-size nonprofits. By definition, these organizations have limited budgets and limited access to fee-for-service expertise. Obligated by their own standards and mission to operate transparently and efficiently, regardless of their size, type or mission, they need to be able to access IRS guidance and educational resources.

Form 990-N filers<sup>60</sup> and Form 990-EZ filers<sup>61</sup> have a greater propensity to seek assistance with 990 filing issues from the IRS website and the IRS telephone helpline than nonprofits that have more significant budgets and assets.<sup>62</sup> These small- and medium-size organizations are less likely to consult accountants when they have tax form filing questions (although accountants remain the most prevalent source of support for all types of filers) and are more likely to rely upon free, publicly available resources.

<b>When you need help completing the Form 990 (N, EZ or full Form 990), where do you primarily turn for that assistance?<sup>59</sup></b>			
	<b>990-EZ Filers</b>	<b>990-N Filers</b>	<b>990 Filers</b>
Accountants	67.89%	52.78%	89.48%
IRS Website	17.86%	19.4%	4.23%
General Website	5.95%	8.33%	1.78%
Attorney	5.56%	5.56%	1.91%
IRS Toll-Free Helpline	1.19%	5.56%	0.55%
Other Nonprofits	3.57%	5.56%	1.37%
Associations	2.38%		

<sup>58</sup> *Nine Things You Might Not Know about U.S. Nonprofits*, GuideStar, November 2015.

<sup>59</sup> 2015 ACT Report: *EO: The Redesigned Form 990: Recommendations for Improving its Effectiveness as a Reporting Tool and Source of Data for the Exempt Organization Community*, (June 2015).

<sup>60</sup> Form 990-N filers have gross receipts normally of less than or equal to \$50,000.

<sup>61</sup> Form 990-EZ filers have gross receipts of less than \$200,000 and total assets of less than \$500,000.

<sup>62</sup> Nonprofits that have more significant budgets and assets are those that filed the full version of the Form 990, which is required for all nonprofits with gross receipts equal to or greater than \$200,000 or total assets equal to or greater than \$500,000.

## EXEMPT ORGANIZATIONS

### 1. Detailed audit data

One cost-effective way for EO to fulfill its mission to educate the sector is to release more information about compliance problems raised in EO audits. Speaking on December 11, 2015, at the American Bar Association's National Institutes on Criminal Tax Fraud and Tax Controversy in Las Vegas, IRS Chief Counsel William Wilkins acknowledged that the recent IRS budget cuts are putting IRS service and compliance at risk. This is especially true for the EO division. EO has experienced flat or declining budgets over the last three years and the loss of 100 employees (see table below, *EO Examinations and Ruling and Agreements Staffing*). Over the same period, the percentage of annual EO returns examined has remained flat at 0.4 percent.

<b>Exempt Organization Annual Returns Examined<sup>63</sup></b>				
<b>Fiscal Year</b>	<b>All Annual Returns Filed</b>	<b>Form 990/990-EZ Examined</b>	<b>Other Annual Returns Examined<sup>64</sup></b>	<b>Percent Annual Returns Examined<sup>65</sup></b>
<b>2010</b>	776,300	3,596	329	0.5%
<b>2011</b>	858,865	2,962	240	0.4%
<b>2012</b>	798,903	2,918	125	0.4%
<b>2013</b>	771,675	2,774	138	0.4%
<b>2014</b>	765,395	2,579	246	0.4%

<sup>63</sup> See *IRS Data Book 2010*, Table 13; *IRS Data Book 2011*, Table 13; *IRS Data Book 2012*, Table 13; *IRS Data Book 2013*, Table 13; *IRS Data Book 2014*, Table 13. The number of annual returns examined does not equal the number of organizations examined. EO could examine multiple returns for a single organization.

<sup>64</sup> "Other Annual Returns Examined" includes Form 990-PF (private foundations), Form 1041-A (certain trusts), Form 1120-POL (certain political organizations) and Form 5227 (certain trusts). See, e.g., *IRS Data Book 2014*, at 34 note 1.

<sup>65</sup> The percent of annual returns examined is based on the number of annual returns examined in a given fiscal year compared to the number of annual returns filed during the calendar year ending in that fiscal year. Thus, the percent provided only provides an estimate of examination coverage because the returns examined in a given fiscal year were usually filed in earlier years. See Lloyd Hitoshi Mayer, "The Better Part of Valour Is Discretion: Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations?" Notre Dame Legal Studies Paper No. 1523. *Columbia Journal of Tax Law*, (forthcoming, 2016).

According to a 2014 GAO Report,

Over the past several years, as the Internal Revenue Service (IRS) budget has declined, the number of full-time equivalents (FTEs) within its Exempt Organizations (EO) division has fallen, leading to a steady decrease in the number of charitable organizations examined.<sup>66</sup> In 2011, the examination rate was 0.81 percent; in 2013, it fell to 0.71 percent.

This rate is lower than the exam rate for other types of taxpayers, such as individuals (1.0 percent) and corporations (1.4 percent).<sup>67</sup>

EO is beginning to shift resources to Examinations. For example, because of the efficiencies achieved in EO Determinations after the implementation of Form 1023-EZ, approximately 33 employees were realigned from Determinations to Examinations. With this uptick in Examinations staffing, we might see an uptick in audits. Nevertheless, the information released to the public will continue to be limited and of little value to the sector if it remains in its current form. Currently, EO provides the public only aggregate data — number of returns processed in the previous calendar year and the number of returns examined during the most recently ended fiscal year by type of return.

<b>EO -- Examinations and Rulings and Agreements Staffing</b>									
<b>Fiscal Year</b>									
<b>Function</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>FY 2016-- 12/26/2015 (PP 25)</b>
<b>R&amp;A</b>	364	366	337	332	335	316	333	321	230
<b>Exam</b>	449	525	538	531	516	489	471	450	460
<b>Total</b>	<b>813</b>	<b>891</b>	<b>875</b>	<b>863</b>	<b>851</b>	<b>805</b>	<b>804</b>	<b>771</b>	<b>690</b>
<b>Source:</b> FY Historical data identified in TE/GE Hiring Plans and HR Reports in the HR Reporting Center.									

<sup>66</sup> The GAO Report analyzes the number of *charitable organizations* examined, while the chart above reports the number of EO *returns* examined.

<sup>67</sup> Government Accounting Office Report, *Better Compliance and Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations*, GAO 15-164. (December 17, 2014).

## EXEMPT ORGANIZATIONS

At the Urban Institute’s “Data Collection, Sharing, and Transparency in the Tax-Exempt Sector” symposium in December 2015, a representative from the Department of Treasury acknowledged that public charities have a level of public oversight and that data are obviously a key to that public oversight. EO, however, is missing an opportunity to provide to the public more complete and therefore useful data, which could enhance the public’s ability to oversee public charities. Releasing detailed audit data, beyond the current high-level statistics about the volume of audits, would serve two key EO goals:

- 1) **Educate the sector.** By providing details about the issues resulting in adjustments in tax liability and the type and frequency of specific areas of non-compliance, EO will help foster compliance and will advance its goal of building a more self-sufficient sector.
- 2) **Deterrence.** Providing specific information about compliance problems revealed in audits and the resulting taxes and penalties will deter noncompliance. Publicity is an effective compliance tool. As the 2004 ACT report stated, “Publicity concerning EO enforcement efforts not only deters wrongdoing, but also serves to reassure the donating public that there is credible oversight by EO.”<sup>68</sup>

During the course of the ACT’s interviews, a number of individuals highlighted practices by international regulators to increase transparency and educate the regulated community. Such practices include public announcement of investigations and publication of aggregate data on issues emerging during the audit process.

The IRS might be reluctant to release more detailed audit information for fear of running afoul of the confidentiality and disclosure rules afforded by Section 6108 of the Internal Revenue Code.<sup>69</sup> Prior to 1977, tax information was considered a public record and open to inspection under Department of Treasury regulations approved by the President or under Presidential order.<sup>70</sup> As a direct result of the Watergate hearings, there was increased Congressional and public concern about attempts to use the IRS for political

---

<sup>68</sup> 2004 ACT Report, *Reviewing IRS Policies and Procedures to Leverage Enforcement (“RIPPLE”): Recommendations to Enhance Exempt Organizations’ Enforcement and Compliance Efforts*, June 9, 2004.

<sup>69</sup> IRC §6108(c).

<sup>70</sup> 2013 ACT Report, *Exempt Organizations: Leveraging Limited IRS Resources in the Tax Administration of Small Tax-Exempt Organizations*, September 12, 2013 p. 11.

purposes. This concern led to the enactment of Section 6103 as part of the Tax Reform Act of 1976.<sup>71</sup> Section 6103 mandates that tax returns and return information are confidential and not subject to disclosure, except in limited situations.

The ACT recommends that TE/GE release detailed audit information, including: (i) the number and type of organizations reviewed (but not the specific identities of audited institutions), not just the aggregate number of returns; (ii) the most frequently occurring issues that result in tax assessment and penalties and (iii) outcome statistics: modifications of exempt status, revocation of exemption and the average tax assessment per return examined and per organization examined.<sup>72</sup> Our recommendation, similar to that made in the 2004 ACT report, is to release non-identifiable audit information, not taxpayer-specific return information. Therefore, the restrictions of Section 6103, which involves the sharing of taxpayer-specific information, should not apply. Nevertheless, if the IRS determines that more detailed audit information cannot be shared with the public because of Section 6103, the ACT encourages the IRS to support an appropriate regulatory or legislative fix.

## **2. Relevant, user-focused guidance, akin to former CPE text**

Several interviewees observed that to improve responsiveness to the nonprofit sector in the future, TE/GE must provide more easily accessible, easily understood guidance. This is especially true given the likelihood that TE/GE will continue to have limited resources and, therefore, will be unable to provide individualized, direct contacts with exempt organizations. One suggestion offered by several interviewees is to re-launch the [Continuing Professional Education Technical Instruction Program](#) – also known as the EO CPE text – or to provide similar resources addressing the issues of the day.

As noted earlier, there is a discrepancy in the amount of information offered: for certain topics, TE/GE has few educational resources and for other topics affecting exempt organizations, TE/GE has a wealth of information. Most of these resources are difficult

<sup>71</sup> Pub. L. No. 94-455, 90 Stat. 1520 (1976).

<sup>72</sup> Some audit data is found in the Statistics of Income Data Book, Table 13, <https://www.irs.gov/uac/Enforcement-Examinations>.

## EXEMPT ORGANIZATIONS

to understand, difficult to find on the IRS website or simply a restatement of the law, which is not easily understood by non-lawyers.

The CPE text provided an annual technical update for EO revenue agents. Although the text could not be relied upon as precedent, the IRS routinely released the CPE text to the public to help inform the sector about the topics and substance of current issues on which agents were being trained.

Most EO CPE articles published between 1979 and 2004 are available on the IRS website. No articles have been published since 2004. Interviewees praised the CPE text as an invaluable tool that provided glimpses into how TE/GE grappled with applying 1960s law to modern day fact patterns. The 2002 article discussing, in question and answer format, issues concerning political activities by exempt organizations is a sector favorite and a resource that is still used by practitioners.<sup>73</sup> There is a dearth of up-to-date resources equivalent to the CPE text.

Formal guidance is valuable. With the shift in responsibility for formal guidance from EO to the Office of Chief Counsel and the associated increase in the private letter ruling request user fee to \$28,300, little formal guidance is expected in the future.<sup>74</sup> This will create a void in guidance resources right at the time when EO is striving to promote a more self-sufficient sector. There is a need and an opportunity for EO to provide the sector with useful, up-to-date, and easily accessed and understood resources, all of which directly support the IRS mission and TBOR.

### Current IRS efforts

EO has launched several initiatives that could help answer the sector's call for contemporaneous resources. Those key efforts include the following:

- **Knowledge Networks:** EO has created six Knowledge Networks (K-Nets) for the following areas: 1) private foundations, 2) hospitals and health care, 3) Section

---

<sup>73</sup> Judith E. Kindell and John Francis Reilly. *Election Year Issues*, 2002 CPE Text.

<sup>74</sup> In addition, a number of matters are considered "no ruling areas" which means informal guidance in the forms of PLRs is unavailable on these matters.

501(c)(3) exemption issues, 4) other Section 501(c) exemption issues, 5) unrelated business income and 6) employment tax issues (TE/GE-wide). K-Nets are internal staff resources used to train and inform EO staff and will not be made publicly available. Issue Snapshots, on the other hand, which are based on K-Nets, serve as public answers to frequently asked EO questions (such as questions about group rulings). According to EO leadership, they are being generated based on issues seen in the exempt organizations field and are intended to provide transparent public information about a variety of technical issues. The first few Issue Snapshots were released on the IRS website in the first quarter of 2016.<sup>75</sup> Giving the public a glimpse of these EO resources is helpful because it allows the sector to better understand how EO interprets and intends to apply the applicable law. We encourage EO to make these Issue Snapshots available as swiftly as possible.

- **TE/GE Directives:** TE/GE provides administrative guidance to its examiners to ensure consistent tax administration. TE/GE directives are released to the public.<sup>76</sup> The directives do not establish the IRS position on legal issues and are not legal guidance, but these directives provide concise guidance on thorny and timely issues facing TE/GE communities. For example, a 2015 directive addressed the tax treatment of uniforms issued to government employees by fire and police departments.<sup>77</sup> To date, TE/GE has not released an EO-specific directive.
- **Revenue Rulings Review Project:** EO has undertaken a long-term project to review all revenue rulings under its purview. Over the next few years, EO, in collaboration with Division Counsel, will review and assess over 1,800 EO revenue rulings that have been issued since the 1950s. EO, working with the Office of the Chief Counsel, will determine which rulings are obsolete, which need to be combined or revised and which rulings need to be retained.

<sup>75</sup> <https://www.irs.gov/uac/Electronic-Reading-Room>.

<sup>76</sup> All Interim Guidance is published on the [www.irs.gov](http://www.irs.gov) website.

<sup>77</sup> Paul Marmolejo, Memorandum for Federal, State, and Local Government Employees, "The Tax Treatment of Uniforms Issued to Government Employees by Fire and Police Departments" (June 15, 2015).

## EXEMPT ORGANIZATIONS

Current IRS efforts to provide the sector with relevant resources are wise and will help the sector better understand and comply with applicable tax law. These efforts, however, will not fully answer the sector's call for modern, easy-to-find, user-focused resources on cutting-edge issues. Particular areas of interest include joint ventures and relationships between Section 501(c)(3)s and Section 501(c)(4)s or for-profit partners, crowd funding, cyber security and governance issues of newly formed nonprofits. The CPE text provided the sector a unique opportunity to understand how TE/GE grappled with applying old law to new situations.

The ACT encourages EO to either expand the scope of the K-Nets initiative to address a broader range of EO topics and ensure that the newly released Issue Snapshots are useful and relevant (rather than reinstatements of existing law), or otherwise develop a consolidated, user-focused resource that applies the law to current and emerging issues in the sector, akin to the former EO CPE text.

The ACT recognizes that EO has limited resources to deploy. In the ACT interviews with international regulators, we learned that international regulators have worked with external professional advisors to provide the public free resources and information. We recognize that the IRS traditionally has not collaborated with the private sector in this manner, but doing so is an option to consider.

In the ACT's interviews with international regulators, some examples of this kind of collaboration were highlighted, among them:

- Australia: The tax regulator developed an accounting program in collaboration with accounting firms allowing a nonprofit to export the exact financial data required by the regulator to the regulator's database with the press of a button. In addition, independent financial and legal consultants and capacity-building nonprofits have helped nonprofits become more self-reliant. The Australia Charities and Not-for-Profits Commission (ACNC) encourages this by convening

working groups of key opinion makers within these fields to advise them. This multiplies its capacity to communicate with the sector.<sup>78</sup>

- Ireland: Irish Charities Tax Research (ICTR) is a leadership organization working on behalf of charities to enhance the conditions for a vibrant and independent charity sector in Ireland. ICTR is a membership organization of Irish charities, focused on creating a policy climate in which philanthropy can thrive through a combination of taxation and regulatory reform. ICTR was commissioned by the Department of Community, Equality and Gaeltacht (*primarily Irish speaking region*) Affairs to implement The Statement of Guiding Principles for Fundraising, a set of overarching principles and guidelines for fundraising in Ireland. The guiding principles seek to help charities that fundraise from the public, take the lead and apply the highest possible standards. There are general codes for charitable organizations as well as more detailed codes for individual fundraisers. Compliance with the codes is voluntary. Examples of some of the papers produced by ICTR are found in the International Resource List in Appendix D of the ACT report.<sup>79</sup>

Providing the sector an easy-to-find, comprehensive and relevant resource will help drive compliance efforts and will advance the EO's goal of promoting a self-sufficient sector. The ACT further encourages EO to dedicate resources to ensuring that this public resource is maintained and updated as needed.

### **3. An easily navigated website**

As stated previously, the mission of TE/GE is to “provide [its] customers top quality service by helping them understand and comply with applicable tax laws and to protect the public interest by applying the tax law with integrity and fairness to all.” Compliance with the tax laws is difficult when an organization that is otherwise trying to comply doesn't have the resources and tools it needs from the IRS.

---

<sup>78</sup> Myles McGregor-Lowndes, Professor, Centre for Philanthropy and Nonprofits Studies, Queensland University of Technology, Australia.

<sup>79</sup> Sheila Nordon, Director, Irish Charities Tax Reform.

## EXEMPT ORGANIZATIONS

ACT interviewees highly encouraged the IRS to address this concern, in part, by making its website more effective. The IRS should present information to exempt organizations in a manner that is easy for them to navigate, identify and digest. The IRS website is an excellent resource for exempt organizations — if they know how to traverse the website and find what they need. Improving the website is especially important as TE/GE strives to support a more self-sufficient sector.

The IRS, in its TE/GE Priorities for FY 2016, stated that it is developing innovative education products to allow customers to find answers to questions and solutions to problems and that it will develop focused training modules for customers to self-train and move customer support to online platforms. This is certainly a welcome development for exempt organizations, but TE/GE must ensure its forthcoming “innovative education products” are easily accessible.

The 2013 ACT report, *Exempt Organizations: Leveraging Limited IRS Resources in the Tax Administration of Small Tax-Exempt Organizations*, noted that after the IRS unveiled its newly designed website in late 2012, users found it complicated and time-consuming, and that it was especially inaccessible for volunteers and exempt organization staff with limited time to devote to tax-related matters.<sup>80</sup> Although practitioners and others who frequently search the EO website may know where to look to find what they are trying to access, exempt organizations (and those who manage them) need to be able find the information they are seeking, even if they are not regular visitors to the website.

The authors of the 2013 ACT report and practitioners were especially troubled by the removal of the prominent and direct link to the IRS EO Web page from the [www.irs.gov](http://www.irs.gov) home page. As of the time of this report’s submission, the [www.irs.gov](http://www.irs.gov) home page lacks

---

<sup>80</sup> A recent example is the new 60-day notice requirement for Section 501(c)(4) organizations. When the notice requirement was adopted, a search of “501(c)(4)” on the main EO Web page provided a list of results, the first of which was “local association of employees” (a narrow subset of Section 501(c)(4) entities), while the new notice requirement was listed as the fourth result. As another example, the website link to which a taxpayer is directed when clicking on the User Fee for Form 8940, Request for Miscellaneous Determination, takes the taxpayer to a general IRS page on “Tax information for Charities and Other Nonprofits” with no specific information on the user fees.

a specific link to the EO Web page. For a new exempt organization trying to navigate the IRS website, this could be especially discouraging.

We acknowledge that a recommendation that the IRS update its website is not a new idea.<sup>81</sup> As part of this report, the ACT continues to recommend that the IRS undertake a review of its website to assess and analyze its ease of use by the nonprofit community, especially by smaller nonprofits that may not have the resources to engage professionals to provide advice on their activities and reporting. Organizations, even those that do not search the IRS website with regularity, must be able to find and access the information they need. At a minimum, as has previously been suggested by the ACT, the IRS home page should have a link to the EO home page to make it easy for an organization to jump from [www.irs.gov](http://www.irs.gov) immediately to the EO portion of the website.<sup>82</sup>

The IRS also should provide updates to the nonprofit sector on current developments in an easily accessed manner. Organizations that subscribe to paid services have access to publicly released information such as rulings and notices that allow them to stay informed. Organizations without access to these services rely on the IRS website and updates from the IRS for this information. We recommend that the IRS publish a daily or weekly EO Summary Page on the Charities and Nonprofits Web page that provides up-to-date, relevant information for exempt organizations. We understand that EO sends periodic free EO Updates to those who subscribe. The proposed EO Summary Page should be more comprehensive and posted more frequently than the current EO

---

<sup>81</sup> One of the recommendations in the 2013 ACT Report was the following: “The IRS should continue to revise its website and improve its accessibility to individuals engaged in managing small exempt organizations. This should include the creation of prominent links beginning with the IRS main web landing page ([www.irs.gov](http://www.irs.gov)) and the addition of links that visitors can use to report problems and that offer visitors guidance for navigating resources available on the site. The IRS should also encourage state charity regulators and affiliate organizations to create links to the IRS website.” [Similarly, the 2014 ACT Report contained this recommendation, “The IRS should continue to leverage its use of its electronic database and web based resources to improve and enhance its communication, education, and training. The IRS should continue to improve, update, and enhance the public and tax professional’s access to the IRS materials and information available on its website.”]

<sup>82</sup> We note that on March 22, 2016, the IRS announced that it is offering up to \$10,000 to the winner of a new competition to enhance its website, with emphasis on designs that will improve the visual layout and style of IRS information for the taxpayer, make it easier for taxpayers to manage their tax responsibilities, and enable taxpayers to make informed and effective decisions about their personal finances. This competition is not specific to the EO portion of the website, but rather is aimed at improving the ease and usability of the overall IRS website.

## EXEMPT ORGANIZATIONS

Update. In addition, organizations should be able to access a prior week's or month's update pages, similar to an online periodical, if they want to catch up on past developments.

### **D. Assure Cyber Integrity Through Technology Tools, Data Collection and Secured Cyber Storage.**

As part of communication and outreach, the IRS should use the best technologies available to communicate, intake, streamline and make carrying out the work of EO more efficient. Concomitantly, it is incumbent upon the IRS to protect the sensitive information it collects.

The federal government is getting smarter on information technology, which can generate efficiencies and reduce costs. As the government's reliance on technology has grown, however, so have its cyber risks. For the fifth consecutive year, the Treasury Inspector General for Tax Administration (TIGTA) has designated security for taxpayer data and employees as the IRS's number one management and performance challenge.<sup>83</sup> As identified by the federal government, there are three primary cyber security challenges: 1) outdated technology, 2) fragmented governance and 3) workforce gaps.<sup>84</sup>

For the IRS, fiscal austerity and increased public scrutiny have driven the agency to consider adoption of new technology systems and practices. This focus on new technology is driven by EO's need to utilize its resources as efficiently as possible to reduce costs and increase standardization and speed. Unfortunately, the IRS hasn't had sufficient resources to hire skilled personnel to keep pace with its growing IT needs. Declining resources – funding for cyber security dropped more than 20 percent from \$187 million in 2011 to \$149 million in 2015 – have led to reductions in cyber security

---

<sup>83</sup> Treasury Inspector General for Tax Administration, "Annual Assessment of the Internal Revenue Service Information Technology Program," 2015-20-094 (September 30, 2015), available at <https://www.treasury.gov/tigta/auditreports/2015reports/201520094fr.html>.

<sup>84</sup> Strengthening Federal Cyber Security white paper available at [https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/fact\\_sheets/a\\_government\\_of\\_the\\_future2\\_10.pdf](https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/fact_sheets/a_government_of_the_future2_10.pdf).

positions across the agency.<sup>85</sup> The IRS "lost several key leaders in the information technology and analytics areas due to the loss of streamlined critical pay authority," according to an IRS spokesman.<sup>86</sup>

The critical pay authority allowed the IRS to appoint or retain people with a high level of expertise for up to four years at salary rates above normal government levels.<sup>87</sup> IT appointments accounted for most of the positions filled under this program. The "private-sector expertise had been crucial to introducing new leadership to supplement in-house expertise," according to a 2014 report by the Treasury Department's Inspector General.<sup>88</sup>

To absorb significant budget cuts since fiscal year 2010, the IRS has delayed IT projects and substantially reduced employee training.<sup>89</sup> Paradoxically, the number of IRS cyber security personnel is declining precipitously while the IRS is relying more heavily on technology and online platforms, which increase cyber risks. As the IRS Advisory Council has warned, "recent reductions in funding endanger the significant investments and substantial progress made in the last two decades in modernizing the IRS, and compromises the IRS' ability to deal with the challenges now before us and those to come."<sup>90</sup>

---

<sup>85</sup> P. Thibodeau, "Who Should Get the Blame in IRS Breach," *Computerworld* (June 2, 2015), available at <http://www.computerworld.com/article/2929857/data-privacy/who-should-get-the-blame-in-irs-breach.html>.

<sup>86</sup> *Ibid.*

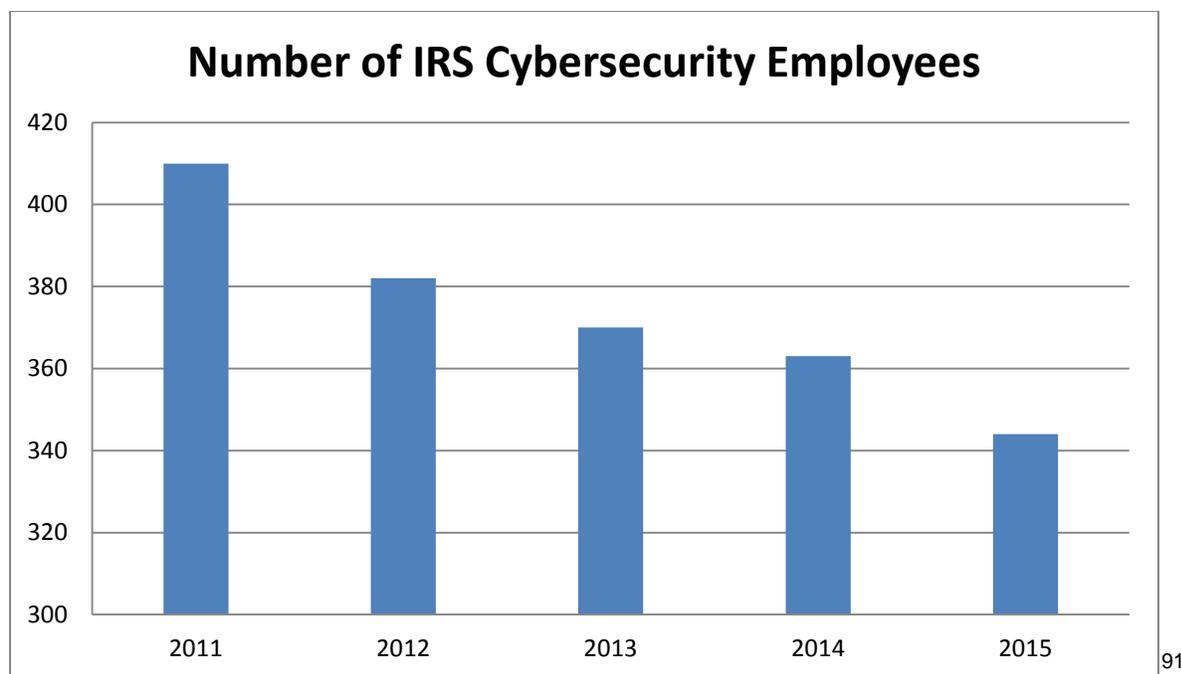
<sup>87</sup> No critical pay employee can have a salary higher than the Vice President, who earns \$233,000.

<sup>88</sup> <https://www.treasury.gov/tigta/iereports/2015reports/2015IER001fr.pdf>.

<sup>89</sup> U.S. Government Accountability Office GAO-14-534R Internal Revenue Service (April 21, 2014), available at <http://www.gao.gov/assets/670/662681.pdf>.

<sup>90</sup> General Report of the Internal Revenue Service Advisory Council, 2014 IRSAC General Report (November 19, 2014), available at <https://www.irs.gov/PUP/taxpros/2014-IRSAC-Full-Report.pdf>.

## EXEMPT ORGANIZATIONS



New IRS initiatives might exacerbate cyber security concerns. For example, the IRS plans to make electronically filed Form 990s available in machine-readable format later this year. This change comes after the United States District Court ordered the IRS to produce nine requested Form 990s in modernized E-file format in the *Public.Resource.org* case.<sup>92</sup> On at least two occasions, senior officials at EO and TE/GE have suggested that the IRS is considering eliminating Schedule B.<sup>93</sup> Whether or not the elimination of Schedule B will gain traction is uncertain. Many states, most notably California, collect Schedule B forms and may rely upon them to assist in enforcing state charitable organization laws.<sup>94</sup>

The dawn of machine-readable 990s is a win for the IRS, the sector and the public. All interested stakeholders will be able to aggregate and analyze tax-exempt organization

<sup>91</sup> Number of employees as of July each year. See, e.g., Treasury Inspector General for Tax Administration, “Annual Assessment of the Internal Revenue Service Information Technology Program,” 2015-20-094 (Sept. 30, 2015), available at <https://www.treasury.gov/tigta/auditreports/2015reports/201520094fr.pdf>.

<sup>92</sup> 2015 ACT Report. *Public.Resource.org v. United States Internal Revenue Service*, Not Reported in F.Supp.3d, 2015 WL 393736 13-CV-02789-WHO (N.D.Ca. January 29, 2015).

<sup>93</sup> Statements by Tamera Ripperda, Director of EO, at Urban Institute’s “Data Collection, Sharing, and Transparency in the Tax-Exempt Sector” seminar (December 1, 2015, attended by ACT members C. Lott, A. Coates Madsen and A. Watt) and Sunita Lough, TE/GE Commissioner, at the Washington Nonprofit Legal and Tax Conference, (March 18, 2016) as reported by the *EO Tax Journal* (March 29, 2016).

<sup>94</sup> See, e.g., *Americans for Prosperity Foundation v. Harris* (December 29, 2015).

data. Nevertheless, this change demonstrates how the IRS's desired "future state"<sup>95</sup> can enlarge cyber security concerns.

### **Current cyber security efforts**

The federal government is striving to address cyber security concerns. The 2016 budget provided \$290 million in additional funds to the IRS, a portion of which is for cyber security initiatives. Though none of this additional funding is specifically allocated to EO, EO will benefit indirectly because it relies upon IRS IT resources to address its cyber security concerns. For example, EO has recently worked with IRS IT on security issues in rolling out the electronic 990-N portal on [www.irs.gov](http://www.irs.gov), which went live on February 29, 2016. EO is currently working with IT to determine how to make the machine-readable 990 data publicly available. Agency-wide, the IRS is partnering with the U.S. Digital Service to bolster electronic authentication procedures for access to all IRS digital services.<sup>96</sup> The President's fiscal year 2017 budget proposes further enhancement of cyber security efforts across the federal government. The budget seeks to invest over \$19 billion, or a roughly 35 percent increase from fiscal year 2016, to implement a Cyber Security National Action Plan (CNAP). CNAP aims to dramatically increase the level of cyber security in both the federal government and the country's digital ecosystem as a whole.<sup>97</sup> CNAP will establish the "Commission on Enhancing National Cyber Security," which will make recommendations to strengthen cyber security. CNAP also funds the creation of a new Federal Chief Information Security Officer who will help retire, replace and modernize legacy IT across the government. This is the first time that a dedicated senior official will focus exclusively on cyber security strategy across the entire federal government.<sup>98</sup> The President's fiscal year 2017 budget also proposes a new \$110 million Treasury-wide Cyber Security

---

<sup>95</sup> The term "future state" is being used inside the IRS to represent where the agency would like to be in five years. See comments of William J. Wilkins, IRS Chief Counsel, as delivered to attendees at the American Bar Association's National Institutes on Criminal Tax Fraud and Tax Controversy in Las Vegas on December 11, 2015, reported in Matthew R. Madara, "IRS to Expand Online Access as Agency Looks to the Future," *Tax Notes* (December 15, 2015).

<sup>96</sup> <https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY17FactSheet.pdf>.

<sup>97</sup> Strengthening Federal Cyber Security whitepaper, available at [https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/fact\\_sheets/a\\_government\\_of\\_the\\_future2\\_10.pdf](https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/fact_sheets/a_government_of_the_future2_10.pdf).

<sup>98</sup> <https://www.whitehouse.gov/the-press-office/2016/02/09/fact-sheet-cybersecurity-national-action-plan>.

## EXEMPT ORGANIZATIONS

Enhancement Account to more strategically focus Department of Treasury's cyber security efforts.<sup>99</sup>

### **What more is needed to address cyber security: Limit & Protect**

Protecting sensitive data is critical to stewarding the public trust and to providing quality service to exempt organizations. Current efforts to strengthen cyber security are laudable. To fully recognize the promise of technology and to achieve the IRS desired "future state," however, cyber security must be a top priority.

Recommendations:

**1. Limit** – don't over collect sensitive information.

The ACT recommends that the IRS methodically assess the information, particularly sensitive, personally identifiable information, it collects to determine whether it is required for tax administration purposes. If any information does not serve a legitimate tax administration purpose, the IRS should not collect it.

**2. Protect** – make targeted investments in IT enhancements and personnel, particularly skilled cyber security personnel to ensure that resources keep pace with the changing cyber security landscape.

### **E. Release and Share Data Where Appropriate for Public Use.**

**1. IRS information sharing with state charities officials**

States currently may not receive information from the IRS on tax-exempt organizations without risking the same criminal penalties as for prohibited release of individual private taxpayer information.<sup>100</sup> Although the decision to amend the current statute is within the purview of Congress, the IRS should continue to strongly advocate with states for amendment of IRC Sections 6103 and 6104 in order to allow sharing of information with state charities officials without criminal penalties attaching.

---

<sup>99</sup> The President's FY2017 budget has not been approved as of the date of the submission of this ACT report.

<sup>100</sup> Pension Protection Act of 2006, Pub. L. No. 109-280 (Aug. 17, 2006) §§ 6103, 6104.

For the state offices charged with protecting charitable resources, the current restrictions on information sharing between the IRS and the states is not only hobbling on a substantive front, it creates logistical difficulties and further inefficiencies. In 2011, 43 state attorneys general signed a letter to Senators Baucus and Hatch of the Senate Finance Committee explaining the current untenable situation and requesting a statutory fix:

As a result of the Act subjecting information sharing between the IRS and state charity officials to IRC §7213's criminal penalties, the IRS has had to subject state charity officials, including state attorneys general, to the same informational safeguards imposed on the tax and revenue agencies of the 50 states...These procedures not only create ethical and legal conflicts..., they are simply unworkable given the limited resources of state charity officials and should not apply to information regarding the revenue, expenses and governance data of charitable organizations already required to publicly report their financial and operational data... Consequently, despite years of diligent efforts by state attorneys general to obtain information from the IRS, only three state Attorney General offices—New York, California and Hawaii—have entered into information-sharing agreements with the IRS since the adoption of the Act.<sup>101</sup>

Since the time of that letter from attorneys general, the states that had entered into these agreements with the IRS have withdrawn from those agreements. The IRS and the EO division need to press for Congressional action on this statute both to free the hands of state charities regulators in obtaining needed information for proper enforcement in the sector, and to afford the opportunity for more joint enforcement actions between states and the IRS in EO.

---

<sup>101</sup> Letter from the National Association of Attorneys General to the Honorable Max Baucus, Chairman, Committee on Finance, United States Senate and the Honorable Orrin Hatch, Ranking Member, Committee on Finance, United States Senate (Oct. 28, 2011).

## EXEMPT ORGANIZATIONS

### 2. Electronic filing and dissemination of IRS information

At this point in the electronic and digitized age of data and information, it is incumbent upon the IRS to put back into the public domain in digitized format that information which it receives in digitized format. Such data are far more transparent than mere images of filings and far more useful to the nonprofit sector's stakeholders, including the public, practitioners, regulators, policymakers and academic researchers. Both the receipt and the public dissemination of the sector's public data are necessary for transparency and a robust understanding of the import and scope of the nonprofit sector's role in the U.S. economy.<sup>102</sup>

As in the report by the Aspen Institute in 2013,<sup>103</sup> electronic filing requirements for the sector have been recommended for several years.<sup>104</sup> President Obama's 2016 budget included a requirement for e-filing, as well as Rep. Dave Camp's draft legislation titled, "Tax Reform Act of 2014." Spurred on by a lawsuit regarding the availability of specific entities' digitized data,<sup>105</sup> the IRS has now publicly announced that it will release electronically that data which it receives electronically, beginning at some point in 2016.<sup>106</sup> Mandatory filing of digitized data and the release of that data, where not legally confidential, would inure to the benefit of the public and the sector, including an increase in transparency, a reduction in fraud and more accurate data collection.<sup>107</sup>

---

<sup>102</sup> Hugh R. Jones, "The Importance of Transparency in the Governmental Regulation of the Nonprofit Sector: Room for Improvement?," Columbia University Academic Commons (2013), <http://dx.doi.org/10.7916/D86H4FG7>; Justin Duncan, "In the fight for open nonprofit data, everything changed in one month," Data Transparency Coalition (July 2, 2015), <http://www.datacoalition.org/in-the-fight-for-open-nonprofit-data-everything-changed-in-one-month/>.

<sup>103</sup> Beth Simone Noveck and Daniel L. Goroff, *Information for Impact: Liberating Nonprofit Sector Data*, 2nd ed., The Aspen Institute, (Sept. 26, 2013), [http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Information\\_for\\_Impact\\_Report\\_FINAL\\_REPORT\\_9-26-13.pdf](http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Information_for_Impact_Report_FINAL_REPORT_9-26-13.pdf).

<sup>104</sup> As we were "going to press" with this report, the Senate Finance Committee leadership proposed the "CHARITY Act" (S. 2750) which contains several items that could affect EOs in the future. Included in this proposal is mandatory electronic filing for all nonprofits. It will be interesting to see how this bill fares in 2016.

<sup>105</sup> *Public.Resource.org v. United States Internal Revenue Serv.*, 78 F. Supp. 3d 1262, 1266 (N.D. Cal. 2015), appeal dismissed (June 24, 2015).

<sup>106</sup> Tamera L. Ripperda, Director, Exempt Organizations, Internal Revenue Service, remarks at the Urban Institute's Emerging Issues in Philanthropy Seminar: Data Collection, Sharing, and Transparency in the Tax-Exempt Sector: at the Intersection of Regulators, Technology and Sector Stakeholders (December 1, 2015).

<sup>107</sup> The Aspen Institute, *Transparency, Accuracy, and Innovation: Electronic-Filing of IRS Forms 990 for Open Data*, <http://www.aspeninstitute.org/sites/default/files/content/images/Form%20990%20E-filing%20One%20Pager%207-31-15.pdf>.

Note that although the requirements for electronic filing are being discussed at the federal level, state charities regulators rely on the information the Form 990 provides, whether digitized or not,<sup>108</sup> with their own state-specific requirements adding to the information received by regulators. The “Single Portal” initiative launched by the state charities regulators in the past several years, due to come online in 2016, will enable electronic filing at the state level for those charities that must register within individual states, and it will enable electronic data sharing.<sup>109</sup> When launched, the Single Portal platform can be integrated with the federal electronic data and with other states’ data as well. The GAO overtly supports this next, technologically enabled step toward transparency.<sup>110</sup> Once publicly available, such digitized data will serve as an invaluable resource to researchers, regulators and the public. To best serve both public and regulatory oversight and research efforts, the IRS and the EO division must utilize the most current technologies to allow access to public data about regulated entities. Whatever leaps in technology occur for digitization and interoperability of data sharing, the ACT urges the IRS to make adoption of those technologies a priority.

---

<sup>108</sup> A total of 39 states require that the 990 also to be filed with the respective states in which the entity registers. See Draft of Memorandum from the National Association of State Charity Officials to the National Association of Attorneys General 2 (Jan. 2016) (on file with author).

<sup>109</sup> Multi-State Filer Project, *supra* note 18 (“The most recent version of the URS [Unified Registration Statement] is v. 4.02, which was released in March 2014. Version 4.02 supports 37 jurisdictions (36 states and the District of Columbia), and requires (and includes) supplemental forms for 13 jurisdictions.”).

<sup>110</sup> U.S. Government Accountability Office, Highlights of GAO-15-164, Report to the Ranking Member, Committee on Homeland Security and Government Affairs, U.S. Senate; *Tax-Exempt Organizations: Better Compliance Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations* 40-41 (2014) (“The challenges to information sharing between IRS and state charity regulators are related to uncertainty about what is permissible under the PPA. The lack of information impedes state charity regulators’ ability to identify and prosecute bad actors for violating state laws and hinders states’ ability to inform donors of scam charities. . . . Congress should consider expanding the mandate for 501(c)(3) organizations to electronically file their tax returns to cover a greater share of filed returns.”); see also Beth Simone Noveck and Daniel L. Goroff, *Information for Impact: Liberating Nonprofit Sector Data*, The Aspen Institute (2nd Ed., Sept. 26, 2013), [http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Information\\_for\\_Impact\\_Report\\_FINAL\\_REPORT\\_9-26-13.pdf](http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Information_for_Impact_Report_FINAL_REPORT_9-26-13.pdf) (“[I]nformation contained in the 990s could potentially be far more useful if it were not only public but ‘open’ data. Open data are data that are available to all, free of charge, in a standard format, published without proprietary conditions, and available online as a bulk download rather than only through single-entry lookup. Making the Form 990 data truly open in this sense would not only make it easier to use for the organizations that already process it, but would also make it useful to researchers, advocates, entrepreneurs, technologists, and nonprofits that do not have the resources to use the data in their current form. We argue that open 990 data may increase transparency for nonprofit organizations, making it easier for state and federal authorities to detect fraud, spur innovation in the nonprofit sector and, above all, help us to understand the potential value of the 990 data.”).

## EXEMPT ORGANIZATIONS

### **F. Foster Two-Way Communication Between the IRS Exempt Organizations Division and the Nonprofit Sector.**

#### **1. Find ways to solicit input from a greater number of voices (including small nonprofits) and provide open channels for stakeholders to take issues to the IRS**

EO should seek opportunities to interact with organizations and leaders in the sector. Seeking input from across the sector at early stages of new initiatives or proposals will provide EO with diverse perspectives, particularly with respect to potential unintended consequences and detrimental effects. Currently, legislative proposals and areas where EO believes guidance is necessary are submitted to the Department of Treasury and released annually in its Priority Guidance Plan. That plan publicly communicates the areas for which IRS plans to issue regulations, revenue rulings and procedures and additional guidance.

An opportunity for exempt organizations to “identify and resolve frequently disputed or burdensome tax issues that are common to a significant number of entities” has come with the issuance of Revenue Procedure 2016-19. The Industry Issues Resolution (IIR) Program – historically available only to members of the Large Business and International (LB&I) and Small Business and Self Employed (SB/SE) operating divisions – is now open to Tax Exempt and Government Entities (TE/GE).

Per the IRS, “[t]he objective of the IIR Program is to identify and resolve frequently disputed or burdensome tax issues that are common to a significant number of entities. Resolving issues through pre-filing guidance rather than post-filing examination is a goal of the Internal Revenue Service (IRS) and the Office of Chief Counsel.”<sup>111</sup>

The revenue procedure sets forth guidelines for who (requesters) may submit and what types of issues might be submitted. There is no defined format for submissions, but requesters are instructed to “include an issue statement, a description of why the issue is appropriate for the IIR Program, an explanation of the need for guidance, an estimate of the number of entities affected by the issue, a description of how the requester

---

<sup>111</sup> Rev. Proc. 2016-19.

relates to those entities, and the name and telephone number of an individual to contact if additional information is needed. The submission may also include a recommendation as to how the issue may be resolved.”<sup>112</sup>

For example, a group representing colleges and universities might request pre-filing guidance through the IIR Program on a Treasury Regulations §1.512(a)(1)(a) unrelated business expense allocation issue common to all member schools.

The tenets of this revenue procedure are effective as of April 25, 2016.

One recent example of a situation where seeking early input in the development of a proposal could have yielded helpful and efficient feedback is the 2015 charitable gift substantiation proposal. In September 2015, the Department of Treasury and the IRS issued proposed donee gift substantiation regulations and sought formal written comments. The process yielded nearly 38,000 public comments and as a consequence, the proposal was withdrawn. With a greater willingness to talk with leaders in the nonprofit sector prior to issuing the proposed regulations, the IRS could have avoided significant investment of resources of its own staff and that of nonprofit leaders and nonprofit regulators around the nation. Encouragement for seeking input from the regulated public (the nonprofit sector in this case), is further supported by two executive orders, Executive Order 12866 §6(a)(1) and Executive Order 13563 §2(c).<sup>113</sup>

### **Public announcements not readily available to charities**

EO must work diligently to ensure that its public announcements, press releases and other updates are digitized, searchable and easy for the public to review and download free-of-charge without subscribing to private subscription news services.

The charitable donee gift substantiation proposal also brings to light another issue related to accessibility of the IRS EO information to organizations of all sizes and types.

---

<sup>112</sup> Rev. Proc. 2016-19.

<sup>113</sup> See Executive Order 12866 §6(a)(1) (“before issuing a notice of proposed rulemaking, each agency should ... seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation”); Executive Order 13563 §2(c) (“Before issuing a notice of proposed rulemaking, each agency ... shall seek the views of those who are likely to be affected, including those who are likely to benefit and those who are potentially subject to such rulemaking”).

## EXEMPT ORGANIZATIONS

The IRS issued follow up information that attempted to further explain the charitable substantiation proposed regulations. This supplemental information appears to have been released only to news and subscription services but not published in the press releases or other publicly accessible portions of the IRS website. For those that do not pay for these subscription services, there was no direct avenue from the IRS for them to learn about this important release. We recognize that the proposed regulations were issued by the Department of Treasury, not the IRS. But, given the impact of the proposed regulations on the EO sector, the IRS website should have informed the sector of their release and possible impact.

Although many exempt organization leaders and practitioners find special subscription services to be a helpful and informative way to keep up with IRS news, information and updates, the fees for such services are cost prohibitive for many in the nonprofit community. One interviewee stated concern about the IRS practice of distributing information about charitable nonprofits through expensive channels that grant ‘insiders’ greater access to information than others.<sup>114</sup> By sharing information with, for example, those attorneys and accountants who subscribe to certain services, the IRS creates an uneven and unfair playing field.

Whenever the IRS shares information with one group, it should simultaneously provide equal information to nonprofits and the general public across America, which can be accomplished easily through its website. Implementing this recommendation will help EO achieve greater transparency and fulfill its mission to apply tax law with fairness to all.

### **Private letter rulings only accessible to the largest exempt organizations**

Interviews for this year’s ACT report also revealed that stakeholders perceive that IRS staff and other resources are only accessible to the largest nonprofits and their paid advisors, e.g., attorneys and accountants.

---

<sup>114</sup> The ACT reviewed the fees for several associations and subscription services. The fees varied from less than \$125 to more than \$3,000. Each subscription service has its own dues and fees schedules and bases its rates on different metrics related to variables such as the individual subscriber’s position and experience, the type of firm represented by the subscriber and tenure.

Obtaining a private letter ruling is cost prohibitive to all but the largest institutions. At the time of this report (April 2016), the cost of a private letter ruling for organizations with gross income of \$1 million or more is \$28,300.<sup>115</sup> While there are reduced user fees for smaller exempt organizations seeking a ruling request, it tends to be the larger institutions and foundations that request rulings. The high cost for these organizations coupled with the various “no ruling” areas means that there are fewer published rulings and less overall guidance provided to the exempt organization sector as a whole. It is incumbent for EO leadership to engage in conversation with the Office of Chief Counsel to identify the appropriate resources to fill in the gap created by lack of access to equivalent guidance.

### **Elimination of small and mid-size tax-exempt organization workshops**

EO invests considerable time and effort providing staff to serve as speakers and facilitators at conferences and other public and learning events. In the past, a significant number of these events were open to nonprofit organizations of all types and sizes with many specifically focused on the needs of small- and medium-size nonprofit organizations that comprise the greatest share of the exempt organization landscape. However, it appears that most programming that boasted this level of accessibility to the small and mid-size nonprofits has been eliminated with recent budget cutting measures. The elimination of these programs has significantly reduced opportunities for small- and medium-size nonprofit representatives to interact with EO staff members and leadership.

One such initiative was the IRS EO workshop series for small- and medium-size nonprofits (SMS).<sup>116</sup> This effort, which began in 2010, featured IRS partnerships with colleges and universities and offered single day workshops geared toward individuals operating small- and medium-size nonprofits as part of EO’s overall “effort to help develop nonprofit leaders of tomorrow.” The programs were described as covering the “nuts and bolts of tax compliance for exempt organizations, and were designed for

---

<sup>115</sup> Rev. Proc. 2016-1. Appendix A: Schedule of User Fees (as of February 1, 2015).

<sup>116</sup> According to TE/GE staff members, the cost per IRS workshop was approximately \$1,500 per day for travel for their subject matter experts to attend each SMS program. This does not include the actual staff time or the loss of time away from the revenue agents’ existing caseloads.

## EXEMPT ORGANIZATIONS

board members, officers, volunteers and staff of small- and medium-size 501(c)(3) organizations, tax practitioners and students in nonprofit management programs.” Programs were sometimes co-sponsored with a local nonprofit provided that the official host was a university or college. Universities provided the room use, marketing registration, audiovisual needs, staffing for the day of the event and general planning. The IRS provided speakers including their travel and lodging costs and workshop materials. The host was permitted to charge a small fee to participants.

This program was offered regularly since its 2010 inception. The program has now been phased out and has been replaced by the Virtual Small- and Mid-Size Tax Exempt Organization Workshop, described as the “online version of our popular Small- and Mid-Size 501(c)(3) Organization Workshops.” This online video series is available for free viewing and download and can be found at <https://www.stayexempt.irs.gov/Resource-Library/Virtual-Small-to-Mid-Size-Tax-Exempt-Organization-Workshop>. The series provides programs on multiple EO topics as well as a downloadable copy of the SMS instructional handout. EO has also eliminated its educational phone forum series and significantly reduced its webinar offerings though some recorded programs are available via [www.irs.gov](http://www.irs.gov).

The IRS should be commended for continuing to offer much of this content through this free downloadable video series, but should recognize that the transition to the all-video format shrinks already limited opportunities for small- and medium-size nonprofit leaders to interact with IRS staff and to learn from one another.

The loss of these engagements between the EO staff and exempt organizations results in missed opportunities for EO staff to learn about the key questions and challenges faced by the nonprofit sector as well as a loss of an opportunity for nonprofit leaders to converse with EO staff.

In the ACT’s interviews with international regulators, some examples of this kind of interaction were highlighted, among them these comments from Australia:

## EXEMPT ORGANIZATIONS

- Not-for-profit sector organizations are the dominant voice in structuring policies of the Australia Charities and Not-for-Profits Commission (ACNC). Quarterly meetings are held in which nonprofit organizations provide advice to the ACNC. Three groups are involved: Professional Users group (leading accountants and attorneys in the nonprofit sector), Sector Users group (leaders of key nonprofit sector organizations) and Statutory Advisory group (academics and government officials from around the country). ACNC is heavily involved in social media, which aids in the continuing dialogue with state and local governments and the nonprofit sector, and builds trust.<sup>117</sup>
- Australian Taxation Office (ATO) and ACNC operate in close partnership with each other and with the nonprofit sector. They have quarterly meetings with nonprofit advisory groups to get feedback on how they can do a better job of supporting the sector and to be sure there are strong compliance networks to ensure fairness and confidence in the sector, and they provide the sector with tangible support tools.<sup>118</sup> The ATO is interested in finding ways to engage with the nonprofit community. It has a program “Let’s Talk” (<http://letstalkaustralia.com.au>) that provides training and coaching for organizations and individuals on effective communication, meeting human needs in NGOs and leadership skills.<sup>119</sup>

It is our understanding that there has been a strategic decision to expend limited resources on materials that are posted to the IRS website for all to see as opposed to materials available only to those who attend or sign up to attend training opportunities. With many programs eliminated, the primary remaining IRS EO sponsored educational seminars are offered as part of the TE/GE Council Meetings and the IRS Nationwide Tax Forums – advertised as “three full days of seminar with the latest word from IRS leaders and experts in the field of tax law, compliance, and ethics.” The tax forums are offered at different locations around the country in the summer months. The targeted

---

<sup>117</sup> Susan Pascoe, Commissioner, Australian Charities and Not-for-Profit Commission (ACNC), and Murray Beard, General Counsel, ACNC.

<sup>118</sup> Rod Walker, Director, NFP Hub, Strategy and Policy Branch, Australian Taxation Office (ATO).

<sup>119</sup> Mark Fowler, attorney and member of the ACNC Professional Users Group.

## EXEMPT ORGANIZATIONS

audience for the forums includes: attorneys, accountants and enrolled agents. EO related seminars offered during the National Tax Forums are available for a fee and provide the opportunity to earn continuing professional education (CPE) credits. In 2015, five IRS Nationwide Tax Forums were offered. EO seminars offered as part of the forums are geared toward dedicated tax professionals rather than small- and mid-size nonprofit leaders.

### **Decreased access to EO speakers and presenters**

Historically, EO has provided speakers and presenters for programs around the nation for audiences that were broad and diverse. The number of speaking engagements, however, has declined in recent years.<sup>120</sup> With reductions in the number of speaking engagements, opportunities for cross learning between EO staff and sector stakeholders has diminished.

We recognize that significant effort goes into determining where to place limited resources for EO staff members' speaking engagements. Events like the TE/GE Council programs and Nationwide Tax Forums are attractive because they are viewed as national in scope and can reach a broad array of individuals. Nevertheless, the gap created by the decrease in direct EO engagement with the sector should be filled so as to provide resources and advice to nonprofits, in particular the ever-increasing community of small nonprofits.

### **2. Revise the Determination Letter to educate exempt organizations on their tax obligations and responsibilities**

Because of IRS budget cuts and the resulting cuts in the number and frequency of contacts with the sector, the IRS must take full advantage of its remaining points of contact with the sector. The determination letter is one point of contact that the IRS could better leverage for educational purposes.

---

<sup>120</sup> For instance, in calendar year 2013, EO staff sent speakers to over 150 programs, some hosted by the IRS (including the series mentioned above) and some hosted by outside entities. In calendar year 2014, the number of speaking engagements was halved to 74 and by 2015, this number was approximately halved again.

With a few exceptions,<sup>121</sup> Section 501(c)(3) organizations must file an application (IRS Form 1023 or 1023-EZ) with the IRS to have their charitable status recognized by the IRS. Most other types of tax-exempt organizations under Section 501, such as social clubs and business leagues, may but are not required to file an application (Form 1024) to have their tax-exempt status recognized.<sup>122</sup> The IRS, following a determination that an organization has been recognized as a tax-exempt organization described in Section 501, sends a letter by mail to the organization. This determination letter typically serves as the IRS's first formal contact following recognition of the organization's exempt status and presents an incredible opportunity to educate the organization on its responsibilities as a tax-exempt entity. It also provides a way for the IRS to offer resources to the organization regarding its federal tax exemption.

The current determination letter sent by the IRS to newly recognized organizations is sparse and for many organizations can be confusing. This may especially be true of an organization filing a 1023-EZ, which may have had little or no education on operating as a charitable organization.<sup>123</sup>

The ACT recommends that the IRS revamp the determination letter sent to exempt organizations to include more information that will help exempt organizations protect and maintain their tax-exempt status. We have included as Appendix A a proposed determination letter that would provide new exempt organizations with much-needed education regarding their tax-exempt status. The proposed determination letter has been written for newly recognized public charities, but could easily be revised for private

---

<sup>121</sup> Churches, conventions or associates of churches, integrated auxiliaries of a church, small organizations with gross receipts that are normally not more than \$5,000 annually and subordinate organizations covered by a group exemption are not required to file a Form 1023 to have their Section 501(c)(3) status recognized by the IRS.

<sup>122</sup> Certain employee benefit organizations, prepaid tuition plans operated by private educational institutions, health insurance insurers and credit counseling organizations that desire exemption as social welfare organizations are required to timely apply for recognition of exemption.

<sup>123</sup> In the past, the letter sent by the IRS was accompanied by a booklet that set forth organized information for the organization including information on its Form 990 filing requirements, maintaining tax-exempt status, restrictions on lobbying and political activity and the disclosure requirements for tax-exempt organizations. In 2014, the IRS stopped sending this booklet to the organization with the determination letter. This booklet (Pub. 4221-PC Compliance Guide for 501(c)(3) Public Charities) is now available online and a link is provided in the determination letters that are sent out. As a result, the determination letter mailing contains very little information to educate a recently formed exempt organization on the federal income tax requirements for maintaining its newly recognized tax-exempt status.

## EXEMPT ORGANIZATIONS

foundations and for other types of tax-exempt organizations. This letter should be sent to exempt organizations via a technologically current, accessible platform.

### **3. Use current technology to communicate with exempt organizations**

Currently, the IRS does not use email or other current technologies to communicate with tax-exempt organizations. IRS policy prohibits the collection of email information from taxpayers or use of email to contact taxpayers or notify them of specific information regarding their organizations.<sup>124</sup> Part of the reason the IRS does not collect, maintain and utilize email addresses for exempt organizations is that the email addresses associated with tax-exempt organizations frequently change, especially with volunteer-run organizations, but a great potential for the IRS to communicate with the sector is lost as a result of this practice.

State Offices of the Attorney General and Offices of the Secretary of State often use email to notify nonprofit organizations of approved applications, annual report filings, and due dates for registrations and renewals. For example, the Texas Comptroller of Public Accounts notifies tax-exempt organizations of their qualification for tax exemption via email, and the Connecticut Department of Consumer Protection notifies charities of their charity registration renewal by email. The notification provides taxpayers with several links to obtain more information on their responsibilities and obligations. Because the notification is sent via email, it is timely and the links providing additional education are live and easily accessed. In addition, the ease with which emails can be forwarded means others associated with the exempt organization, including board members, also may receive the information.

Many nonprofit organizations have an official “contact us” email address they share with the public on their websites. The IRS makes submission of this type of contact email address optional, rather than mandatory, on the Form 1023 application. The IRS does not use this email address in any communications with the applicant organization.

---

<sup>124</sup> The IRS provides an EO Update via email. This function is pursuant to an “opt in” listserv. As the ACT discussed in its 2014 report, the listserv is voluntary and the email addresses in the listserv are not linked to registered nonprofit organizations. See, “Analysis and Recommendations Regarding Unrelated Business Income Tax Compliance of Colleges and Universities,” page 82.

The IRS policy of not using email or other current technology to communicate with tax-exempt organizations results in a missed opportunity to reach out to these organizations in a timely, cost-effective way. The IRS could easily communicate with exempt organizations via email to provide notices, status updates, information on missed filing deadlines and other pertinent information. Unlike a paper letter or notice, email allows the IRS to provide accessible linked information regarding educational and compliance topics of general interest to exempt organizations.

The ACT recommends that the IRS require and maintain a primary organizational contact email address for each tax-exempt organization through which the IRS may timely communicate with the organization and provide updates and notices. Preferably, this email address will be an organizational email address that will not change even when there are changes to an organization's staff or volunteers. In addition, the IRS should institute a simple method for exempt organizations to notify it of a change to an organization's email contact address, such as through the Form 990 reporting process, which could request both a mailing address and primary contact email address for each tax-exempt organization. The organization could check a box on its Form 990 if its primary email address has changed since the prior year, as is already done with mailing address changes. Organizations that do not file a Form 990<sup>125</sup> could voluntarily notify the IRS of a change in primary email address by use of a special form or online method.

#### **4. Increase the availability of relevant expert resources through IRS TE/GE phone customer service**

The Taxpayer Bill of Rights provides taxpayers the right to receive prompt, courteous and professional assistance in their dealings with the IRS, to be spoken to in a way they can easily understand, and to receive clear and easily understandable communications from the IRS. If a taxpayer receives inadequate service, the taxpayer, including an

---

<sup>125</sup> Tax-exempt organizations that are exempt from the Form 990 filing requirements include churches, their integrated auxiliaries, conventions of associations of churches, the exclusively religious activities of a religious order, state institutions (including state colleges and universities), instrumentalities of United States, schools affiliated with a church or operated by a religious order, and organizations that are part of a group exemption and included on a group return filed by the central or parent organization. The IRS also has the discretion under Section 6033(a)(3)(B) to relieve additional organizations from the Form 990 filing requirements where it determines the filing is not necessary to the efficient administration of the internal revenue laws, which it has done, for example, for government units and affiliates of governmental units.

## EXEMPT ORGANIZATIONS

exempt organization, has a right to speak to a supervisor. Based on the ACT interviews, the IRS is failing to provide high quality customer service.

Although TE/GE leadership focuses intently on increasing the “self-sufficiency”<sup>126</sup> of taxpayers (in this case, exempt organizations), taxpayers are not experiencing a correlation between greater online filing and less phone volume. In fact, the January 2016 report from the Taxpayer Advocate Service indicated that despite the fact that the IRS has increased individual tax return e-filing rates from 54 percent to 85 percent, enhanced the Where’s My Refund? tool and added information to the [www.irs.gov](http://www.irs.gov) website, “the number of taxpayer calls to its customer service lines has *increased* by 59 percent” from fiscal year 2006 to fiscal year 2015.<sup>127</sup>

Phone assistance is often difficult to access. Individuals who staff the IRS Customer Service lines, including the line specifically advertised as the line for TE/GE (877-829-5500) are not staff members of the TE/GE Division. They are staff members contracted to provide this service from the Wage and Investment (W&I) Division of the IRS although they receive calls regarding other IRS divisions, including Exempt Organizations. Staff answering live calls do not have access to the EO Knowledge Management files (described in section V.A.1 of this report).

The call volume on this IRS TE/GE phone line is so over-subscribed that at high call volume times, callers hear a recorded message requesting that they call back at another time and are disconnected rather than placed on hold to speak with the next customer service representative.

It is worth highlighting that the fiscal year 2016 omnibus budget appropriates \$11.235 billion for funding IRS operations. That represents an increase of \$290 million compared to fiscal year 2015 spending. The IRS is to use the additional funding, in part, to make “measurable improvements in the customer service” and to enhance cyber security. The ACT recommends that EO consider offering additional avenues of support beyond phone assistance, such as online live chat.

---

<sup>126</sup> Sunita Lough, TE/GE Priorities for FY 2016.

<sup>127</sup> 2015 Annual Report to Congress, Most Serious Problem, Taxpayer Advisory Service, January 2016.

## VI. CONCLUSIONS

With this report, the ACT has tried to reflect the issues that the IRS, as regulator, must tackle today to prepare for tomorrow. Some of these are depicted as challenges, many as opportunities. Above all else, we recognized, as did those we interviewed, that EO is determined to fulfill its designated functions responsibly and effectively. Our recommendations are designed to help the IRS achieve those goals.

We know that the scope of our discussions and the nature of our recommendations do not all fall neatly within the defined responsibilities of the EO division. Indeed, that is one of the chief points we would like to stress to the nonprofit sector, Congress and the federal executive branch: the EO division does not operate in a vacuum. It is part of a community of institutional partners, federal agencies, Congress and state regulators. The EO division can also draw informally on the experience, learning and models of its counterpart regulators around the globe, as well as the knowledge and understanding of the communities it regulates. This report speaks to that broad community in addition to the EO division.

We were particularly struck by comments made during our conversations with other regulators in which it was stressed that successful outcomes depend on proactive engagement and the belief that the nonprofit community is not the opposition; rather, it has an important role to play in the development and support of the process of regulation. This concept was reinforced in the majority of our conversations with professional advisers, with nonprofit leaders and with academics and government advisers. Close engagement with these key stakeholders provides stability, experience and continuity in the volatile environment that is our current and future reality.

The recommendations represent what we (and those with whom we spoke) consider to be the necessary elements of a solid platform on which a regulatory partnership can be built: an adequately resourced regulator, armed with appropriate and available data and tools for the benefit of an educated exempt community, all based on strong, two-way dialogue and shared learning. The ACT recognizes that it is not EO's role to provide technical, precedential guidance. To regulate the sector effectively, however, EO must

## **EXEMPT ORGANIZATIONS**

provide education, awareness and appropriate and timely support. Community and philanthropic engagement through the tax-exempt sector enrich and underpin our communities and society. Freedom of association encourages that engagement, but this is not without risk. Mitigating that risk through education, awareness building and appropriate and timely support are hallmarks of a successful regulator.

We believe that, with the good will of all involved, there should be a bright future ahead for the nonprofit and social sectors of the United States. Such a future can only be achieved with the full participation of all partners undertaking to deliver on their responsibilities; it is not within the power of EO to deliver on all of our recommendations in isolation. Our final, overarching recommendation for this year's ACT report is that the EO division, in serving our exempt communities and the public at large, must serve as a convener and as a focal point for this essential community of support.

**ACKNOWLEDGEMENTS**

The Exempt Organizations Subcommittee of the ACT thanks the following for their support and input into this report:

- Cathlene Williams, PhD, for her assistance with interviews and report preparation.
- Staff of the Washington, D.C. office of Polsinelli PC for providing meeting space.
- All of the individuals we interviewed (listed in Appendix C) for this report.

We would also like to thank Tamera Ripperda, Margaret von Lienen and the entire staff of the Exempt Organizations function of the IRS who are dedicated to helping exempt organizations understand and comply with their tax responsibilities and ultimately administering the nation's tax law for the exempt organizations community. We are honored to work with you.

APPENDIX A

PROPOSED NEW DETERMINATION LETTER

**[Sent via email to exempt organization with hard copy to follow]**

Dear Applicant:

Congratulations! We have determined your organization is exempt from federal income tax under Internal Revenue Code Section 501(c)(3). We also want to share with you information that will be helpful to you as you continue with your operations as a charitable organization. Please keep this letter in your permanent records for tax and donor purposes.

**Charitable (Section 501(c)(3)) status.** We have determined that based on your represented activities, your organization will qualify as a charitable organization within the meaning of Section 501(c)(3). To maintain this status, your organization must continue to be organized and operate in a charitable manner. For more information on charitable activities, please go to [https://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exemption-Requirements-Section-501\(c\)\(3\)-Organizations](https://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exemption-Requirements-Section-501(c)(3)-Organizations).

**Public charity status.** At the top of this letter, we indicated your public charity status. You need to be familiar with the requirements to maintain this public charity status. For example, your organization may be subject to a public support test that requires that it receive a certain amount of public support each year. For more information on the various types of public charities and the requirements for each type, visit the IRS website at <https://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Public-Charities>.

**Annual information return.** If we indicated at the top of this letter that you are required to file a Form 990/990-EZ/990-N, our records show that your organization is required to file an annual information return (Form 990 or Form 990-EZ) or electronic notice (Form 990-N) with the IRS. Which return or notice you file depends, in part, upon your size:

Gross receipts or fair market value of assets	Return required
Gross receipts normally not more than \$50,000 (regardless of total assets)	990-N (but may file a Form 990 or 990-EZ)
Gross receipts < \$200,000, <i>and</i> Total assets < \$500,000	990-EZ (but may file a Form 990)
Gross receipts $\geq$ \$200,000, <i>or</i> Total assets $\geq$ \$500,000	990

If your organization fails to file the return or notice for three consecutive years, it will automatically lose its tax-exempt status. Please note that there are exceptions to these filing rules. If you are uncertain which Form 990 to file, go to

<https://www.irs.gov/Charities-&-Non-Profits/Annual-Exempt-Organization>Returns,-Notices-and-Schedules>.

You can find out more information on the annual information return filing requirement at <https://www.irs.gov/Charities-&-Non-Profits/Annual-Exempt-Organization-Return-Who-Must-File>.

**Limitations on lobbying and political activities.** As a public charity, your political campaign and legislative activities are subject to these limitations:

- You may not intervene in political campaign activities, either in support of or in opposition to a candidate for public office.
- You may not engage in substantial legislative activities, which means only an insubstantial part of its activities can be influencing legislation (more commonly referred to as “lobbying”).

An organization is generally regarded as influencing legislation if it contacts, or urges the public to contact, members or employees of a legislative body for purposes of proposing, supporting or opposing legislation, or advocates for the adoption or rejection of legislation. Go to <https://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Political-and-Lobbying-Activities> and click on the related links to find out

## EXEMPT ORGANIZATIONS – APPENDIX A

more about the political campaign and legislative activity limitations and the optional Section 501(h) election for lobbying expenses.

**Disclosure requirements.** Your organization is required to make the following documents available to the public:

- Its three most recent information returns (including amended returns and including the Form 990-T); and
- Its IRS application for tax exemption, including all documents and statements the IRS required you to file with the application, any statement or other supporting document submitted by you in support of your application and any letter or other document issued by the IRS concerning the application.
- This requirement includes making a copy of your organization’s determination letter available to the public.

Go to <https://www.irs.gov/Charities-&Non-Profits/Exempt-Organization-Public-Disclosure-and-Availability-Requirements> for more information about these disclosure requirements.

**State law.** The IRS has determined that you are exempt from federal income tax law. This does not automatically mean you are exempt from state income taxes or other state and local taxes to which you may be subject. In addition, states may have other filing requirements to which you are subject. <https://www.irs.gov/Charities-&Non-Profits/State-Links>. You should contact your state’s Secretary of State and Office of the Attorney General to determine other requirements to which you may be subject. For state-specific information, go to <http://www.nasconet.org/resources/>.

**Charitable contributions.** Contributions made to you are generally tax-deductible by a donor, subject to certain limitations. A donor may deduct a charitable contribution of cash, check or other monetary amount of \$250 or more to you only if the donor has a contemporaneous written acknowledgement from you. A donor cannot claim a deduction for any contribution of cash, check or other monetary gift unless the donor maintains a written record of the contribution, even if the gift is less than \$250. Strict rules and additional substantiation may apply for deductions of quid pro quo

contributions where a donor receives goods or services in return for a contribution (such as a fundraising dinner) and for noncash gifts. For more information on these contribution and substantiation rules, go to <https://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Charitable-Organizations-Substantiation-and-Disclosure-Requirements> or read IRS Publication 1771 at <https://www.irs.gov/pub/irs-pdf/p1771.pdf>.

**Private inurement and private benefit.** Section 501(c)(3) charitable organizations are prohibited from allowing the earnings of the organization to inure to the benefit of an insider. An “insider” is typically a person who has a personal or private interest in the activities of the organization, such as an officer, director or key employee. An example of private inurement is unreasonable compensation paid to an officer. A Section 501(c)(3) charitable organization is also prohibited from allowing more than insubstantial benefits to be conferred on private persons generally. A charitable organization generally must serve public interests, not private interests.

**Unrelated business income.** We have determined that your organization is exempt from federal income tax on income derived in the furtherance of its tax-exempt purposes. Tax-exempt organizations, however, are subject to a federal income tax on activities that are unrelated to the exempt functions of the organization, known as the unrelated business income tax (UBIT). Examples of activities that may generate UBIT are advertising income, the provision of certain types of services by a tax-exempt organization and the conduct of travel tours that are not substantially related to your exempt purpose. There are a number of important exceptions to the application of UBIT, such as the volunteer labor exception and the sale of donated merchandise. To learn more about UBIT, go to <https://www.irs.gov/Charities-&-Non-Profits/Unrelated-Business-Income-Tax> or read IRS Publication 598 at <https://www.irs.gov/publications/p598/index.html>.

**Reporting changes to the IRS.** We understand that your organization may change over time. Some of these changes can be reported to the IRS as part of the annual information return filing (i.e., Form 990). Other changes may be more material and

## EXEMPT ORGANIZATIONS – APPENDIX A

require the filing of a notice or form with the IRS. You should familiarize yourself with IRS Form 8940 <https://www.irs.gov/pub/irs-pdf/f8940.pdf> on which many of these changes may be reported. The instructions to Form 8940 can be found at <https://www.irs.gov/pub/irs-pdf/i8940.pdf>.

**Other matters.** For a more complete listing of issues and resources for tax-exempt organizations, visit the IRS Web page at [www.irs.gov/eo](http://www.irs.gov/eo) and review Publication 557, Tax-Exempt Status for Your Organization, at <https://www.irs.gov/pub/irs-pdf/p557.pdf>.

Again, congratulations on the recognition of your organization's Section 501(c)(3) and public charity status. We encourage you to explore the materials referenced in this letter to ensure compliance with the tax laws and to provide information on the permissible activities and restrictions for a charitable organization.

## APPENDIX B

### PROPOSED OUTLINE OF INTERNATIONAL ACTIVITIES

#### FACT SHEET

It would be beneficial for the EO community to have a document (perhaps a “fact sheet”) that provides “one-stop shopping” with respect to potential required filings and compliance in the international tax arena. In developing a draft International Activities – EO Fact Sheet/Quick Reference Guide, the IRS should aggregate existing guidance with regard to the items enumerated below. The content should include:

1. Purpose of the form
2. Who must file
3. Due dates
4. Penalties
5. Citations from form instructions
6. Links to IRS Web pages, publications and instructions
7. Specific situational examples:
  - Foreign Activities – Grants
    - Information to gather from foreign grantees to ensure that proper documentation is made regarding the purpose and use of funds (Treasury Regulations under 4942)
    - Schedule F (Form 990) completion
  - Foreign financial and bank account reporting (Fin Cen Form 114 [formerly Form TD F 90-22.1])
    - Definitions of “United States person”
    - Thresholds for filing (aggregate \$10,000)
    - New filing deadlines

## EXEMPT ORGANIZATIONS – APPENDIX B

- Transfers of property from a U.S. entity to a foreign corporation (Form 926)
  - Who must file?
  - Define “certain transfers”
  - Exceptions
- Reporting by certain U.S. citizens and residents who are officers, directors or shareholders in certain foreign corporations (Form 5471)
  - Alert for small/mid-size EOs
  - Categories of filers (simplified with examples)
  - Highlights of schedules for Form 5471 (Schedules A, C, E, F, G, H, I, J, M, O part I, O part II – not to be confused with Form 990 schedules)
- Transactions with foreign trusts and certain foreign gifts (Form 3520)
  - Define “responsible party” and “U.S. person”
  - Exceptions
  - Specific instructions (summary)
- Reporting by U.S. owners of foreign trusts (Form 3520-A)
  - Define “U.S. owner”
  - Exceptions
- Reporting by U.S. persons who are direct or indirect shareholders of a Passive Foreign Investment Company (Form 8621)
  - Alert for small/mid-size EOs
  - Define Passive Foreign Investment Company “PFIC”
  - Define “direct shareholder” and “indirect shareholder”
- Reporting by U.S. entities with respect to controlled foreign partnerships and/or transfers to foreign partnerships (Form 8865)
  - Categories of filers (simplified with examples)
  - Highlights of schedules for Form 8865 (Schedules A, A-1, A-2, B, K, L, M-1, M-2, N, D, K-1, O, P, not to be confused with Form 990, Form 1120, Form 1120-S, Form 1065 schedules)
  - Relief provisions

- Reporting information with respect to certain foreign disregarded entities (Form 8858)
  - Define “tax owners”
  - Categories (of other forms)
  - Define Foreign Disregarded Entity (FDE)
  - Discuss exchange rates
- Reporting transfers into and operations in boycotted countries (Form 5713)
  - Define “U.S. person”
  - Who must also file
  - Exceptions
  - List current boycotted countries
- Regional reporting concepts/requirements (Form 990, Schedule F)
  - Summarize Form 990, Part IV, Lines 14a, 14b, 15 and 16
  - Summarize Schedule F (Form 990) instructions
  - Related definitions from Form 990 glossary
  - Examples re: foreign activities, investments, etc.
  - Discuss “links/overlaps” to other international filings
- Reporting foreign person's U.S. source income subject to withholding (Form 1042-S/Form 1042)
  - Define "withholding agent"
  - Examples of exempt organization filing instances
  - Comment on filing mismatches that are causing claims to be rejected

**APPENDIX C**

**LIST OF INDIVIDUALS INTERVIEWED**

The individuals listed below agreed to be interviewed for this report:

Adler & Colvin, San Francisco, California: Robert Wexler, Principal

American Institute of CPAs, Washington, D.C.: Chris Cole, Senior Technical Manager,  
Not-for-Profit Content Development and AICPA Not-for-Profit Expert Panel

Aspen Institute, Washington, D.C.: Cinthia Schuman-Ottinger, Deputy Director for  
Philanthropy Programs

Association of Healthcare Philanthropy, Falls Church, Virginia: Steve Churchill,  
President and CEO

Australian Charities and Not-for-Profits Commission, Sydney, Australia: Susan Pascoe,  
Commissioner, and Murray Beard, General Counsel

Australian Taxation Office, Strategy and Policy Branch, Private Groups and High Wealth  
Individuals, Sydney, Australia: Rod Walker, Director

Blumberg Segal LLP, Toronto, Canada: Mark Blumberg, Partner

Center on Nonprofits and Philanthropy, Urban Institute, Washington, D.C.: Elizabeth  
Boris, Director

Center on Philanthropy and Civil Society, Stanford University, Stanford, California: Lucy  
Bernholz, Senior Research Scholar

Centre for Philanthropy and Nonprofits Studies, Queensland University, Australia: Myles  
McGregor-Lowndes, Professor

Children's Hospital of Philadelphia, Philadelphia, Pennsylvania: Bonnie Brier, General  
Counsel

Council for Advancement and Support of Education, Washington, D.C.: Sue Cunningham, President

Council on Foundations, Washington, D.C.: Suzanne Friday, Senior Counsel and Vice President of Legal Affairs, and Katherine LaBeau, (former) Policy Director and Counsel

European Fundraising Association, Austria: Guenther Lutschinger, Chair (and CEO of the Austrian Association)

Evangelical Council for Financial Accountability, Winchester, Virginia: John Van Drunen, Executive Vice President and General Counsel, and Dan Busby, President

Ewing Marion Kauffman Foundation and Philanthropy Roundtable: John Tyler, General Counsel and Corporate Secretary

Exponent Philanthropy, Washington, D.C.: Henry Berman, CEO

Grants Manager's Network, Washington, D.C.: Michelle Greanias, Executive Director

GuideStar, Williamsburg, Virginia: Jacob Harold, CEO

Historic Environment Scotland, Dundee, Scotland: Jane Ryder (former CEO of Office of the Scottish Charity Regulator)

Humanitarian Quality Assurance Initiative, Sydney, Australia: Sue Ann Wallace (former CEO, Fundraising Institute Australia)

Independent Sector, Washington, D.C.: Geoffrey Plague, Vice President, Public Policy, and Allison Grayson, Director, Policy Development and Analysis

International Center for Nonprofit Law, Washington, D.C.: Doug Rutzen, President and CEO

Irish Charities Tax Reform, Dublin, Ireland: Shiela Nordon, Director

Loeb and Loeb, Washington, D.C.: Marc Owens, Partner

## **EXEMPT ORGANIZATIONS – APPENDIX C**

National Council of Nonprofits, Washington, D.C.: Jenny Chandler, Vice President, and Tim Delaney, President and CEO

NT Lawyers, Brisbane, Australia: Mark Fowler, Director

NTEN Coalition, Portland, Oregon: Amy Sample Ward, CEO

Simpson, Thacher & Bartlett, Washington, D.C.: Dave Shevlin, Partner

Tennessee Attorney General: Janet Kleinfelter, Deputy Attorney General (and President, National Association of State Charity Officials)

U.S. Conference of Bishops, Washington, D.C.: Michael Giuliano, Assistant General Counsel, Office of the General Counsel

Washington Society of CPAs, Washington, D.C.: Kari Bedell, Executive Director

**APPENDIX D****LIST OF INTERNATIONAL RESOURCES**

The following list provides examples of helpful web-based resources developed by tax authorities in countries of individuals interviewed by the ACT:

**Charity Regulation in Australia**

Australian Charities and Not-for-Profit Commission website <http://www.acnc.gov.au/> provides advice for not-for-profits, legal forms that can be adapted for use in particular organizational environments.

Australia Taxation Office, “Let’s Talk” website <http://letstalkaustralia.com.au> provides training and coaching for organizations and individuals on effective communication, meeting human needs in NGOs and leadership skills.

Australia Taxation Office website <https://www.ato.gov.au/Non-profit/> provides information on charities to the public and information for charities on how to comply with tax law.

**Charity Regulation in Canada**

Canada Revenue Agency website <http://www.cra-arc.gc.ca/menu-eng.html> provides information on charities to the public and information for charities on how to comply with tax law.

Canada Revenue Agency Fundraising Guidelines website <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/fndrsng-eng.html> outlines the legal principles that relate to fundraising issues that are connected to federal (CRA) regulation of charities registered under the *Income Tax Act*, the policies and practices the CRA uses when it assesses fundraising in applications for registration or in audits of existing registered charities and how fundraising expenditures should be allocated for the purposes of completing [T3010 - Registered Charity Information Return](#).

## Charity Regulation in the Republic of Ireland

Irish Charities Tax Reform Group website <http://www.ictr.ie>. ICTR is a leadership organization working on behalf of charities to enhance the conditions for a vibrant and independent charity sector in Ireland. Irish Charities Tax Research Ltd. is a sister organization to ICTR which has carried out research on VAT and Charities, tax relief on donations and on how regulation of fundraising by means of Codes of Practice can work in Ireland.

Irish Charities Tax Research Ltd and Philanthropy Ireland, “Research into Tax and Regulatory Policy in Ireland to Encourage Greater Philanthropy,” September 2009. <http://www.ictr.ie/files/Research%20into%20Tax%20and%20Regulatory%20Policy%20in%20Ireland%20to%20Encourage%20Greater%20Philanthropy1.pdf> Report containing recommendations for reforms to the Tax Code of Ireland to encourage charitable donations.

Irish Charities Tax Research Ltd, “Regulation of Fundraising by charities through legislation and codes of practice,” <http://www.ictr.ie/files/R1.%20Regulation%20of%20Fundraising%20Report%20-%20May%202008.pdf>.

Irish Charities Tax Research Ltd, “Statement of Guiding Principles for Fundraising,” Feb 2008, <http://www.ictr.ie/files/R2.%20Guiding%20Principles%20of%20Fundraising%20-%20Feb%202008.pdf>.

Irish Charities Tax Research Ltd, “Briefing Notes on the Charities Act 2009,” [http://www.ictr.ie/files/Briefing%20Note%20on%20Charities%20Act%202009\\_0.pdf](http://www.ictr.ie/files/Briefing%20Note%20on%20Charities%20Act%202009_0.pdf).

Irish Charities Tax Research Ltd., “Good Practice Fact Sheets,” <http://www.ictr.ie/content/good-practice-factsheets>.

## Charity Regulation in the U.K.

Charity Commission of England and Wales website

<https://www.gov.uk/government/organisations/charity-commission> provides information on charities to the public and information for charities on how to comply with tax law.

U.K. Fundraising Standards Board website <http://www.frsb.org.uk/>. FSB is the independent self-regulator for fundraising in the UK. The Board encourages high standards in fundraising so that the public can be confident when they make a donation. The Board has 1,977 members and 50 percent of all voluntary income in the UK is raised by charities that are regulated by the FRSB. They support charities in being accountable for their fundraising and listen and help to resolve any concerns from the public.

**Office of the Scottish Charity Regulator** website <http://www.oscr.org.uk/> provides information on charities to the public and information for charities on how to comply with tax law.

This page intentionally left blank.

**ADVISORY COMMITTEE ON  
TAX EXEMPT AND GOVERNMENT ENTITIES  
(ACT)**

**Federal, State and Local Governments:**

**Revised FSLG Trainings and  
Communicating with Small Local Governments**

David Augustine  
Dean Conder  
Vandee DeVore

**June 8, 2016**

This page intentionally left blank.

TABLE OF CONTENTS

**I. EXECUTIVE SUMMARY .....[161](#)**

**II. INTRODUCTION.....[162](#)**

**III. HISTORY .....[162](#)**

**IV. DUE DILIGENCE .....[163](#)**

**V. CONCLUSION .....[167](#)**

**APPENDIX A – Training Recommendations for the Social Security and Medicare Coverage for State and Local Government Employees.....[168](#)**

**APPENDIX B – Survey of Small Local Government Entities (including narrative comments).....[173](#)**

**APPENDIX C – National Associations and Professional Organizations.....[195](#)**

This page intentionally left blank.

## I. EXECUTIVE SUMMARY

The ACT FSLG Subcommittee took on two projects for this report: a technical revision of internal FSLG Section 218<sup>128</sup> Trainings and a project to better achieve outreach and education to small local governments. There are 90,056 local government entities in the United States<sup>129</sup> with 11,933,783 full-time equivalent employees with payrolls in excess of \$50 billion,<sup>130</sup> and currently only 47 IRS FSLG field specialists dedicated to state and local government issues.

Technical experts among the FSLG Subcommittee reviewed and made comments on the FSLG Phase Training, which is the internal program providing specialized knowledge to FSLG employees on the complex compliance issues for state and local government employers. The members of the subcommittee worked with senior FSLG agents to devise a new strategy and syllabus for FSLG internal training on Section 218 (42 U.S.C. 418) matters for new and continuing education.

The ACT FSLG Subcommittee formulated a survey to seek input from small local governments. The survey was distributed through various professional organizations and other outlets. A total of 437 responses were received. There were seven total questions plus an opportunity for free form feedback. The respondents seemed to value the survey as many took the time to provide narrative responses. This survey provides the backbone to the Subcommittee's recommendations.

The ACT FSLG Subcommittee makes the following recommendations (numbered for ease of reference not necessarily importance):

1. Implement changes to the FSLG Phase Training as identified in Appendix A;
2. Provide more focus on state specific laws in the FSLG Phase Training;

---

<sup>128</sup> "Section 218" refers to a process under which a governmental employer provides voluntary Social Security and Medicare coverage to its employees.

<sup>129</sup> [http://www2.census.gov/govs/cog/g12\\_org.pdf](http://www2.census.gov/govs/cog/g12_org.pdf).

<sup>130</sup> <http://www2.census.gov/govs/apes/12locus.txt>.

## **FEDERAL, STATE AND LOCAL GOVERNMENTS**

3. Partner with state auditor's offices to ensure proper compliance of local governments with employment tax laws, by utilizing basic reviews of 218 Agreements, coupled with W-2 and 1099 reporting;
4. FSLG partner with the national, professional organizations identified in Appendix C to further the educational outreach to small local governments;
5. Email "flash news" was preferred by small local governments, so FSLG needs to find better ways to advertise the existing FSLG email subscription service;
6. FSLG should NOT hesitate to repeat topics of importance when conducting outreach;
7. Smaller government entities need direct training and the staff of these entities should be the target of outreach efforts; and
8. FSLG work with other TE/GE Divisions to develop a comprehensive plan on identifying government entities in each state.

## **II. INTRODUCTION**

The ACT FSLG Subcommittee took on two projects for this report: a technical revision of internal FSLG Section 218 trainings and a project to better achieve outreach and education to small local governments. Regarding the latter topic, the Subcommittee desired to create a framework regarding how local government entities are identified in the states, and to identify preferred training content and delivery methods.

## **III. HISTORY**

Prior to 1987, state and local government employment taxes (Social Security and/or Medicare taxes otherwise known as FICA) were collected by each State Social Security Administrator (See 20 C.F.R 404.1204) and prior to July 2, 1991, the only way for a state or local government employer to provide Social Security coverage to its employees was through a Section 218 Agreement. In 1987, the IRS was officially tasked to collect employment taxes from these government employers. The IRS in

2000 formed the Federal, State and Local Governments division to provide compliance oversight to state and local government employers. FSLG continues to supply audit, compliance review and outreach products to this customer base of state and local governments. The area of state and local government FICA compliance is exceedingly complex and requires specialized knowledge by IRS agents assigned to FSLG. This specialized knowledge is delivered by FSLG through its “Phase Training.”

In regard to outreach to small local governments, even comprehending the landscape is difficult. There are 90,056 local government entities in the United States<sup>131</sup> with 11,933,783 Full-time Equivalent employees with payrolls in excess of \$50 billion,<sup>132</sup> and currently only 47 IRS FSLG field specialists dedicated to state and local government issues. These local government entities range from traditionally understood institutions, like cities and counties, to less known ones, like fire protection and utility districts. (The Subcommittee takes a broad view of what constitutes a government entity, and includes in this definition quasi-government institutions as well.) It is difficult to generalize about the characteristics of these organizations, which can have no employees or tens of thousands of employees. However, a great number of these entities may have reporting obligations with the IRS, and would benefit from information provided from the IRS on a variety of topics. Many of the smaller entities are essentially “off the radar” from the IRS and do not appear to be connected to the FSLG in any way. The Subcommittee wanted to better understand who these political subdivisions might be, determine if they interact with the IRS and determine what content and method of information sharing is preferred.

#### **IV. DUE DILIGENCE**

##### **Revision of Internal FSLG Section 218 Trainings:**

The Subcommittee has commented on and assisted FSLG with a new strategy and syllabus for the IRS FSLG agents’ internal training, both for new hires and continuing education.

---

<sup>131</sup> [http://www2.census.gov/govs/cog/g12\\_org.pdf](http://www2.census.gov/govs/cog/g12_org.pdf).

<sup>132</sup> <http://www2.census.gov/govs/apes/12locus.txt>.

## **FEDERAL, STATE AND LOCAL GOVERNMENTS**

FSLG is revising the entire Phase Training components and other internal trainings. FSLG staff provided documents with these new strategies. The Subcommittee reviewed these documents and commented. Phase I training is usually completed in classroom, but may be done virtually in the future. About three weeks after Phase I, an on-the-job instructor (OJI), or senior agent, is assigned to a new hire for real world work assignments of “training cases” that are denoted from project codes in the system.

The OJI is determined by the area manager based upon skill sets for communication, experience levels, interpersonal skills and knowledge sharing. The intent is to have the same OJI assigned to the hire throughout the entire process for continuity purposes.

### **Recommendations:**

FSLG staff provided the training materials, which were edited by the Subcommittee, and agreed to by the agents. We recommend implementation of these changes. (See Appendix A for training recommendations strategy.)

The Subcommittee suggests that the training materials include more focus on state specific laws, knowledge and practices, since after Phase I is completed, a new hire will know the states he/she will be assigned.

Currently, it does not appear that any state auditor’s office includes Section 218 or any other employment tax questions in their audit plans for the local entities. The IRS may want to consider partnering with state auditor’s offices to include Section 218 questions and other employment tax basic reviews like whether reporting should be done on Form W-2 or Form 1099s in various reporting situations.

### **FSLG Outreach and Education to Small Local Governments Project**

The ACT FSLG Subcommittee spoke with Mr. Paul Marmolejo, FSLG Director, and members of his staff periodically throughout 2015. The ACT FSLG Subcommittee formulated a survey to seek input from small local governments (see Appendix B for

survey questions and responses). The survey was distributed through various professional organizations and other outlets (see Appendix C for distribution list). The survey was open for responses from October 9, 2015 through December 31, 2015.

A total of 437 responses were received. There were seven total questions plus an opportunity for free form feedback. The respondents seemed to value the survey as many took the time to provide narrative responses. The target universe was reached; 100 percent responding were from traditional government entities, including, in order of volume, cities/towns, school districts, fire districts and counties.

We asked entities to describe what state level entity they registered with (Question 2). We received a range of responses, and there was—as one might expect—no consistent set of agencies that regulated or managed the political subdivisions. The result is not surprising that there are a range of local political entities that have various forms of governance and regulation. This makes it difficult for the IRS/FSLG to partner with state governments as the primary distribution link to reach local government entities.

Many of the entities that responded to our survey indicated that they have more than 20 full-time employees. While the Subcommittee was pleased with the fact that 437 entities responded to the survey, it should be acknowledged that there are estimated to be more than 100,000 small governmental entities nationwide. We also understand that a majority of respondents to the survey resulted via the connection with the National Conference of State Social Security Administrators. Despite the survey results, the Subcommittee believes the majority of government entities in the country have fewer than 20 employees, and outreach needs to be crafted to reflect this reality. Of the types of staffing reported, the vast majority of entities employ internal staff, as opposed to third parties or contractors, to make required IRS filings.

Respondents were then asked in what format they prefer to receive communications regarding IRS education and updates. A clear plurality favored flash releases via email as the preferred method of information distribution. The respondents ranked the formats in the following order: flash news releases via email, quarterly

## **FEDERAL, STATE AND LOCAL GOVERNMENTS**

newsletters on various topics via email, 15-30 minute webinars on specific topics, materials posted to the irs.gov website, printed materials, 15-30 minute podcasts and 15-30 minute phone forums.

In terms of preferred topics, there was demand for assistance with IRS reporting requirements (e.g., employment tax and new reporting under the Affordable Care Act), fringe benefit exclusion rules, Payroll 101 and employer-provided cell phones and vehicles.

### **Recommendations:**

Our Subcommittee contacted several national associations to distribute our survey, and had some success. We recommend IRS partner with these national organizations (listed in Appendix C) to further the outreach for information and education exchange to these small local governments. The State Administrator/Retirement System contacts were particularly effective for dissemination of the survey, but further affiliations would be beneficial.

In terms of format, small entities preferred “flash news” items via email over other formats. Webinars and phone forums have been prioritized by the IRS recently, and the subcommittee wants to call attention to the fact that alternative forms of communication may be warranted to supplement webinars. Anecdotal feedback indicates that many respondents view the phone forums as too time-consuming and scripted. The Subcommittee recommends that the IRS/FSLG find better ways to get the word out about their existing email subscription service through partnering with the national associations identified in Appendix C.

Regarding content, the Subcommittee recommends small, topical articles, specific to one subject emailed periodically throughout the year. FSLG should not hesitate to repeat topics of importance using different messaging to capture different audiences, and also to make content easier to understand. The IRS FSLG should not necessarily ensure that materials are comprehensive on all facets, since there is a tradeoff between length of program and quality and volume of participation.

Regarding outreach, it will be key to target internal staff in these entities. It appears that smaller entities need direct training with their employees as opposed to reliance on their CPA firms or other third parties.

The Subcommittee recommends that the IRS FSLG develop a comprehensive plan for how to identify government entities in each state. This plan could involve the use of other professional associations, state associations and state officials.

## **V. CONCLUSION**

The area of state and local government FICA compliance is exceedingly complex and requires specialized knowledge by IRS agents assigned to FSLG. With the limited resources available to the FSLG, it is vitally important to have well-trained staff. By implementing a new strategy and syllabus for FSLG internal training on Section 218 (42 U.S.C. 418) matters for new agents and providing continuing education, the FSLG will have the necessary expertise.

With over 90,000 local government entities in the United States and only 47 agents to ensure compliance, FSLG must rely upon outreach and education to gain the most effect for the efforts of those 47 agents. Outreach to smaller local government entities is even more crucial as these types of entities often times lack the specialized knowledge required and rely on internal staff for compliance. First, the FSLG must develop a system that accurately identifies these small local governments (they are often created and dissolved within each state). Next, the FSLG should find new ways to advertise their existing email subscription service to provide the preferred “flash news” items that can enhance compliance. FSLG should not hesitate to repeat topics of importance using different messaging to capture different audiences, and also to make content easier to understand.

## APPENDIX A

### Training Recommendations for the Social Security and Medicare Coverage for State and Local Government Employees Guide

Assigned IRS staff will begin developing the *Social Security and Medicare Coverage for State and Local Government Employees Guide* (guide) in November of 2015. The guide will incorporate information from Publication 963 (Federal-State Reference Guide), State and Local Coverage Handbook (SLCH) and most current training materials.

#### **New hires – classroom training (as it occurs)**

The guide will be used in conjunction with Phase I, II, and III\* classroom training material. There are generally two basic training materials used in training new hires, a Student Guide and an Instructor Guide (training material). Throughout both training materials, the guide will be referenced. The Instructor Guide will indicate to the instructor what excerpts from the guide such as case studies, examples, etc. to emphasize.

\*NOTE: Because of the complexity of the topics in Phase II, we most likely will move or expand some of the topics into Phase III.

#### **New hires – on-the-job training**

At the end of Phase I and II training, the new hires go through an “on-the-job” phase where they work cases with the assistance of an “on-the-job” instructor (OJI) incorporating the concepts learned in phase training and create tools, not in the guide, as issues come up such as, but not limited to:

- Recap Revenue Procedure 91-40
- Job aid defining part-time and how to work that issue
- Form to request modification from State Social Security Administrator

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX A

- Job aid on election worker payments
- The form entities may use – IRS Name Change Notification – for IRS IDRS updates
- Utilize State and Local Coverage Handbook from SSA
- Job aid on 414(h)(2) "pick up" contributions
- Create or incorporate 218 information in the Internal Revenue Manual (IRM) and FSLG website
- Job aid on mandatory Social Security and Medicare coverage
- Job aid on student services
- Special state provisions noting differences among states

The OJI and Section 218 group champions, which are located in each group, may work together to train the students on Social Security and Medicare coverage for government employees. The OJI's student training will include, but will not be limited to, the following:

- How to look at modifications
- How to read modifications
- Understand customer bases
- Discuss basic 218 issues such as:
  - Absolute coverage groups (b5)
  - Retirement system coverage groups (d4) or (d6)
  - Mandatory exclusions
  - Optional exclusions
  - Effective dates

### **Fiscal year 2016 continuing professional education (CPE):**

CPE is conducted through SABA meeting, a virtual outlet. For fiscal year 2016, each Section 218 group champion will discuss a Section 218 item.

**Fiscal year 2017 continuing professional education and subsequent year**

Section 218 group champions will discuss reoccurring or problematic issues, segments of the guide to provide additional and/or more detail training, job aids, work papers, legislative changes and other items of significance to FSLG employees.

**Social Security and Medicare Coverage for Government Employees Guide**

Take the current sections of Phase I and II and combine the topics into chapters that go together in a way that flows best. We can delete, reduce or combine sections as needed. Throughout the document when appropriate, we can cite a “HINT,” initial interview #1, IDR or audit procedure. Take all the hints and create a separate job aid/link/exhibit for each type of hint (i.e., a job aid for initial interview). Within the document, we could also cite examples from the ACT committee, references to State and Local Handbook or Pub 963 (whatever is acceptable).

\*NOTE: There are other sections in Phase I and II training that cite Section 218 Agreement items. We may want to just look at those sections to ensure that correct information is included.

**Phase I**

**Chapter**

- 1 Legislative History
- 2 Public Retirement Systems
- 3 Section 218 Coverage
  - Basic Section 218 Concepts
    - Glossary of Terms
    - State Enabling Legislation
    - Original Agreement
    - Modifications
  - Mandatory Section 218 Exclusions
  - Optional Section 218 Exclusions
  - Coverage Groups
    - Absolute Coverage Group
    - Retirement System Coverage Group
      - Majority Vote Referendum
      - Divided Vote Referendum
      - Medicare HI-Only for Pre-86 Hires
- 4 Non Section 218 Coverage
  - Mandatory Social Security Coverage
    - Exclusions
  - Mandatory Medicare Coverage
    - Exclusions
    - Continuing Employment Exception
- 5 Police Officers and Firefighters
- 6 Teachers
- 7 Steps to Determine Social Security and Medicare Coverage
- 8 Effective Dates of Coverage
- 9 Form 8821

**Phase II**

**Chapter**

- 1 A Review of Social Security and Medicare Coverage of State and Local Government Employees
- 2 Retirement System Coverage
  - System-wide
  - Entity
- 3 Retirement Plan Optionals
- 4 Retirement Plan Ineligibles
- 5 Rehired Annuitants
  - New Hire vs New Member
  - Frequently Asked Questions
- 6 Multiple Positions
- 7 Dates Associated with Section 218 Modifications
- 8 Reporting New Government Components
- 9 Error Modifications
- 10 Continuation of Coverage Rules
  - Majority Vote Retirement System
  - Divided Vote Retirement System
- 11 Termination of Coverage Rules
- 12 Review of Modification Examples

**APPENDIX B**

**Survey of Small Local Government Entities  
(including narrative comments)**

**Q1 What best describes how you would identify your entity?**

Answered: 437 Skipped: 0

**Table 1: Survey Q1 Selected Answers**

Answer Choices	Responses	
City/Municipality/Village/Township	37.99%	166
School District	14.42%	63
Fire District	8.47%	37
Other (please specify)	7.32%	32
Water/Sewer District	7.09%	31
County	4.81%	21
Ambulance/911 District	2.75%	12
Soil & Water Conservation District	2.75%	12
Port Authority	2.52%	11
Library District	2.29%	10
College/University/Higher Education	1.60%	7
Economic Planning Commission	1.60%	7
Utility	1.60%	7
Cemetery District	1.14%	5
Transit Authority/Transportation District	1.14%	5
Housing Authority	0.92%	4
Road District	0.92%	4
A Company	0.23%	1
Airport	0.23%	1
Levee District	0.23%	1
Hospital/Health Center	0.00%	0
Nursing Home	0.00%	0
<b>Total</b>		<b>437</b>

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

Table 2: Survey Q1 “Other” Narrative Answers

#	Other (please specify)	Date
1	501(c)(3) Corporation	12/23/2015 10:41 AM
2	Drainage District	12/22/2015 1:29 PM
3	Irrigation District	12/22/2015 12:46 PM
4	Political Subdivision-Senior Services Tax Fund	12/14/2015 10:42 AM
5	Irrigation District	12/14/2015 10:11 AM
6	Parks and Recreation District	12/14/2015 10:04 AM
7	Nuclear Plant	12/14/2015 9:41 AM
8	State	12/14/2015 9:39 AM
9	Local Government	12/14/2015 9:35 AM
10	Non-Profit - Federally Funded	12/14/2015 9:34 AM
11	Irrigation District	12/14/2015 9:32 AM
12	Quasi-Governmental Organization	12/14/2015 9:18 AM
13	Workers Compensation	12/14/2015 9:06 AM
14	Licensing Agency	12/14/2015 9:00 AM
15	Public Marina	12/14/2015 9:00 AM
16	Mosquito Control District	12/14/2015 8:59 AM
17	Special District - Park & Recreation	12/14/2015 8:52 AM
18	Semi-independent State Agency	12/14/2015 8:50 AM
19	Special District Organized Under ORS 190	12/14/2015 8:46 AM
20	State Commodity Commission	12/14/2015 8:37 AM
21	Senior Citizens Activity Center	12/14/2015 8:33 AM
22	Weed & Pest Control District	12/11/2015 11:55 AM
23	Joint Powers Board	12/11/2015 8:43 AM
24	State Government	12/8/2015 2:27 PM
25	Clean Air Agency	12/8/2015 2:09 PM
26	Inter-Governmental Agency	12/8/2015 2:06 PM
27	Subdivision of State; Regional Air Pollution Agency	12/8/2015 2:02 PM
28	Irrigation District (Special Purpose District)	12/8/2015 2:02 PM
29	Area Agency on Aging	12/8/2015 2:01 PM
30	State Agency	11/23/2015 11:09 AM
31	Park District	11/19/2015 8:58 AM
32	Excess Liability JPA	11/2/2015 3:37 PM

**FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B**

**Q2 Does your entity register with any State agency?  
(i.e.,: Secretary of State, Dept of Revenue, Dept of Labor, etc.)  
Please list all that apply:**

Answered: 437 Skipped: 0

**Table 3: Survey Q2 Narrative Answers**

#	Responses	Date
1	WY Dept of Workforce Services WY Dept of Audit-Survey of County Board Finances	12/31/2015 12:32 PM
2	Unknown	12/31/2015 11:58 AM
3	All of the above	12/31/2015 10:39 AM
4	Unknown	12/30/2015 4:26 PM
5	Revenue Dept., BOLI, other agencies as required	12/28/2015 6:08 PM
6	Secretary of State, Dept of revenue, ODE	12/28/2015 6:04 PM
7	All	12/28/2015 4:20 PM
8	Dept of Revenue, Dept of Labor & Industries, Secretary of State,	12/23/2015 1:36 PM
9	Yes	12/23/2015 10:41 AM
10	report to Secretary of State, Dept of Revenue	12/22/2015 3:54 PM
11	Dept of Revenue, Dept of Retirement, State Auditor, Labor & Industries, Employment Security	12/22/2015 1:57 PM
12	Dept of Revenue	12/22/2015 1:54 PM
13	Secretary of State Oregon Dept of Energy Oregon Dept of Revenue Oregon PUC Oregon State Audits Division Oregon PERS	12/22/2015 1:54 PM
14	Dept of Revenue, Dept of Labor	12/22/2015 1:53 PM
15	Dept. of Revenue, BSO, Internal Revenue, Dept. of Labor and PERS.	12/22/2015 1:52 PM
16	Secretary of State, Dept of Revenue, OR Dept of Transportation, Special Districts Asn of OR	12/22/2015 1:52 PM
17	Dept. of Labor, Dept. of Revenue, Secretary of State	12/22/2015 1:51 PM
18	Secretary of State, Dept of Revenue, Dept of Labor, Dept of Retirement Systems, Dept of Transportation, Unemployment (list may not be all inclusive)	12/22/2015 1:50 PM
19	Unknown	12/22/2015 1:50 PM
20	Secretary of State Dept of Revenue Dept of Labor Employment Security Dept Dept of Retirement Systems	12/22/2015 1:49 PM
21	Secretary of State Department of Revenue Department of Labor	12/22/2015 1:49 PM
22	State Auditor's Office, L&I, Department of Retirement, Department of Revenue	12/22/2015 1:48 PM
23	sos, dol	12/22/2015 1:42 PM
24	Department of Higher Education	12/22/2015 1:42 PM
25	Auditor, Emergency Management, Public Safety, Secretary of State, Department of Transportation, Health & Senior Services, Social Services, Homeland Security	12/22/2015 1:41 PM
26	We are a subdivision of the state.	12/22/2015 1:40 PM
27	secretary of state, Dept of revenue, Dept of Labor dept of justice and etc. we are a political subdivision of the state of oregon	12/22/2015 1:39 PM
28	State Board of Education, Office of Community Colleges and Workforce Development	12/22/2015 1:38 PM
29	Employment Security Department Department of Labor & Industries Department of Retirement Services	12/22/2015 1:37 PM
30	Dept. of Audit	12/22/2015 1:36 PM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

Table 4: Survey Q2 Narrative Answers (continued)

#	Responses	Date
31	Secretary of State; Department of Revenue; Attorney General Office; Wyoming Retirement System; Local Government Liability Pool; Wyoming Workforce Services; Wyoming Child Support Enforcement; Wyoming Emergency Preparedness	12/22/2015 1:36 PM
32	Secretary of State	12/22/2015 1:35 PM
33	Secretary of State	12/22/2015 1:34 PM
34	No	12/22/2015 1:34 PM
35	Secretary of State	12/22/2015 1:33 PM
36	DEPT OF LABOR	12/22/2015 1:32 PM
37	Not sure if we register with a State agency. We are funded and regulated by the State.	12/22/2015 1:30 PM
38	Oregon Dept of Revenue	12/22/2015 1:29 PM
39	State of Oregon	12/22/2015 1:27 PM
40	Dept. of Revenue Bureau of Labor State	12/22/2015 1:25 PM
41	DOR DOL	12/22/2015 1:06 PM
42	Dept of Revenue, Dept of Labor, DSHS, Employment Security Dept, Social Security, Bureau of Labor Statistics, WA St. Dept of Retirement, ST Auditor's Office, Sec of State Office, WA St Archives, Dept Of Licensing (there may be others, but these are the ones for my department - Payroll, Election, Recording,	12/22/2015 1:03 PM
43	Yes, Secretary of State, Depts of Revenue, Labor, Retirement, Employment Security	12/22/2015 1:02 PM
44	Department of Revenue, Washington State Department of Retirement Systems, Employment Security Department, Department of Labor & Industries	12/22/2015 1:02 PM
45	Dept of Revenue Dept of Labor Dept of Retirement Dept of Employment Security Dept of Transportation (cognizant agency)	12/22/2015 1:01 PM
46	State of Washington DSHS, Dept of Labor, Dept of Revenue, Dept of Retirement,	12/22/2015 1:00 PM
47	Secretary of State Dept of Revenue Dept of Labor	12/22/2015 12:58 PM
48	Secretary of state, dept of revenue, dept of labor	12/22/2015 12:58 PM
49	Secretary of State, Dept of labor	12/22/2015 12:57 PM
50	dept of revenue, dept of labor,	12/22/2015 12:56 PM
51	Department of Revenue Department of Labor Department of Retirement Systems Employment Security Department	12/22/2015 12:56 PM
52	Secretary of State, Department of Revenue, Department of Labor, Missouri Department of Conservation, State Emergency Management Agency	12/22/2015 12:55 PM
53	SOS	12/22/2015 12:55 PM
54	Secretary of State	12/22/2015 12:54 PM
55	Secretary of State Dept. of Labor Dept. of Revenue SEMA	12/22/2015 12:54 PM
56	Dept of Revenue Dept of Labor Secretary of State	12/22/2015 12:53 PM
57	Colo Dept of Revenue	12/22/2015 12:53 PM
58	Secretary of State, Dept of Labor, Dept of Revenue,	12/22/2015 12:52 PM
59	Missouri Department of Higher Education	12/22/2015 12:52 PM
60	Secretary of State, Department of Labor, Department of Revenue, Office of Administration, Department of Transportation, Department of Natural Resources, Health and Senior Services, Department of Economic Development, Department of Public Safety, University of Missouri,	12/22/2015 12:51 PM

**FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B**

**Table 5: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
61	No	12/22/2015 12:51 PM
62	State Auditor, Dept of Revenue, Dept of Labor, State Department of Local Affairs, State Treasurer	12/22/2015 12:50 PM
63	Wyo Retirement system	12/22/2015 12:50 PM
64	No	12/22/2015 12:49 PM
65	No	12/22/2015 12:49 PM
66	WE have a Federal ID number, tax exempt number, work closely with the SOS and DOR	12/22/2015 12:47 PM
67	Dept. of Revenue, Dept. of Labor, Dept. of Public Funds, and Dept. of Workforce Services	12/22/2015 12:46 PM
68	Wyoming State Library, Department of Audit	12/22/2015 12:45 PM
69	Dept. or Revenue	12/22/2015 12:44 PM
70	Not applicable	12/22/2015 12:43 PM
71	Secretary of State Dept of Revenue Dept of Labor	12/22/2015 12:36 PM
72	Dept of Labor Employment Security Dept of Revenue Dept of Retirement Systems	12/22/2015 12:35 PM
73	Dept of Revenue	12/22/2015 12:35 PM
74	Department of Education	12/22/2015 12:34 PM
75	Department of Revenue, Department of Labor	12/22/2015 12:14 PM
76	Department of Revenue	12/16/2015 11:04 AM
77	no	12/15/2015 4:43 PM
78	Wy Dept of Labor, Wy Dept Revenue, Wy Dept of Education	12/15/2015 4:33 PM
79	Secretary of State	12/15/2015 4:31 PM
80	Secretary of State	12/15/2015 2:02 PM
81	No	12/14/2015 5:00 PM
82	zvzxvz	12/14/2015 11:21 AM
83	?	12/14/2015 11:20 AM
84	We are part of Wyoming Department of Education	12/14/2015 10:50 AM
85	Dept of Labor, Dept of Revenue	12/14/2015 10:49 AM
86	Dept of Revenue, Secretary of State, Dept of Labor	12/14/2015 10:49 AM
87	Department of Revenue, Department of Labor, Secretary of State	12/14/2015 10:48 AM
88	Ethics	12/14/2015 10:48 AM
89	DOR, DOL	12/14/2015 10:47 AM
90	DESE	12/14/2015 10:46 AM
91	Secretary of State, Dept of Revenue, Dept of Education	12/14/2015 10:46 AM
92	Secretary of State Dept of Revenue Dept of Labor Dept of Transportation Dept of Natural Resources	12/14/2015 10:45 AM
93	Department of Labor, Department of Revenue	12/14/2015 10:45 AM
94	Unknown	12/14/2015 10:44 AM
95	Secretary of State, Department of Revenue, Department of Labor, Missouri Ethics Commission	12/14/2015 10:43 AM
96	Secretary of State, Dept of Elementary and Secondary Education, MO Dept of Revenue	12/14/2015 10:43 AM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

Table 6: Survey Q2 Narrative Answers (continued)

#	Responses	Date
97	DOR, DOL	12/14/2015 10:42 AM
98	Dept of Revenue	12/14/2015 10:42 AM
99	Dept of Revenue Division of Employment Security Missouri State Auditor	12/14/2015 10:41 AM
100	Department of Elementary and Secondary Education	12/14/2015 10:41 AM
101	Dept of Revenue Dept of Labor	12/14/2015 10:41 AM
102	No.	12/14/2015 10:39 AM
103	Dept of Revenue Secretary of State	12/14/2015 10:38 AM
104	Dept of Revenue Dept of Labor State Grant Agencies	12/14/2015 10:38 AM
105	Secretary of State, Dept. of Revenue and Dept. of Labor	12/14/2015 10:38 AM
106	Dept of Local Affairs, Dept of Revenue, Secretary of State	12/14/2015 10:37 AM
107	Sec of State	12/14/2015 10:37 AM
108	Dept of Labor	12/14/2015 10:36 AM
109	Department of Health, Bureau of EMS	12/14/2015 10:36 AM
110	Dept of Revenue Dept of Treasury	12/14/2015 10:35 AM
111	Secretary of State, Department of Revenue, Office of Missouri State Auditor	12/14/2015 10:35 AM
112	Secretary of State, Dept of Revenue	12/14/2015 10:34 AM
113	All the above	12/14/2015 10:34 AM
114	Dept of Natural Resources	12/14/2015 10:33 AM
115	Department of Revenue, Secretary of State, Department of Labor,	12/14/2015 10:33 AM
116	Department of Local Affairs State Auditors Office Secretary of State	12/14/2015 10:32 AM
117	Dept. of Revenue, Dept. of Labor, Ethics Commission, Mo. State Auditor, County Legislature, Board of Elections	12/14/2015 10:31 AM
118	Department of Elementary and Secondary Education	12/14/2015 10:31 AM
119	DHSS, Bureau of EMS	12/14/2015 10:30 AM
120	Department of Revenue	12/14/2015 10:30 AM
121	All	12/14/2015 10:29 AM
122	unknown	12/14/2015 10:28 AM
123	Yes	12/14/2015 10:28 AM
124	Revenue Labor	12/14/2015 10:26 AM
125	Not that I am aware of	12/14/2015 10:25 AM
126	Dept. of Revenue, Dept. of Labor, State of Colorado	12/14/2015 10:25 AM
127	Dept. of Revenue, Dept. of Education, Dept. of Labor,	12/14/2015 10:24 AM
128	noi	12/14/2015 10:23 AM
129	Secretary of State, Dept. of Revenue, Dept. of Labor	12/14/2015 10:22 AM
130	?	12/14/2015 10:21 AM
131	Secretary of State, Department of Revenue, Department of Labor	12/14/2015 10:20 AM
132	Dept of Revenue; Division of Employment Security	12/14/2015 10:20 AM

**FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B**

**Table 7: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
133	Dept of Labor, Dept of Revenue, Dept of Workforce Development, Dept of Employee Trust Funds, Dept of Public Instruction	12/14/2015 10:19 AM
134	Department of Elementary and Secondary Education	12/14/2015 10:19 AM
135	DOLA, Office of the State Auditor, CDOT	12/14/2015 10:18 AM
136	?Not sure what is meant by register... Department of Elem. and Sec. Ed. Missouri Ethics Commission Dept. of Labor Missouri Public School Retirement System Department of Revenue	12/14/2015 10:17 AM
137	DOR, LNI	12/14/2015 10:16 AM
138	Dept. of Retirement Systems, Revenue, Labor & Industries, Employment Security	12/14/2015 10:15 AM
139	WA Department of Revenue WA Department of Labor & Industries WA Employment Security Department	12/14/2015 10:14 AM
140	Department of Revenue Department of Labor and Industries Department of Employment Security	12/14/2015 10:13 AM
141	What does "register" mean? We deal with nearly all state agencies. We have accounts for payroll taxes and utility excise taxes with the applicable agencies.	12/14/2015 10:13 AM
142	?	12/14/2015 10:12 AM
143	Secretary of State, Dept Labor and Industries, Employment Security, Department of Retirement	12/14/2015 10:11 AM
144	Department of Revenue, Department of Labor, Department of Labor and Industries, Department of Retirement Systems, Department of Social and Health Svs.	12/14/2015 10:10 AM
145	Employment Security, L&I	12/14/2015 10:10 AM
146	saw, ,DOH,SAO,L&I, DOR	12/14/2015 10:09 AM
147	Dept. of Revenue Dept. of Labor & Industries Employment Security Dept.	12/14/2015 10:08 AM
148	Dept of Revenue, Employment Security, Health and Social Services,	12/14/2015 10:07 AM
149	Department of Revenue, Department of Labor & Industries, Employment Security Department, Secretary of State, Department of Retirement, Department of Ecology	12/14/2015 10:06 AM
150	Department of Retirement Systems WA Labor and Industries Employment Security Department	12/14/2015 10:06 AM
151	Washington State Auditor Dept of Revenue L&I Employment Security Dept.	12/14/2015 10:05 AM
152	All relevant government entities L & I, IRS, Dept of Revenue, Dept of Retirements Systems, Dept. of Employment Security - State of Idaho-Taxes - .	12/14/2015 10:05 AM
153	WA State: Auditor's Office Dept of Commerce Dept of Employment Security Dept of Labor & Industries Dept of Licensing Dept of Retirement Systems Dept of Revenue Health Care Authority	12/14/2015 10:04 AM
154	Dept of Revenue	12/14/2015 10:04 AM
155	Dept of Revenue, Dept of Labor, Unemployment Agency	12/14/2015 10:03 AM
156	Department of labor, department of revenue	12/14/2015 10:02 AM
157	Department of Education	12/14/2015 10:02 AM
158	No	12/14/2015 10:01 AM
159	Dept. of Revenue, Dept. Labor and Industries, Employment Security, State Auditor, Health Care Authority, Dept. of Retirement Systems, Conservation Commission	12/14/2015 10:00 AM
160	Dept of Revenue, Dept of Labor, Internal Revenue Service, Employment Security Dept.	12/14/2015 9:59 AM
161	Secretary of State State Auditor Department of Revenue Department of Retirement Systems	12/14/2015 9:58 AM
162	Dept of Revenue, Dept of L & I, Dept of Employment Sec. Dept of Retirement	12/14/2015 9:58 AM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

#	Responses	Date
163	SAM DOR EDS L&I Secretary of State	12/14/2015 9:57 AM

**Table 8: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
164	WA State Dept of Revenue, WA State Dept of L&I, WA State Dept of Health, WA State Dept of Retirement Systems	12/14/2015 9:57 AM
165	Dept of Revenue Dept of Labor	12/14/2015 9:56 AM
166	Secretary of State, Department of Revenue, Labor and Industries, Employment Security, Board for Volunteer Firefighters	12/14/2015 9:56 AM
167	No	12/14/2015 9:55 AM
168	Dept of Revenue, Dept of Labor	12/14/2015 9:55 AM
169	no	12/14/2015 9:54 AM
170	DOR, DOL	12/14/2015 9:54 AM
171	Secretary of State, Dept of Revenue	12/14/2015 9:53 AM
172	DRS Dept of Revenue	12/14/2015 9:52 AM
173	All government agencies related to typical local government operating.	12/14/2015 9:52 AM
174	Dept of Revenue, Dept of Labor, Employment Security,	12/14/2015 9:51 AM
175	Dept of Revenue, Dept of L&I, State Unemployment, Department of Retirement Systems	12/14/2015 9:51 AM
176	Secretary of State, Dept of Revenue, Dept of Labor, Dept of Retirement Systems	12/14/2015 9:50 AM
177	Department of Health, Department of Licensing	12/14/2015 9:49 AM
178	Dept of Labor, Employment Security Dept, Dept of Revenue, Internal Revenue Service, Department of Retirement Systems	12/14/2015 9:48 AM
179	Dept of Revenue, Dept of Labor, SAO	12/14/2015 9:48 AM
180	Dept. of L & I; Employment Security; State Auditor; Dept. of Retirement	12/14/2015 9:48 AM
181	Secretary of State	12/14/2015 9:47 AM
182	Secretary of State, Dept of Revenue, Dept of L&I, Dept of Retirement.	12/14/2015 9:47 AM
183	Dept. Of Revenue, L&I, Employment Security.	12/14/2015 9:46 AM
184	Department of Revenue, Department of Labor & Industries, Employment Security, Department of Retirement and Washington State Deferred Compensation	12/14/2015 9:46 AM
185	L&I	12/14/2015 9:45 AM
186	Department of Labor Department of Revenue	12/14/2015 9:44 AM
187	Secretary of State, Department of Revenue, Department of Labor & Industries, Employment Security, DRS	12/14/2015 9:44 AM
188	Dept of Revenue, Labor & Industries, Employment Security, Dept of Retirement Systems.	12/14/2015 9:43 AM
189	Dept of L & I Employment Security Dept WA State Retirement Systems	12/14/2015 9:42 AM
190	Dept of Revenue, L & I, Unemployment Security, DRS	12/14/2015 9:42 AM
191	Work with Dept of Revenue, Dept of Labor/Industries, State Treasurer, Dept of Retirement, Employment Security, WSDOT, RCO, TIB, Dept of Ecology, and several others.	12/14/2015 9:41 AM
192	Department of Labor State PERS Employment Security	12/14/2015 9:41 AM
193	Secretary of State, Department of Revenue, Department of Labor, Department of Transportation, Department of Local Affairs, Department of Treasury, Department of Health and Environment, Department of Regulatory Agencies, Department of Natural Resources, Department of Agriculture,	12/14/2015 9:40 AM

**FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B**

#	Responses	Date
194	N/A	12/14/2015 9:39 AM
195	Not sure what is meant by register. Report to DOL and pay to DOR	12/14/2015 9:38 AM

**Table 9: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
196	Dept of Revenue	12/14/2015 9:38 AM
197	Dept of Revenue, L&I, Unemployment, Licensing, Health	12/14/2015 9:38 AM
198	Dept of Revenue Dept of Workforce Development Dept of Natural Resources Dept of Transportation and probably others I haven't learned about yet	12/14/2015 9:37 AM
199	no	12/14/2015 9:36 AM
200	Dept of revenue	12/14/2015 9:36 AM
201	Dept. of Revenue Dept. of Labor & Industries WA State Employment Security	12/14/2015 9:35 AM
202	yes	12/14/2015 9:35 AM
203	DOL, DOR , State of Washington	12/14/2015 9:34 AM
204	Dept. of Revenue WA Secretary of State Dept. of Labor WA State Auditor WA Employment Security Dept WA Dept of Labor and Industries	12/14/2015 9:34 AM
205	Dept of Revenue Dept of Labor and Employment Secretary of State Dept of Transportation	12/14/2015 9:33 AM
206	Department of Revenue, L&I, Employment Security, Secretary of State, Internal Revenue Service	12/14/2015 9:33 AM
207	Secretary of State, Dept of Revenue, Dept of Labor, State Auditor, MRCS, Dept. of Ecology, WA State Dept. of Retirement	12/14/2015 9:32 AM
208	State Auditors Office	12/14/2015 9:32 AM
209	Dept. of Revenue, Department of Labor & Industries, Employment Security Department, Department of Retirement	12/14/2015 9:32 AM
210	Department of Treasury WA Health Care Authority WA Department of Revenue Department of Labor & Industry Employment Security Department WA Department of Retirement Systems	12/14/2015 9:31 AM
211	Secretary of State, Dept of Revenue, Dept of Labor Employment Security	12/14/2015 9:31 AM
212	Department of Revenue Department of Labor	12/14/2015 9:30 AM
213	Dept of Revenue, Dept of Labor & Industries, Employment Security, State Auditor's Office, Dept of Retirement Systems	12/14/2015 9:30 AM
214	Not sure what "register" means in this context - we file forms with Dept. of Revenue for property taxes and revenue sharing, as well as submit our budget resolution annually.	12/14/2015 9:29 AM
215	Department of Revenue	12/14/2015 9:29 AM
216	Dept of Revenue	12/14/2015 9:28 AM
217	?	12/14/2015 9:27 AM
218	Secretary of State; Oregon Department of Education	12/14/2015 9:27 AM
219	Oregon Dpts. of: Education, Revenue, Energy, Labor	12/14/2015 9:26 AM
220	Dept of Revenue, DUNS, CCR	12/14/2015 9:26 AM
221	Secretary of State, Dept of Revenue, Oregon PERS.	12/14/2015 9:25 AM
222	Dept of Labor Dept of Revenue	12/14/2015 9:25 AM
223	Secretary of State, Department of Revenue for taxes, Department of Labor for multi work site	12/14/2015 9:24 AM
224	Secretary of State, Department of Revenue	12/14/2015 9:24 AM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

#	Responses	Date
225	Oregon Department of Education	12/14/2015 9:23 AM
226	Dep.t of Revenue	12/14/2015 9:22 AM
227	Department of Education	12/14/2015 9:22 AM

**Table 10: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
228	Oregon Department of Education Oregon Department of Revenue	12/14/2015 9:21 AM
229	Dept of Revenue, Dept of Labor, and other state agencies as required.	12/14/2015 9:21 AM
230	Oregon Department of Revenue BOLI	12/14/2015 9:20 AM
231	None	12/14/2015 9:18 AM
232	Don't know	12/14/2015 9:18 AM
233	Secretary of State, Dept of Revenue	12/14/2015 9:17 AM
234	Secretary of State, Department of Revenue, Department of Education	12/14/2015 9:17 AM
235	Yes	12/14/2015 9:16 AM
236	Secretary of State	12/14/2015 9:15 AM
237	Department of Revenue	12/14/2015 9:15 AM
238	Not sure how to answer this question.	12/14/2015 9:14 AM
239	Dept of Revenue, Dept of Business & Consumer Affairs, Secretary of State	12/14/2015 9:14 AM
240	no	12/14/2015 9:13 AM
241	All state agencies	12/14/2015 9:13 AM
242	Secretary of State, Dept of Revenue, Dept of Labor	12/14/2015 9:12 AM
243	I am not sure what you mean "register". Being a public school district we probably register with many agencies. ODE, Dept of Revenue, IRS, Local Government Investment Pool, etc.	12/14/2015 9:11 AM
244	Department of Revenue	12/14/2015 9:10 AM
245	Secretary of State, Dept. of Revenue, Dept. of Labor	12/14/2015 9:10 AM
246	Yes.	12/14/2015 9:09 AM
247	Secretary of State, Department of Revenue, Department of Labor	12/14/2015 9:09 AM
248	Dept of Revenue Secretary of State DEQ DHS	12/14/2015 9:08 AM
249	Secretary of State, Dept of Revenue, Dept of Human Services	12/14/2015 9:08 AM
250	Secretary of State	12/14/2015 9:07 AM
251	unk	12/14/2015 9:07 AM
252	Yes, all agencies	12/14/2015 9:06 AM
253	none	12/14/2015 9:05 AM
254	State of Oregon	12/14/2015 9:05 AM
255	Dept of Revenue	12/14/2015 9:04 AM
256	No	12/14/2015 9:04 AM
257	Secretary of State, Oregon Department of Revenue, Health Department	12/14/2015 9:03 AM
258	DL & I, Employment Security, DSHS, Department of Revenue, Department of Retirement Systems	12/14/2015 9:01 AM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

#	Responses	Date
259	No	12/14/2015 9:01 AM
260	No, we are a state agency	12/14/2015 9:00 AM
261	Dept of Rev Dept of Labor	12/14/2015 9:00 AM
262	Yes, all of the above	12/14/2015 8:59 AM

**Table 11: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
263	Dept. of Ecology Dept. of Ag	12/14/2015 8:59 AM
264	Dept of Revenue, Dept of Labor and Indust, Employment Security, Retirement	12/14/2015 8:56 AM
265	Secretary of State, Department of Revenue and Labor.	12/14/2015 8:56 AM
266	Employment Security, Labor and Industries, Dept. of Retirement, Military Dept.	12/14/2015 8:55 AM
267	Dept of Revenue	12/14/2015 8:55 AM
268	Oregon Secretary of State Oregon Dept. of Revenue	12/14/2015 8:53 AM
269	?	12/14/2015 8:52 AM
270	Department of Revenue Department of Retirement Systems Department of Labor Employment Security	12/14/2015 8:52 AM
271	I don't understand the question	12/14/2015 8:51 AM
272	all of the above mentioned	12/14/2015 8:51 AM
273	Dept. of Revenue	12/14/2015 8:50 AM
274	N/A - Semi-independent state agency	12/14/2015 8:50 AM
275	Dept of Revenue, Dept of Labor, Department of Retirement Systems	12/14/2015 8:49 AM
276	SAM	12/14/2015 8:49 AM
277	Secretary of State, Dept of Revenue, Wash Dept of Labor & Industries, Employment Security Dept	12/14/2015 8:48 AM
278	Secretary of State, Dept. of Revenue, Dept. of Labor, US Dept of Housing & Urban Development, Rural Development	12/14/2015 8:48 AM
279	Department of Revenue Department of labor	12/14/2015 8:47 AM
280	Dept of Revenue	12/14/2015 8:46 AM
281	SOS, DOR	12/14/2015 8:46 AM
282	Department of Revenue	12/14/2015 8:45 AM
283	secretary of state, dept of revenue	12/14/2015 8:45 AM
284	Dept of Revenue	12/14/2015 8:44 AM
285	What is meant by register? We are an incorporated city, we comply with Dept. or Revenue, Secretary of State and all other regulatory agencies.	12/14/2015 8:44 AM
286	NO	12/14/2015 8:43 AM
287	Not sure what you are asking here.	12/14/2015 8:43 AM
288	Dept of Revenue, Secretary of State, DEQ, OAWU, Oregon Dept of Labor, PER, League of Oregon Cities, Oregon Association of Municipal Recordors, Oregon Mayors Association	12/14/2015 8:42 AM
289	Dept. of Revenue	12/14/2015 8:42 AM
290	Dept of Revenue, Secretary of State, DEQ,	12/14/2015 8:41 AM
291	Department of Revenue	12/14/2015 8:41 AM

**FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B**

#	Responses	Date
292	Secretary of State, Dept of Revenue, Dept of Labor, DEQ,	12/14/2015 8:40 AM
293	Secretary of State Audit division, Oregon Government Ethics Commission	12/14/2015 8:38 AM
294	Dept of Revenue	12/14/2015 8:38 AM
295	Dept. of Revenue, Dept. of Labor & Industries, Dept. of Retirement Systems	12/14/2015 8:38 AM
296	Oregon Department of Agriculture	12/14/2015 8:37 AM
297	Secretary of State, Dept of Revenue	12/14/2015 8:37 AM

**Table 12: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
298	Missouri Ethics Commission	12/14/2015 8:36 AM
299	Dept of Revenue, Dept of Labor, Dept of Ecology, Employment Security Dept, Dept of Retirement Systems, Dept of Commerce, Public Disclosure Commission, Public Works Trust Board, State Auditors Office, Transportation Improvement Board	12/14/2015 8:35 AM
300	Not sure what register means. But we deal with Dept of Revenue, Dept of Labor, Employment Security, Secretary of State, State Treasurer	12/14/2015 8:35 AM
301	Department of Retirement, Labor and Industries, Department of Labor	12/14/2015 8:34 AM
302	Dept. of Revenue BOLI	12/14/2015 8:34 AM
303	Dept of Revenue Dept of Labor/Industry Dept of Unemployment Dept of Retirement	12/14/2015 8:33 AM
304	Secretary of State, Dept of Revenue and Dept of labor	12/14/2015 8:33 AM
305	Department of Education	12/14/2015 8:32 AM
306	Dept of Revenue Dept of Audit Dept of Labor Secretary of State	12/14/2015 8:32 AM
307	Not sure if any do	12/14/2015 8:31 AM
308	Department of Agriculture, Secretary of State, Department of Audit, Department of Revenue and Workforce Services	12/14/2015 8:31 AM
309	Not sure.	12/14/2015 8:31 AM
310	Sec of State, Dept of Revenue, Dept of Audit, Wy Department of Environmental Quality, Dept of Labor, Wyoming Retirement Systems	12/14/2015 8:30 AM
311	No	12/14/2015 8:30 AM
312	No	12/14/2015 8:28 AM
313	Wyoming Dept. of Workforce Services Wyoming New Hire Reporting Wyoming Department of Education Wyoming Retirement System	12/14/2015 8:27 AM
314	Don't know	12/11/2015 3:06 PM
315	Wyoming Department of Agriculture	12/11/2015 12:47 PM
316	Department of Revenue Department of Workforce Services Department of Agriculture	12/11/2015 11:55 AM
317	Department of transportation	12/11/2015 11:12 AM
318	Secretary of State, Dept. of Revenue, Dept. of Labor	12/11/2015 11:04 AM
319	No	12/11/2015 10:38 AM
320	Secretary of State Dept of Revenue Dept of Labor	12/11/2015 10:01 AM
321	Secretary of State	12/11/2015 9:50 AM
322	Secretary of State State Auditor Dept of Revenue Dept of Workforce Svcs	12/11/2015 9:46 AM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

#	Responses	Date
323	do not know	12/11/2015 9:45 AM
324	Dept. of Education	12/11/2015 9:24 AM
325	Wyoming Department of Education	12/11/2015 9:09 AM
326	Wyoming Department of Education	12/11/2015 8:54 AM
327	Secretary of State, Dept. of Revenue, Dept. of Labor	12/11/2015 8:52 AM
328	Department of Family Services	12/11/2015 8:43 AM
329	Department of Ag.	12/11/2015 8:34 AM
330	Wyoming Department of Education	12/11/2015 8:13 AM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

Table 13: Survey Q2 Narrative Answers (continued)

#	Responses	Date
331	Department of Audit	12/10/2015 7:13 PM
332	Secretary of State	12/10/2015 4:56 PM
333	Secretary of State Department of Revenue Department of Labor	12/9/2015 8:59 AM
334	We are the state - all agencies are registered.	12/8/2015 2:27 PM
335	Secretary of State Dept. of Revenue Dept. of L&I Employment Security	12/8/2015 2:23 PM
336	Secretary of State	12/8/2015 2:19 PM
337	Secretary of State, Department of Revenue, Department of Labor & Industries, Employment Security Department, Department of Retirement Systems, Office of Financial Management (for electronic payments), and various agencies for grants and permits.	12/8/2015 2:19 PM
338	Dept of Rev, Dept of Labor, all that apply	12/8/2015 2:18 PM
339	WA State DOL; WA State Retirement System: SSA; IRS (these are the agencies this payroll office works with. other City offices may work with other agencies.	12/8/2015 2:17 PM
340	Department of Revenue, Department of Labor, Department of Retirement	12/8/2015 2:17 PM
341	Secretary of State	12/8/2015 2:16 PM
342	Dept of Revenue, Secretary of State, Dept of Labor	12/8/2015 2:15 PM
343	Secretary of State Dept of Revenue	12/8/2015 2:14 PM
344	Dept of Retirement Systems Dept of Ecology Dept of Revenue Dept of Labor & Industry Employment Security Dept	12/8/2015 2:14 PM
345	"register"? We submit audit reports, payroll taxes, unclaimed property, BOLI info, etc.	12/8/2015 2:13 PM
346	Too many to list.	12/8/2015 2:13 PM
347	Secretary of State, Dept of Revenue, DEQ, State Water Board	12/8/2015 2:12 PM
348	State Treasurer, State Auditor, Washington State DOT, Department of Labor, Dept. of Ecology	12/8/2015 2:12 PM
349	Dept of Revenue, Dept of Labor & Industries, Employment Security Dept, State Auditor's Office, Dept. of Retirement Systems	12/8/2015 2:11 PM
350	Oregon Department of Education; Department of Revenue, Department of Labor	12/8/2015 2:10 PM
351	Yes. All	12/8/2015 2:10 PM
352	Department of Labor & Industries, Department of Revenue	12/8/2015 2:09 PM
353	yes, all that are mandated	12/8/2015 2:09 PM
354	Department of Revenue	12/8/2015 2:08 PM
355	Dept of Revenue, Dept of Labor, SAM,	12/8/2015 2:08 PM
356	Dept of Revenue	12/8/2015 2:07 PM
357	Yes, all State Agencies	12/8/2015 2:06 PM
358	Dept of Revenue Dept of Labor	12/8/2015 2:05 PM
359	Dept. of Labor Employment Security Dept. Census Bureau State of Washington	12/8/2015 2:04 PM
360	Dept of Revenue Dept of Labor Employment Security	12/8/2015 2:03 PM
361	To conduct business, we register with Sec of State, Revenue, L&I, IRS, WA Dept. of Retirement, Employment Security, Defense Logistics Agency's Commercial and Government Entity (CAGE), US federal government's System for Award Management (SAM), Grants.gov, Duns & Bradstreet, System for Award Management (SAM replaced CCR), US Environmental Protection Agency, Thurston County	12/8/2015 2:02 PM

**FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B**

**Table 14: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
362	Our District was established in 1918 and is considered a municipal corporation with the WA Sec. of State. We have registered accounts with Dept. of Revenue, Employment Security Dept., Dept. of Labor & Industries, and Office of Financial Management.	12/8/2015 2:02 PM
363	Aging and Long-Term Support Administration	12/8/2015 2:01 PM
364	Department of Revenue (Tax-Exempt Status) Department of Elementary & Secondary Ed (Accrediting)	12/8/2015 2:00 PM
365	Dept of Revenue, Dept of Elementary and Secondary Education	12/8/2015 2:00 PM
366	Unsure what agencies we register with.	12/8/2015 1:59 PM
367	Washington State Treasures Office, Washington State Labor and Industries, Washington State Department of Revenue, Washington State Auditor's Office, Washington State Department of Retirement	12/8/2015 1:59 PM
368	Dept of Revenue, Dept of Revenue	12/8/2015 1:58 PM
369	Dept of Revenue	12/7/2015 7:13 PM
370	OR Dept of Revenue	12/7/2015 3:32 PM
371	I believe so.	12/7/2015 12:59 PM
372	Yes. Dept of Rev, Dept of Justice (child support pmts), others as applicable.	12/4/2015 11:03 AM
373	Dept of Revenue, Dept of Labor	12/2/2015 6:04 PM
374	Secretary of State, Department of Revenue	12/2/2015 2:41 PM
375	Department of Revenue, Department of Education, Department of Labor and Industries,	12/2/2015 2:40 PM
376	California Secretary of State California Franchise Tax Board California Dept of Industrial Relations	12/2/2015 10:37 AM
377	Employment Development Department Department of Industrial Relations State Board of Equalization Franchise Tax Board	12/2/2015 10:34 AM
378	Unsure	12/2/2015 9:52 AM
379	State	12/2/2015 7:36 AM
380	Dept of Revenue, Labor & Industry, Unemployment, Dept. of Ecology, Dept. of Health	12/1/2015 3:35 PM
381	Dept of Revenue	11/30/2015 9:30 AM
382	Dept of Revenue	11/24/2015 1:30 PM
383	Secretary of State	11/24/2015 12:09 PM
384	No, but we are required to file annual financial reports & various other reports.	11/24/2015 8:58 AM
385	Department of Revenue Department of Labor and Industries Washington State Employment Security	11/23/2015 11:51 AM
386	Dept of Revenue	11/23/2015 11:20 AM
387	State Controller's office	11/23/2015 11:09 AM
388	Department of Labor	11/23/2015 10:03 AM
389	no	11/19/2015 6:19 PM
390	NA	11/19/2015 3:11 PM
391	No	11/19/2015 10:38 AM
392	?	11/19/2015 10:26 AM
393	None	11/19/2015 8:58 AM
394	Department of Revenue	11/19/2015 8:47 AM
395	N/A	11/19/2015 8:41 AM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

Table 15: Survey Q2 Narrative Answers (continued)

#	Responses	Date
396	not sure what you mean by "register" We have several reporting requirements with the state auditor and Department of Revenue.	11/19/2015 8:31 AM
397	Department of Education	11/19/2015 8:25 AM
398	Department of Treasury Missouri Department of Revenue Missouri of Employment Security	11/18/2015 10:01 AM
399	revenue	11/17/2015 8:03 AM
400	Department of Education	11/17/2015 7:28 AM
401	Dept of revenue, sec of state, dept of natural resources	11/16/2015 4:12 PM
402	Secretary of State	11/16/2015 3:56 PM
403	Secretary of State	11/16/2015 3:32 PM
404	California Employment Development Department; California State Board of Equalization	11/16/2015 3:21 PM
405	Department of Elementary and Secondary Education	11/16/2015 2:11 PM
406	Yes.	11/13/2015 7:35 PM
407	State Controllers Office, Board of Equalization	11/13/2015 12:14 PM
408	no	11/5/2015 1:51 PM
409	secretary of state, department of labor	11/4/2015 4:44 PM
410	n	11/4/2015 1:15 PM
411	NA	11/3/2015 3:56 PM
412	No	11/3/2015 1:00 PM
413	No	11/3/2015 12:01 PM
414	State Controllers Office	11/3/2015 11:20 AM
415	As required	11/3/2015 10:29 AM
416	State Controller's Office	11/3/2015 8:29 AM
417	Not sure what REGISTER means	11/2/2015 6:06 PM
418	Unknown	11/2/2015 5:22 PM
419	n/a	11/2/2015 5:15 PM
420	Secretary of State, Dept of Finance, Dept of Revenue, State Controller's Office, Dept of Labor, etc. i.e. all finance, engineering, development, public safety related departments.	11/2/2015 5:11 PM
421	EDD, Franchise Tax Board, BOE, State Controller	11/2/2015 4:53 PM
422	note sure. We file reports with State controller, dept of finance, dept of labor.	11/2/2015 4:38 PM
423	Employment Development Department	11/2/2015 4:36 PM
424	State Water Resources Control Board, Board of Equalization, Department of Labor, Department of Public Health	11/2/2015 4:22 PM
425	Not sure what you mean by "register" we are required to file State Controllers' Reports for financial, street, and compensation reports to the State Controller's Office. Our City is a successor agency for the dissolved Redevelopment Agency so we have reports that we have to send to the State Department of Finance, and we have compliance reports and tax returns that we send for payroll to the Employment Development Department. The list goes on for other compliance reporting that we are required to submit.	11/2/2015 3:58 PM
426	Secretary of State, Dept of Labor	11/2/2015 3:53 PM

**FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B**

#	Responses	Date
427	N/A	11/2/2015 3:50 PM

**Table 16: Survey Q2 Narrative Answers (continued)**

#	Responses	Date
428	EDD & Dept of Revenue	11/2/2015 3:45 PM
429	California State Controller	11/2/2015 3:45 PM
430	No	11/2/2015 3:44 PM
431	No	11/2/2015 3:43 PM
432	None	11/2/2015 3:42 PM
433	Secy of State	11/2/2015 3:37 PM
434	DOL, DOF	11/2/2015 3:34 PM
435	N/A	11/2/2015 3:34 PM
436	Secretary of State Department of Finance Department of Labor	11/2/2015 3:33 PM
437	Not sure	11/2/2015 3:32 PM

FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

**Q3 How many full-time and part-time employees does your entity employ on a regular basis?**

Answered: 437 Skipped: 0

Table 17: Survey Q3 Selected Range Answers

Number of Employees						
	1-2	3-4	5-10	11-20	20+	Total
Full-Time Employees (40 or more hours per week)	8.16% 35	7.93% 34	12.59% 54	10.26% 44	61.07% 262	429
Part-Time Employees (less than 40 hours per week)	24.24% 88	13.22% 48	18.73% 68	7.99% 29	35.81% 130	363

**Q4 Are your entity's vendor payments and payroll processing/reporting duties performed by:**

Answered: 437 Skipped: 0

Table 18: Survey Q4 Selected Answers

Answer Choices	Responses
Internal Staff	86.96% 380
An Outsourced Company or Firm	1.60% 7
Both	9.15% 40
Other (please specify)	3.20% 14
<b>Total Respondents: 437</b>	

Table 19: Survey Q4 "Other" Narrative Answers

#	Other (please specify)	Date
1	Vendor Payments are processed by internal staff and payroll is processed by staff and via the State ERP system	12/22/2015 1:42 PM
2	County Tres.	12/14/2015 10:42 AM
3	outsourced individual	12/14/2015 10:37 AM
4	County Treasurer	12/14/2015 10:11 AM
5	County Treasurer's Office	12/14/2015 10:04 AM
6	Local Secretary submits for payment through the Clallam County Treasurer and Auditor	12/14/2015 9:56 AM
7	County Treasurer's Office	12/14/2015 9:49 AM
8	County does our vendor payments and payroll. As of Jan. 1, 2016 I will be doing the payroll.	12/14/2015 9:46 AM
9	a/p internal p/r outsourced	12/14/2015 8:51 AM
10	NA for this large employer.	12/8/2015 2:27 PM
11	Vendor payments are done in house, payroll is shared by in-house staff and county auditor's office	12/8/2015 2:02 PM
12	We submit a voucher to Yakima County on a semi-monthly basis to pay both certain vendors and to replenish our Revolving (Enterprise) Fund, which we use to pay most of our small, regular monthly bills. We do calculate our own payroll and payroll taxes; we voucher the County to prepare a warrant check to each employee for their monthly check (net amount) but we file and pay the payroll taxes in house from the	12/8/2015 2:02 PM
13	In house and County government	12/8/2015 2:01 PM
14	AP is internal, payroll is outsourced	11/2/2015 3:37 PM

FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

**Q5 From which organization did you hear about this survey? (Check all that apply.)**

Answered: 437 Skipped: 0

**Table 20: Survey Q5 Selected Answers**

Answer Choices	Responses	
State Social Security Administrator/Retirement System Contact	83.52%	365
CSMFO (California Society of Municipal Finance Officers)	8.47%	37
GFOA (Government Finance Officers Association)	3.66%	16
AGA (Association of Government Accountants)	1.60%	7
ALGA (Association of Local Government Auditors)	1.37%	6
AASA (American Association of School Administrators)	0.92%	4
APA (American Payroll Association)	0.46%	2
NACD (National Association of Conservation Districts)	0.46%	2
NHC (National Housing Conference)	0.46%	2
AAPA (American Association of Port Authorities)	0.23%	1
ACI-NA (Airports Council International-North America)	0.23%	1
AWWA (American Water Works Association)	0.23%	1
IAFC (International Association of Fire Chiefs)	0.23%	1
NCL (National Civic League)	0.23%	1
NFPA (National Fire Protection Association)	0.23%	1
NLC (National League of Cities)	0.23%	1
NRWA (National Rural Water Association)	0.23%	1
Other (please specify organization name and include website if known)	0.23%	1
ALA (American Library Association)	0.00%	0
APGA (American Public Gas Association)	0.00%	0
ASTHO (Association of State and Territorial Health Officials)	0.00%	0
ASTSWMO (Association of State and Territorial Solid Waste Management Officials)	0.00%	0
NACCHO (National Association of County & City Health Officials)	0.00%	0
NAFSMA (National Association of Flood & Stormwater Management Agencies)	0.00%	0
NATaT (National Association of Towns and Townships)	0.00%	0
SWANA (Solid Waste Association of North America)	0.00%	0
<b>Total Respondents: 437</b>		

**Table 21: Survey Q5 “Other” Narrative Answers**

#	Other (please specify organization name and include website if known)	Date
1	IRS newsletter	12/14/2015 9:20 AM

FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

**Q6 Rank the format you would like to receive  
IRS newsworthy information,  
with 1 being the most preferable method  
and 7 being the least preferable method.**

Answered: 437 Skipped: 0

**Table 22: Survey Q6 Selected Preference Answers**

	1	2	3	4	5	6	7	Total	Score
Flash News releases via email	34.32% 150	19.91% 87	16.93% 74	11.67% 51	6.18% 27	7.32% 32	3.66% 16	437	5.28
Quarterly newsletters on various topics via email	19.45% 85	26.77% 117	18.31% 80	16.02% 70	8.92% 39	7.32% 32	3.20% 14	437	4.97
15-30 minute webinars on specific topics	22.65% 99	15.33% 67	16.48% 72	15.10% 66	16.02% 70	13.04% 57	1.37% 6	437	4.69
Materials posted to the irs.gov website	9.61% 42	12.59% 55	15.56% 68	24.03% 105	18.99% 83	8.92% 39	10.30% 45	437	4.02
Printed materials available by mail	9.15% 40	13.27% 58	17.16% 75	13.96% 61	13.96% 61	15.10% 66	17.39% 76	437	3.75
15-30 minute podcasts on specific topics	3.66% 16	7.78% 34	10.07% 44	11.90% 52	18.76% 82	24.03% 105	23.80% 104	437	2.98
30-60 minute phone forums on specific topics	1.14% 5	4.35% 19	5.49% 24	7.32% 32	17.16% 75	24.26% 106	40.27% 176	437	2.31

**Q7 Which informational topics would be of interest to your  
local governmental entity? (Check all that apply.)**

Answered: 437 Skipped: 0

**Table 23: Survey Q7 Selected Answers**

Answer Choices	Responses
Assistance with IRS Reporting Requirements	61.10% 267
1099 Reporting	50.80% 222
Fringe Benefit Exclusion Rules	43.94% 192
Payroll 101	41.42% 181
Employer Provided Cell Phones	37.53% 164
Employer Provided Vehicles	33.41% 146
Employer Provided or Reimbursed Meal Expenses	32.49% 142
Employee or Contractor?	29.98% 131
Tuition Reduction/Education Reimbursement	28.38% 124
Defining Wages	27.46% 120
What Makes a Uniform a Uniform	17.85% 78
Backup Withholding	16.48% 72

FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

Table 24: Survey Q7 Selected Answers (continued)

Answer Choices	Responses
Do We Have a 218 Agreement?	14.42% 63
ACA Reporting	12.59% 55
Rehired Annuitants	11.67% 51
Other (please specify)	7.09% 31
<b>Total Respondents: 437</b>	

Table 25: Survey Q7 “Other” Narrative Answers

#	Other (please specify)	Date
1	Nothing at this time	12/31/2015 11:58 AM
2	Employee Plans	12/22/2015 1:57 PM
3	We're fine	12/22/2015 1:36 PM
4	Affordable care act implementation and affect	12/22/2015 12:58 PM
5	Assistance with calculating/determining hourly pay rates	12/22/2015 12:54 PM
6	none apply	12/22/2015 12:50 PM
7	.	12/15/2015 4:43 PM
8	More information on Teachers (PSRS Members) who pay Social Security Benefits.	12/14/2015 10:43 AM
9	The usual update on all of the above but I am familiar with most of it.	12/14/2015 10:41 AM
10	Cell phone and other allowances	12/14/2015 10:38 AM
11	none. We don't pay taxes - no employees	12/14/2015 10:37 AM
12	None at this time	12/14/2015 10:34 AM
13	none at tis time	12/14/2015 10:28 AM
14	Any changes in IRS rules or guidance that might impact local government reporting requirements	12/14/2015 10:26 AM
15	My correspondence is usually related to 941 processing	12/14/2015 10:15 AM
16	ACA reporting - how to the various classifications 1A, 1E 1H, etc all work through the individual taxation and employer responsibility system Exempt v non-exempt employees health plans and their reporting and	12/14/2015 10:07 AM
17	CADDILAC TAX	12/14/2015 9:05 AM
18	Depends on what I need at the time, always changing	12/14/2015 8:49 AM
19	Paying volunteer firefighter stipends	12/14/2015 8:42 AM
20	None	12/14/2015 8:41 AM
21	reporting pre-tax and other employee deductions on annual W-2 and/or changes for annual reporting for 2016	12/14/2015 8:38 AM
22	None at this time	12/14/2015 8:31 AM
23	1094 & 1095 Forms	12/11/2015 11:55 AM
24	Reporting and taxable status of cost share for conservation practices on non-commercial/non-agricultural private land	12/8/2015 2:19 PM
25	Cell phone reimbursement for personal cell phones that they also use for work.	12/8/2015 2:12 PM

## FEDERAL, STATE AND LOCAL GOVERNMENTS – APPENDIX B

Table 26: Survey Q7 “Other” Narrative Answers (continued)

#	Other (please specify)	Date
26	This survey left out a big component - -how can things be improved! I have attended several FSLG webinars and they are trying to put across extremely complicated information that makes it difficult to follow along and they just drone on and on...they are attempting to put across far too much information on far too many topics. Narrow it down! Add some pictures showing some examples! These webinars are also geared to entities with over 50 employees, however there are over 1,000 small special purposes districts just in WA State. It would be really nice to have at least a few webinars geared toward smaller entities, especially in	12/8/2015 2:02 PM
27	what constitutes hourly vs salary	12/8/2015 2:00 PM
28	GASB reporting	12/8/2015 2:00 PM
29	Is vacation accrual taxable?	11/3/2015 1:00 PM
30	4850 Pay which is Tax Exempt Pay for a work related injury to a Peace Officer.	11/2/2015 3:45 PM
31	taxation of settlements	11/2/2015 3:32 PM

APPENDIX C

National Associations and Professional Organizations

Table 27: List of National Associations and Professional Organizations

Name		website
American Association of Port Authorities	AAPA	<a href="http://www.aapa-ports.org">www.aapa-ports.org</a>
American Association of School Administrators	AASA	<a href="http://www.aasa.org">www.aasa.org</a>
Airports Council International-North America	ACI-NA	<a href="http://www.aci-na.org">http://www.aci-na.org</a>
Association of Government Accountants	AGA	<a href="http://www.agacgfm.org">www.agacgfm.org</a>
American Library Association	ALA	<a href="http://www.ala.org">www.ala.org</a>
Association of Local Government Auditors	ALGA	<a href="http://www.algaonline.org">www.algaonline.org</a>
American Payroll Association	APA	<a href="http://www.americanpayroll.org">www.americanpayroll.org</a>
American Public Gas Association	APGA	<a href="http://www.apga.org">www.apga.org</a>
Association of State and Territorial Health Officials	ASTHO	<a href="http://www.astho.org">www.astho.org</a>
Association of State and Territorial Solid Waste Management Officials	ASTSWMO	<a href="http://www.astswmo.org">www.astswmo.org</a>
American Water Works Association	AWWA	<a href="http://www.awwa.org">www.awwa.org</a>
California Society of Municipal Finance Officers	CSMFO	<a href="http://www.csmfo.org">www.csmfo.org</a>
Government Finance Officers Association	GFOA	<a href="http://www.gfoa.org">www.gfoa.org</a>
International Association of Fire Chiefs	IAFC	<a href="http://www.iafc.org">www.iafc.org</a>
National Association of County & City Health Officials	NACCHO	<a href="http://www.naccho.org">www.naccho.org</a>
National Association of Conservation Districts	NACD	<a href="http://www.nacd.org">www.nacd.org</a>
National Association of Flood & Stormwater Management Agencies	NAFSMA	<a href="http://www.nafsma.org">www.nafsma.org</a>
National Association of Towns and Townships	NATaT	<a href="http://www.natat.org">www.natat.org</a>
National Civic League	NCL	<a href="http://www.nationalcivicleague.org">www.nationalcivicleague.org</a>
National Fire Protection Association	NFPA	<a href="http://www.nrfpa.org">www.nrfpa.org</a>
National Housing Conference	NHC	<a href="http://www.nhc.org">www.nhc.org</a>
National League of Cities	NLC	<a href="http://www.nlc.org">www.nlc.org</a>
National Rural Water Association	NRWA	<a href="http://www.nrwa.org">www.nrwa.org</a>
Solid Waste Association of North America	SWANA	<a href="http://www.swana.org">www.swana.org</a>

This page intentionally left blank.

**ADVISORY COMMITTEE ON  
TAX EXEMPT AND GOVERNMENT ENTITIES  
(ACT)**

**Indian Tribal Governments:**

**Survey of Tribes Regarding IRS Effectiveness  
with Current Topics of Concerns and Recommendations**

Tino Batt  
Stefani Dalrymple  
Marcelino Gomez

**June 8, 2016**

This page intentionally left blank.

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY .....[201](#)

II. INTRODUCTION .....[201](#)

III. HISTORY .....[202](#)

IV. DUE DILIGENCE .....[203](#)

V. CONCLUSION .....[234](#)

Appendix A: Example ITG Survey Letter .....[236](#)

Appendix B: Example ITG Survey Questionnaires .....[237](#)

Appendix C: ITG Survey Graph Results of Individuals Interviewed .....[243](#)

This page intentionally left blank

## I. EXECUTIVE SUMMARY

The Indian Tribal Governments (ITG) Subcommittee chose for its project the preparation of a survey covering the effectiveness of the Internal Revenue Service communication methodologies and the compilation of the results of that survey. Also included in the survey were questions focused on substantive areas of taxation and the understanding of tribal governments about these substantive areas of taxation and their impact on tribal governments. There have been discussions at different tribal meetings regarding the effectiveness of the communication and training provided by the IRS to tribal governments and entities. This project provides feedback to the IRS/ITG office from Tribal governments and their entities. Through the use of the survey, the ITG Subcommittee believes we can provide recommendations to improve communication, training and interaction with tribal governments and their entities. It is mutually advantageous to both the IRS and the tribal governments to make information about its programs and practices as easy to access and utilize as possible. This report also addresses some of substantive tax topics identified in the survey as concerns of tribal governments. These include the “employer mandate” and “Cadillac Tax” under the Patient Protection and Affordable Care Act of 2010 (ACA),<sup>133</sup> and under the Tribal General Welfare Exclusion ACT (GWEA) of 2014.<sup>134</sup>

## II. INTRODUCTION

Based on the survey results and responses, the recommendations made by the ITG subcommittee are as follows. First, the ITG should continue to participate in annual or semiannual meetings of tribal organizations such as the National Congress of American Indians and the Native American Finance Officers Association to update tribal organizations on important tax topics. Second, the ITG should continue to present relevant and timely webinars that can be virtually attended by tribal finance personnel as well as tribal leaders. Third, the ITG should provide training to ITG field agents on substantive tax topics such as the GWEA and tribal government responsibilities under the GWEA. Fourth, the ITG should provide timely regional face-to-face training to tribal

---

<sup>133</sup> P.L. 111-148 Patient Protection and Affordable Care Act of 2010.

<sup>134</sup> P.L. 113-168 General Welfare Exclusion Act of 2014.

## **INDIAN TRIBAL GOVERNMENTS**

governments and entities on substantive tax topics. Fifth, the IRS should exempt tribal governments from the employer mandate imposed by the ACA. Sixth, the IRS should abandon the payment model under Notice 2015-52, both as a matter of law and tax policy in favor of allowing employers to calculate and pay the tax themselves on any excess benefits they may provide. Seventh, the IRS should resolve uncertainties that have arisen since the passage of the GWEA by clearly defining undefined terms and clarifying confusing language.

### **III. HISTORY**

The United States government has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes and court decisions. Tribal government powers includes the authority to establish, within tribal boundaries, the form of the tribal government, determine tribal membership, regulate tribal and individual property, levy taxes, establish courts and maintain law and order. Generally, Indian tribes provide governmental services, such as transportation, education and medical care to Indian tribal members.

The general rule in the field of Indian law is that unless there is specific delegation of authority provided by Congress, state laws generally do not apply to Indians on tribal land. Thus, Indian tribes are sovereign entities within the borders of the states in which they reside. Tribal sovereignty is the foundation upon which the government-to-government relationship stands. Sovereignty is neither granted by, nor negated by federal statutes, acts or treaties. It is inherent.

Over the years, Presidential Executive Orders have directed federal government agencies, to the extent permitted by law, to "respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the federal government and Indian tribal governments." (Executive Order No. 13175, 65 FR 67249, Nov. 6, 2000.) This relationship is not intended to prevent representatives of the IRS from carrying out official government business.

The mission of the ITG is to provide ITG customers top quality service by helping them to understand and comply with applicable tax laws, and to protect the public interest by applying the tax law with integrity and fairness to all. The ITG is guided by principles of respect for Indian tribal self-government and sovereignty. The ITG maintains a functional and interactive government-to-government relationship between the IRS and Indian tribal governments as envisioned by Presidential Executive Orders. The ITG was established to assist Indian tribes with their federal tax matters. Tribal governments and tribal associations provided valuable input into the design of ITG, which is focused on providing a single point of contact for assistance and service in addressing tax matters.

### **IV. DUE DILIGENCE**

#### **Evaluation Process**

Because ITG cannot contact the tribal governments for this type of project, the ITG Subcommittee members formulated a survey to be distributed to ITG's customers. The survey (using the [www.surveymoney.com](http://www.surveymoney.com) online tool) asked ITG's customers to respond to questions regarding their experience with the training, information, communication and experience with the IRS.

The survey announcement was publicized through the use of the following organizations:

1. NAFOA, National Association Financial Officers Associations
2. National Intertribal Tax Alliance
3. NCAI, National Congress of American Indian
4. USET, United South & Eastern Tribes
5. COLT, Coalition of Large Tribes
6. RMTLC, Rocky Mountain Tribal Leader Council
7. Regional Tribal Organizations

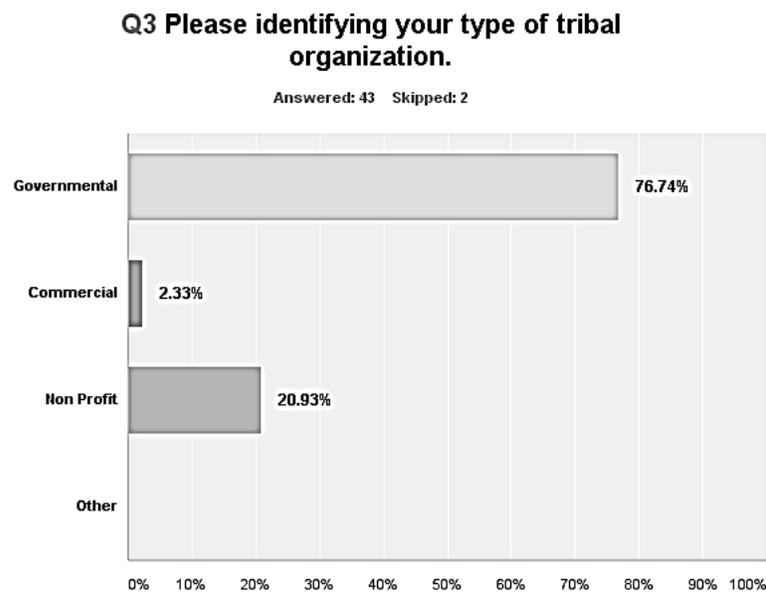
The survey consisted of 32 questions related to the tribal organization, the ITG website, IRS training, communication with the IRS, experience with the IRS and where the ITG

## INDIAN TRIBAL GOVERNMENTS

customers obtain their federal tax information. The survey questions and the combined responses to the survey are contained in Appendices B and C.

### Survey Results

A total of 40 people responded to the survey. Most of the people who responded were tribal government employees (77 percent) who had responsibility for tribal government financial matters including federal taxes. Twenty-one percent were from nonprofits.

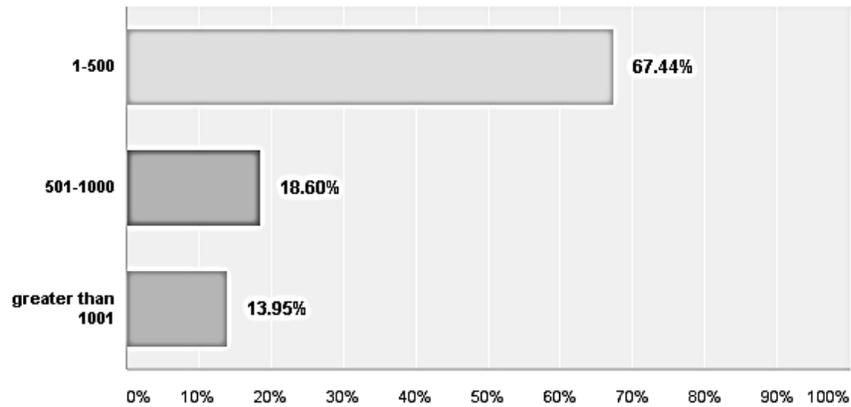


Sixty-four percent of the respondents have been in their positions for less than five years. The remaining 35 percent have been in their positions for more than five years.

In the survey, we asked each respondent to identify the number of employees within their tribal organization. Sixty-seven percent of the organizations had less than 500 employees, 19 percent had between 501 and 1,000 employees and 14 percent had more than 1,000 employees. Ninety percent of the organizations prepare their own payroll reports.

**Q4 How many employees are employed by your Tribal organization?**

Answered: 43 Skipped: 2

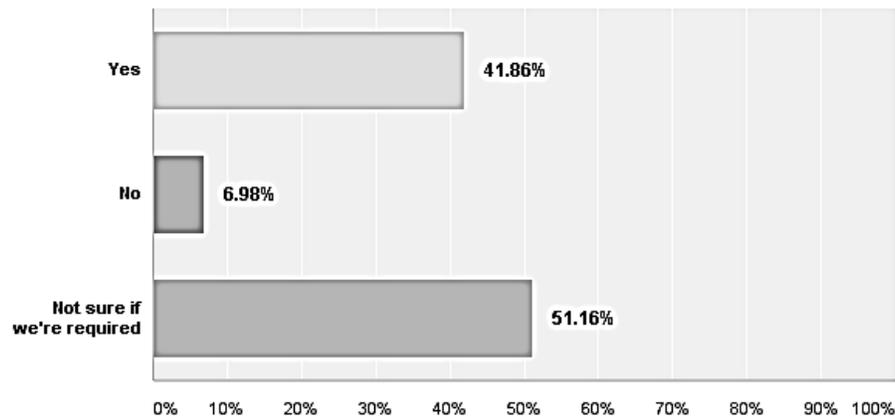


## INDIAN TRIBAL GOVERNMENTS

When asked if their tribal organization planned to prepare reports related to the ACA, 42 percent responded they plan to prepare reports required under the ACA. Seven percent said they did not plan to prepare reports. Fifty-one percent were not sure if they were required to prepare reports.

### Q7 Does your Tribal organization plan to prepare reports related to the Affordable Care Act?

Answered: 43 Skipped: 2

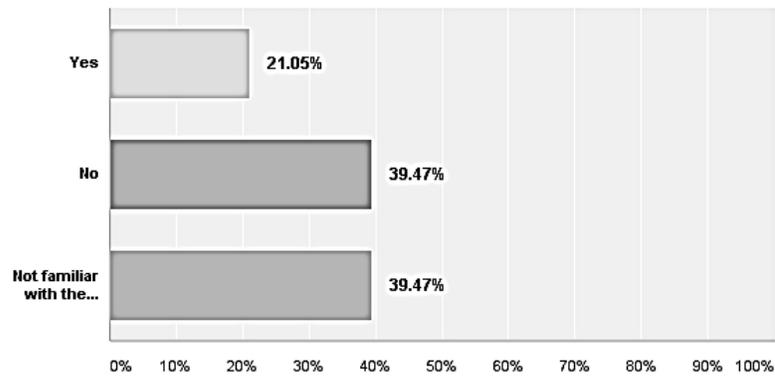


The top federal tax issues identified by the respondents are: 1) ACA reporting, penalties and the Cadillac Tax under the ACA, 2) the GWE reporting requirements under the GWEA and 3) clarification of tax status of tribal organizations.

Some survey questions were asked related to the information on the ITG website related to the ACA and GWEA. Eighteen percent feel there is sufficient information related to the ACA to meet their organization’s needs on the ITG website. Fifty-five percent indicated there is not sufficient information on the ACA. Twenty percent feel there is sufficient information related to the GWEA to meet their organization’s needs on the ITG website. Thirty-nine percent indicated there is not sufficient information on the GWEA.

**Q13 Is there sufficient information available regarding the General Welfare Act to meet your needs on the ITG website?**

Answered: 38 Skipped: 7

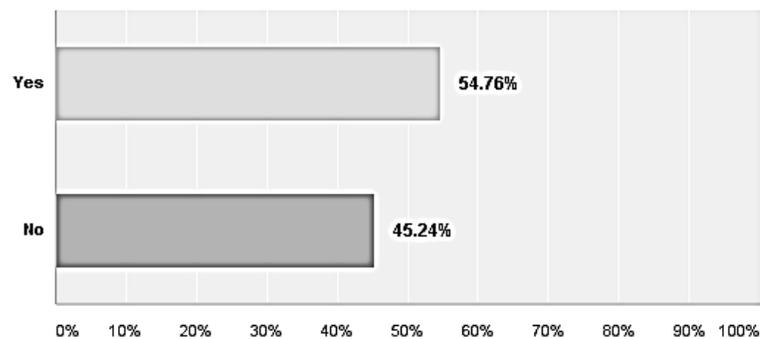


## INDIAN TRIBAL GOVERNMENTS

Fifty-five percent of the respondents were aware of the ITG website. Forty-five percent were not aware. Thirty-five percent use the ITG website less than five times a year, 25 percent utilize it more than six times a year. Fifty percent of the respondents indicated they have never accessed the ITG website. Of those that did access the ITG website, four of five find it easy to access information on the website. Fifty-six percent find the information on the ITG website adequate to meet their tribal organization's needs. Fifty-five percent believe information on the ITG website is updated in a timely manner.

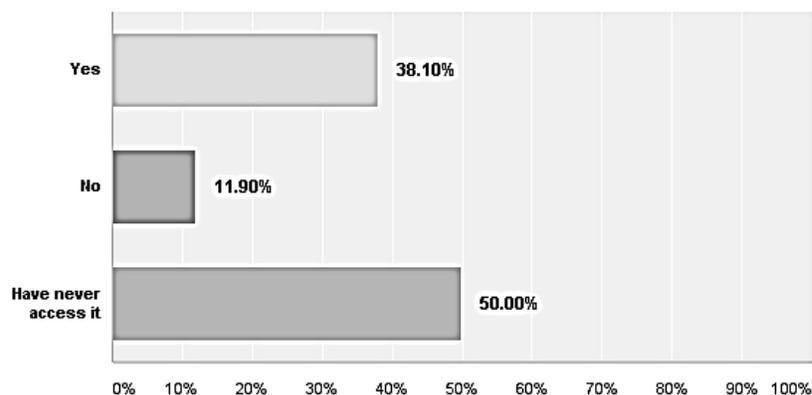
### Q9 Is your Tribal organization aware of the ITG website?

Answered: 42 Skipped: 3



### Q11 Do you find it easy to access the information on the ITG website?

Answered: 42 Skipped: 3

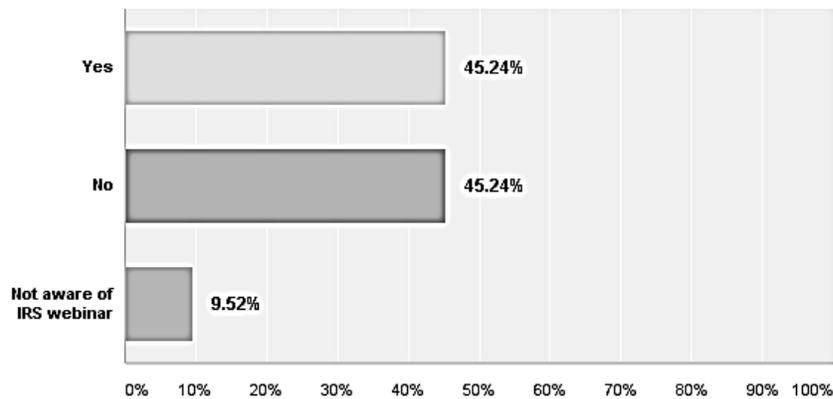


Forty-five percent of the respondents have participated in an IRS webinar. Fifty-five percent have not participated including 10 percent who are not even aware of the existence of IRS webinars. Those who have participated have participated in one to five webinars.

Thirty-six percent receive the IRS ITG newsletter. Sixty-four percent do not receive the newsletter including 26 percent who are not aware of its existence. Most who do not receive it plan to subscribe in the future to IRS ITG newsletter.

**Q16 Have you participated in an IRS webinar?**

Answered: 42 Skipped: 3



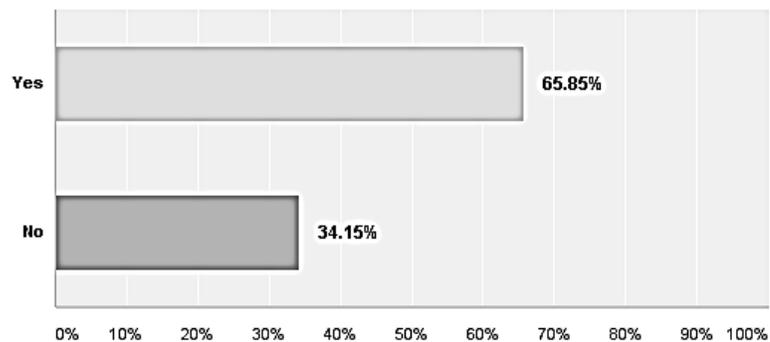
Respondents look primarily to organizations such as the Native American Finance Officers Association (59 percent), the National Congress of American Indians (51 percent), the IRS-ITG (46 percent) and the National Intertribal Tax Alliance (22 percent) for their information on tax-related issues.

## INDIAN TRIBAL GOVERNMENTS

Sixty-six percent of the respondents have received IRS notices in the last two years. Sixty percent of the respondents have been involved in an IRS audit, compliance check or review in the past five years. Thirty-eight percent have had an overall positive experience with the IRS. Thirty-three percent have had a moderately successful experience. Thirty percent have had a less than a moderately successful experience with the IRS.

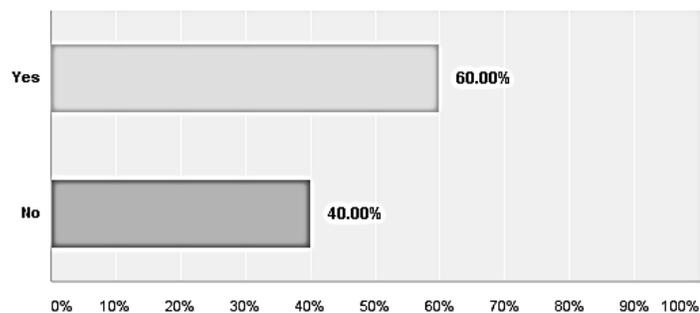
### Q23 Has the Tribal organization received any IRS notices in the last 2 years?

Answered: 41 Skipped: 4

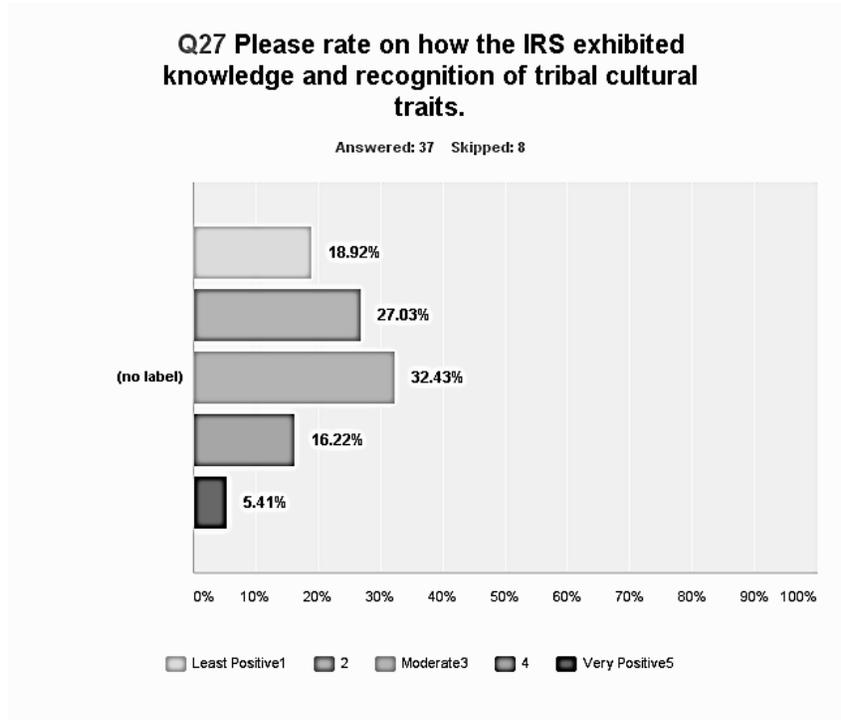


### Q24 Has the Tribal organization been involved in an IRS audit, compliance check, or review in the past 5 yrs.?

Answered: 40 Skipped: 5



Fifty-four percent of the respondents feel the IRS has exhibited knowledge and recognition of tribal cultural traits in their interaction with the respondents. Forty-six percent feel the IRS did not exhibit knowledge and recognition of tribal cultural traits in their interaction with the respondents.

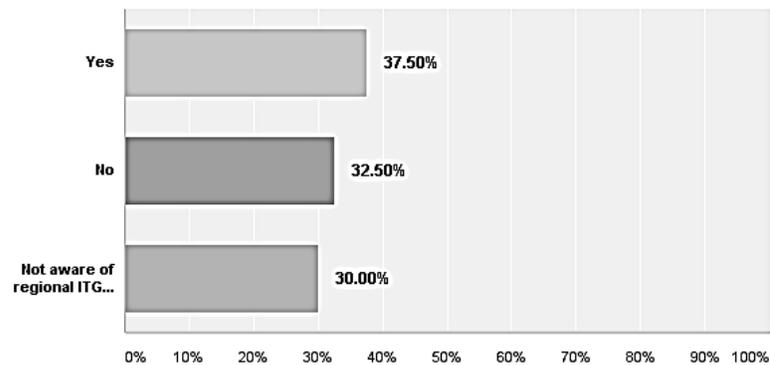


## INDIAN TRIBAL GOVERNMENTS

Thirty-eight percent of the respondents contacted their ITG regional specialist in the past year. Thirty percent are not aware of the existence of their ITG regional specialist. Thirty-eight percent of the respondents rate their interaction in a moderately successful to positive manner with the ITG regional specialist. Thirty-three percent of the respondents rate their interaction as less than moderately successful in the past year.

### Q28 In the past year have you contacted your regional ITG specialist?

Answered: 40 Skipped: 5



## Topics of Discussion

We will provide a discussion of three principal topics resulting from the survey that were identified as major concerns by the survey participants. First, the need for a tribal exemption from the ACA's employer mandate; second, the negative impact of the Cadillac Tax excise tax on high-cost tribal employer-sponsored health coverage - IRS Notice 2015-52 on Section 4980I of the Internal Revenue Code (the Code) and third, the ongoing need to provide guidance related to the GWEA.

## Tribal Exemption from the ACA's Employer Mandate

### a. Introduction

The ITG subcommittee recommends a Tribal exemption from the employer shared responsibility rule implementing Section 4980H of the Code, as added by Section 1513 of the ACA. Section 4980H of the Code does not specifically apply to Tribal governments and Treasury Reg. Section 54.4980H-2(b)(4) of the employer shared responsibility regulations reserves application of special rules for government entities.

The employer shared responsibility rule (also known as the employer mandate) will impose a significant financial hardship for Tribal employers, undercut the right of American Indians and Alaska Natives (AI/ANs) to obtain health care free of charge at Indian Health Service (IHS), Tribal and Urban Indian Organization health facilities (collectively, I/T/U) and nullify various AI/AN-specific protections in the ACA. Many Tribal workforces are largely comprised of Tribal members who are otherwise exempt from the ACA's individual mandate to obtain coverage, and who are eligible to obtain care free of charge through the IHS system. Requiring tribes to either incur the cost of purchasing insurance for their member employees (who already have a right to free care) or pay a penalty is fundamentally inconsistent with the federal trust responsibility and will impose a significant economic burden on Tribal governments. With the employer mandate implementation deadline fast approaching, it is imperative the IRS take immediate action on a Tribal exemption as soon as possible.

#### **b. Background**

Congress has recognized that “[f]ederal health services to maintain and improve the health of the Indians are consistent with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people,” and that it is a “major national goal . . . to provide the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States.”<sup>135</sup> In recognition of the federal trust responsibility, AI/ANs are eligible to receive care through the IHS system free of charge to the individual patient.<sup>136</sup>

In light of the federal government’s trust responsibility, many Tribal employers have not historically offered health coverage to all their employees. The majority of many Tribal workforces qualify for IHS services, and the remote location of many I/T/U facilities means that they are frequently the only viable health care option available for these employees in any event. This means that application of the employer shared

---

<sup>135</sup> 25 U.S.C. § 1601(1)-(2).

<sup>136</sup> 42 C.F.R. §§ 136.11 and 136.12.

## INDIAN TRIBAL GOVERNMENTS

responsibility rule to Tribal governments will impose significant costs on Tribes to provide coverage for AI/ANs for whom the federal government is already obligated to provide care. Federal responsibility for the provision of such health services would allow Tribal governments to allocate and expend scarce resources elsewhere.<sup>137</sup>

### c. Discussion

When viewed against this backdrop, the application of the employer mandate to Tribal employers presents three primary problems: 1) compliance with the mandate is unaffordable, 2) the mandate conflicts with the federal government's trust responsibility towards AI/ANs and 3) the mandate subverts multiple AI/AN protections in the ACA. Each of these issues will be discussed in turn.

#### **The Employer Mandate is Unaffordable for Many Tribal Employers.**

Compliance with the employer mandate forces Tribes to either absorb the cost of employee health insurance or pay non-compliance penalties of up to \$2,000 per year per full-time employee.<sup>138</sup> This is a costly burden for Tribes that are already faced with significant financial hardships.

For example, the Oglala Sioux and the Rosebud Sioux Tribes are among the poorest in the United States, with Tribal member unemployment rates estimated at 89 percent and 83 percent, respectively.<sup>139</sup> Each Tribe has over 800 full-time employees working for the Tribal government alone, excluding casino employees. Although neither Tribe can afford the costs of offering their employees health insurance, each Tribe would face approximately \$1.6 million in annual penalties under the mandate.<sup>140</sup>

---

<sup>137</sup> We note that the federal government's budgeting and expenditures do not come close to meeting the requirements of the trust responsibility: IHS is only funded at approximately 56 percent of need, and the most recent contract support cost shortfall was estimated at \$90 million. NATIONAL TRIBAL BUDGET FORMULATION WORKGROUP'S RECOMMENDATIONS ON THE INDIAN HEALTH SERVICE FISCAL YEAR 2015 BUDGET 3, 6 (2013).

<sup>138</sup> See generally 26 C.F.R. § 54.4980H-4.

<sup>139</sup> See Vincent Shilling, Indian Country Today, "Getting Jobbed: 15 Tribes With Unemployment Rates Over 80 Percent," (Aug. 29, 2013), available at <http://indiancountrytodaymedianetwork.com/2013/08/29/danger-zone-15-tribes-unemployment-rates-over-80-percent-151078>.

<sup>140</sup> We recognize that in order for the penalty to apply, at least one full-time employee must enroll in a Qualified Health Plan through a Marketplace and receive either an advance premium tax credit or a cost-sharing reduction to help pay for coverage. 26 U.S.C. § 4980H (a); 26 C.F.R. § 54.4980H-4(a). However, Tribes have reported that many employees are enrolling in the Marketplace (with active assistance by the Tribes) and have qualified for tax credits, thus subjecting the Tribes to a penalty.

Tribal governments are not like private businesses, whose opposition to the employer mandate may be motivated solely by concern over lost profits. Rather, Tribes are sovereign, governmental entities that are directly responsible for the health and welfare of their people, to whom the United States owes a trust responsibility, and are also often the only major employers on the reservation. Forcing Tribes to pay millions in penalties – or, alternatively, to purchase costly insurance for Tribal member employees who are otherwise exempt from the individual mandate and eligible for free care through the IHS system – will directly result in a reduction in workforce size, a limitation on the scope of Tribal enterprises, and a diminishment of essential governmental services such as social, health and public safety. While all employers subject to the employer mandate must account for insurance costs when making decisions concerning expansion or hiring, the stakes are comparatively much higher when a Tribe might have to choose between purchasing employee health insurance and funding an adequate reservation police force. If applied to Tribal governments, the employer mandate has the potential to critically limit basic Tribal governmental functions.

**i. The Employer Mandate Runs Counter to the Federal Government’s Trust Responsibility**

The federal government owes a trust responsibility toward AI/ANs, through which they are eligible to receive health care free of charge through the IHS system. The IHS is chronically underfunded, however and AI/ANs continue to suffer the highest health disparities of any ethnic group in the United States and are disproportionately likely to be uninsured.<sup>141</sup> The ACA’s employer mandate undercuts the federal trust responsibility by forcing Tribes to divert funding necessary to maintain essential governmental services and redirect it to the purchase of employee health insurance.

First, as a general matter, health plans generally require employees to pay some portion of premium costs. In the case of AI/AN employees, they would be required to “pay” for health care in violation of the trust responsibility. Depending on the type of plan and

---

<sup>141</sup> See generally SAMANTHA ARTIGA ET AL., HENRY J. KAISER FAMILY FOUNDATION, HEALTH COVERAGE AND CARE FOR AMERICAN INDIANS AND ALASKA NATIVES (2013), available at <http://kff.org/disparities-policy/issue-brief/health-coverage-and-care-for-american-indians-and-alaska-natives/> (last visited July 18, 2014).

## INDIAN TRIBAL GOVERNMENTS

whether the AI/AN employee visits facilities that are in or out of network, AI/AN employees may also be subject to copayment, deductible and coinsurance requirements.<sup>142</sup> The trust responsibility protects AI/ANs from having to involuntarily make these types of personal health care expenditures.

Second, the employer mandate would result in a redundant payment cycle in which 1) Tribal employers use their own funding (most likely a combination of federal funding and outside revenue) to purchase employee insurance; 2) many employees visit the local IHS health program for services; and 3) the employee's insurer then reimburses IHS. In these circumstances, the employer mandate essentially requires Tribes to use Tribal funding to purchase insurance from private companies which then pay IHS for providing health services while keeping between 15-20% of the premium payments off the top.<sup>143</sup> Requiring Tribal governments to involuntarily subsidize IHS by providing IHS with a Tribally-funded source of third-party resources does not respect the government-to-government relationship between Tribes and the United States nor the obligations of the trust responsibility.

### **ii. The Employer Mandate Undercuts the ACA's Indian-Specific Protections.**

The ACA included numerous special protections for AI/ANs, including exemptions from the individual mandate and certain ACA Marketplace plan cost-sharing requirements as well as increased eligibility for tax credits. The application of the employer mandate to Tribal employers basically eviscerates all of these exempt provisions.

First, Congress exempted AI/ANs from the ACA's individual mandate out of recognition that AI/ANs are entitled to federal health care benefits and therefore should not be forced to obtain and pay for non-IHS coverage.<sup>144</sup> When Tribal employers are required to offer such coverage anyway, AI/AN employees are given two choices: either accept

---

<sup>142</sup> Along these lines, Tribal employees also might be offered coverage that does not include their local I/T/U facility, thus potentially setting up the Tribal health program for a dispute with the insurer over payment rights as a non-network provider if the employee chose to visit his or her local I/T/U as is otherwise their right.

<sup>143</sup> See 45 C.F.R. § 158.210 (establishing acceptable insurance medical-loss ratios in the large group, and individual health markets).

<sup>144</sup> 26 U.S.C. § 5000A (e) (3).

the coverage and be personally responsible for any applicable employee share of premiums or cost-sharing, or else reject the coverage and lose eligibility for Marketplace tax credits. Under either scenario, the individual AI/AN is “paying” for health coverage in the form of actual plan costs or lost tax credit eligibility.

Second, many Tribes and Tribal organizations have aggressively sought to facilitate AI/AN enrollment in Marketplace plans so as to take advantage of the Marketplace’s Indian-specific cost-sharing protections, which help defray the cost of AI/AN enrollment.<sup>145</sup> However, employers are not subject to the employer mandate penalties unless a full-time employee subsequently enrolls in an ACA Marketplace plan and obtains a tax credit or cost-sharing reduction,<sup>146</sup> which includes the AI/AN cost-sharing protections set out in section 1402 of the ACA.<sup>147</sup> Tribes are therefore placed in a bind with regard to their AI/AN employees: on the one hand, they may not be able to afford to provide them with employer-sponsored coverage, and instead may prefer to assist with Marketplace enrollment. But, if a Tribe does steer employees toward ACA Marketplace plans rather than providing employer coverage, the employees will almost certainly qualify for a cost-sharing reduction or tax credit, thus triggering employer liability under the ACA. This discourages Tribes from guiding AI/AN employees into the Marketplaces (as opposed to comparably less generous coverage options like Medicaid), which both prevents AI/ANs from taking full advantage of their benefits under the ACA and decreases the overall pool of Marketplace applicants. Neither of the outcomes benefit Tribal employers, insurance consumers nationwide nor the federal government.

Third, AI/ANs are further incentivized toward participating in Marketplaces through the availability of premium tax credits: because the IRS excludes various types of Indian-specific income when calculating AI/AN eligibility for the tax credits, it is comparatively easier for AI/ANs to qualify.<sup>148</sup> In light of the fact that AI/AN eligibility for IHS services acts as a natural disincentive for enrollment in private insurance plans that require the individual to pay premiums and cost-sharing, the availability of tax credits may well be a

---

<sup>145</sup> 42 U.S.C. § 18071(d).

<sup>146</sup> 26 U.S.C. § 4980H (a); 26 C.F.R. § 54.4980H-4(a) – 5(a).

<sup>147</sup> Codified as amended at 42 U.S.C. § 18071.

<sup>148</sup> See 26 U.S.C. § 36B (d) (tying tax credit eligibility to modified adjusted gross income); *see also* 43 U.S.C. § 1620, 25 U.S.C. § 1407, 25 U.S.C. § 171b (a) (exempting various AI/AN-specific income from MAGI).

## INDIAN TRIBAL GOVERNMENTS

deciding factor for AI/AN participation in the Marketplace. However, employees are automatically disqualified from tax credit eligibility merely upon receiving an offer of coverage from their employer.<sup>149</sup>

This creates an exceptional burden on Tribes and AI/AN employees. Tribes that seek to comply with the mandate on a limited budget often find that the only available options are very expensive for employees, have high cost-sharing amounts or are less comprehensive than plans available to a large, urban employer.<sup>150</sup> The remote location of many I/T/U facilities creates additional difficulties in locating plans that treat Tribal facilities as in-network or otherwise preferred providers. The end result is that the Tribe must either bear the burden of paying for expensive and/or low-quality coverage or else subjecting itself to significant employer mandate penalties, while the AI/AN employee must choose between paying for his or her own coverage in violation of the AI/AN individual mandate exemption or losing their tax credit eligibility. These are not desirable outcomes under the ACA.

### **iii. The IRS Should Issue a Regulatory Exemption from the Employer Mandate.**

The IRS has previously recognized the burden that the ACA's employer-specific provisions place on Tribal employers: for example, the IRS explicitly excludes "federally recognized Indian tribal governments or, until further guidance, any tribally chartered corporation wholly owned by a federally recognized Indian tribal government" from an otherwise-applicable requirement that employers report the cost of coverage under an employer-sponsored group health plan on their employees' W-2 forms.<sup>151</sup> As discussed above, the IRS should similarly recognize the various legal and practical reasons why Tribal employers should be exempt from the employer mandate. Accordingly Treasury

---

<sup>149</sup> 26 U.S.C. § 36B (2)(B); 26 U.S.C. § 5000A (f)(1)(B), (f)(2). The offer of coverage must otherwise satisfy the ACA's requirements for minimum essential coverage.

<sup>150</sup> See, e.g., Letter from Monica J. Linden, Commissioner, Montana Department of Securities and Insurance, to Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services (Mar. 10, 2014) (recognizing practical difficulties for Tribal employers in finding and offering adequate coverage and seeking Tribal exemption from employer mandate).

<sup>151</sup> See Internal Revenue Service, "Employer-Provided Health Coverage Informational Reporting Requirements: Questions and Answers," available at <http://www.irs.gov/uac/Employer-Provided-Health-Coverage-Informational-Reporting-Requirements:-Questions-and-Answers> (Dec. 19, 2013).

Regulation § 54.4980H–2 should be modified to create a stand-alone exemption for Indian Tribal employers as set forth below:

**Treasury Reg. § 54.4980H–2 Applicable large employer and applicable large employer member.**

**(a) In general.** Section 4980H applies to an applicable large employer and to all of the applicable large employer members that comprise that applicable large employer.

**(b) Determining applicable large employer status—**

**(5) Indian Tribes and Tribal Entities.** For the purposes of any penalty or assessment under 26 U.S.C. § 4980H or 26 C.F.R. § 54.4980H, the term “applicable large employer” shall not include any Indian tribe, tribal health program, tribal organization, or urban Indian organization (as defined in 25 U.S.C. § 1603).

**Excise Tax on High Cost Tribal Employer-Sponsored Health Coverage – IRS Notice 2015-52 on Code Section 4980I**

**a. Introduction**

In Notice 2015-52, the IRS solicited comments on potential regulatory approaches for implementing Section 4980I of the Code,<sup>152</sup> which establishes the Cadillac Tax an excise tax on certain employer-sponsored health benefits under which coverage providers must pay a tax on employee plans that exceed certain statutory cost thresholds (the excise tax).<sup>153</sup>

**b. Background**

The ITG believes that the plain language of Code Section 4980I exempts plans offered by Indian Tribes and Tribal Entities from the scope of the excise tax. We also believe

<sup>152</sup> See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9001, 124 Stat. 119, 793 (2010), codified as amended at 26 U.S.C. § 4980I. Unless otherwise noted, references to “Sections” of statutes within this comment refer to sections of the Code in chapter 26 of the United States Code.

<sup>153</sup> The thresholds are \$10,200 for self-only coverage and \$27,500 for non-self-only coverage, subject to certain adjustments specified in the statute. 26 U.S.C. § 4980I (b)(3)(C).

## INDIAN TRIBAL GOVERNMENTS

that to whatever extent that the IRS ultimately does seek to apply the tax to Tribes, Code Section 4980I additionally exempts plans offered to employees who are members of a federally-recognized Indian tribe. Both exemptions are mandated as a matter of law and are supported as a matter of policy, and ITG subcommittee respectfully requests that the IRS/Treasury acknowledge in the proposed rule that the excise tax does not apply any employer benefits provided by an Indian Tribe or Tribal Entities.

Notwithstanding these provisions, should the IRS nevertheless apply the excise tax to covered Tribal employers, ITG offers the following comments regarding a matter of particular concern on which the IRS solicits input. Specifically, we believe that Notice 2015-52's proposed excise tax payment/reimbursement methodology, under which the "administrator" of a self-insured plan (if determined to be an entity other than the employer itself for purposes of Section 4980I) would pay the tax on the employer's behalf and then bill the employer for the cost after grossing up the amount of the entity's non-deductible excise tax to account for income tax on the reimbursement, is impermissible as a matter of statutory interpretation and very problematic as a matter of tax policy.

### **c. Discussion**

#### **i. Longstanding rules of statutory interpretation indicate that Code Section 4980I excludes Indian Tribal employers from the excise tax.**

Section 9001 of the ACA, which established Code Section 4980I, applied the excise tax to excess benefits provided under "applicable employer-sponsored coverage," as defined in Code Section 4980I(d)(I). That subsection includes a provision specific to governmental employers, which states that "applicable employer-sponsored coverage" includes "coverage under any group health plan established and maintained primarily for its civilian employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any such government."<sup>154</sup> This government plan provision does not clearly and expressly

---

<sup>154</sup> 26 U.S.C. § 4980I(d)(1)(E).

mention anything about plans administered by an Indian Tribe or Tribal organization, despite specifically addressing state governments and the federal government.<sup>155</sup>

Under well-recognized rules of statutory interpretation, Congress's exclusion of Tribal governments from Code Section 4980I must be considered deliberate. First, statutes of general applicability that interfere with rights of self-governance, such as the relationship between Tribal governments and on-reservation Tribal businesses and their employees, require "a clear and plain congressional intent" that they apply to Tribes before they will be so interpreted.<sup>156</sup> Although Congress repeatedly referenced Indian Tribes in the ACA,<sup>157</sup> and specifically discussed governmental entities in Code Section 4980I, it did not include Tribes at all in the statutory provision concerning the coverage of the excise tax. This clearly indicates that Code Section 4980I does not apply to Tribal employers that administer their own plans.<sup>158</sup>

Second, there are numerous provisions in the Code that explicitly mention Tribal governmental entities,<sup>159</sup> include Tribally-sponsored benefits within the definition of

---

<sup>155</sup> The IRS has recognized that the government-specific clause must be read as an integrated whole with the introductory language in 26 U.S.C. § 4980I(d)(1)(A), noting that the fact that the government clause only mentions "civilian" governmental plans implicitly means that Congress intended that military governmental plans are not subject to the excise tax. Notice at 8. This interpretation, and the government clause generally, would not make sense if Congress had intended that the excise tax apply to any government plans other than those specified in paragraph (d)(1)(E). See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a harmonious whole'" (citation omitted)).

<sup>156</sup> *E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (Age Discrimination in Employment Act did not apply to employment discrimination action involving member of Indian Tribe, Tribe as employer, and reservation employment); *accord Snyder v. Navajo Nation*, 382 F.3d 892, 896 (9th Cir. 2004) (Fair Labor Standards Act did not apply to dispute between Navajo and non-Navajo Tribal police officers and Navajo Nation over "work [done] on the reservation to serve the interests of the tribe and reservation governance").

<sup>157</sup> See, e.g., Section 1402(d)(2) (referring to health services provided by an Indian Tribe); Section 2901(b) (referring to health programs operated by Indian Tribes); Section 2951(h)(2) (referring to Tribes carrying out early childhood home visitation programs); Section 2953(c)(2)(A) (discussing Tribal eligibility to operate personal responsibility education programs); Section 3503 (discussing Tribal eligibility for quality improvement and technical assistance grant awards).

<sup>158</sup> To whatever extent that there is uncertainty on this front, the Indian canons of statutory construction require that statutes relating to Indians be "construed liberally in favor" of Tribes. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

<sup>159</sup> See, e.g., 26 U.S.C. § 54F(d)(4) (including "Indian tribal governments (as defined in [Code] section 7701(a)(40))" as qualified bond issuers for certain projects); 26 U.S.C. § 401(k)(4)(B)(iii) ("An employer which is an Indian tribal government (as defined in [Code] section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State, or tribal law which is owned in whole or in part by any of the foregoing may include a qualified cash or deferred arrangement as part of a plan maintained by the employer.").

## INDIAN TRIBAL GOVERNMENTS

“governmental plans” in various contexts<sup>160</sup> or specifically note when Tribal governmental entities are to be treated identically to state governments for the purposes of a given rule.<sup>161</sup> These provisions almost all cite the definition of “Indian tribal government” set out in Code Section 7701, a provision that the ACA repeatedly referenced and amended.<sup>162</sup> Congress clearly knows how to include Tribal governments or their health plans within the scope of a particular Code provision.<sup>163</sup> The ACA explicitly amended the Code section that includes a commonly-cited definition of “Tribal government.”<sup>164</sup> Congress did not mention Tribes in Code Section 4980I’s discussion of governmental entities. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act; it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”<sup>165</sup> Code Section 4980I must and reasonably should be construed to exclude Tribal plans from the excise tax.

### **ii. Policy considerations support the statutory exclusion of Tribal employers who administer their own plans from the excise tax.**

Congress has recognized both that “[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people” and that it is a “major national goal...to provide the resources,

---

<sup>160</sup> See, e.g., 26 U.S.C. § 414(d) (“The term ‘governmental plan’ includes a plan which is established and maintained by an Indian tribal government (as defined in [Code] section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either. . . .”).

<sup>161</sup> See, e.g., 26 U.S.C. § 168(h)(2)(A)(i), (iv) (defining “tax-exempt entities” as including both “the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the foregoing,” and “any Indian tribal government described in section 7701(a)(40),” and then explicitly noting that “any Indian tribal government . . . shall be treated in the same manner as a State”).

<sup>162</sup> See ACA Section 9010(d)(2) (incorporating definitions from Section 7701); Section 1409(a) of the Health Care and Education Reconciliation Act of 2010 (adding new subsection (o) to Section 7701).

<sup>163</sup> See, e.g., *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 329 n.22 (1981) (“The dissent refers to our reading as ‘extremely strained,’ but the dissent, in relying on § 505(e) as evidence of Congress’ intent to preserve the federal common-law nuisance remedy, must read ‘nothing in this section’ to mean ‘nothing in this Act.’ We prefer to read the statute as written. Congress knows how to say ‘nothing in this Act’ when it means to see, e. g., Pub. L. 96–510, § 114(a), 94 Stat. 2795.”); *accord Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1348 (11th Cir. 2014) (“[W]here Congress knows how to say something but chooses not to, its silence is controlling.”) (Citations omitted).

<sup>164</sup> See, e.g., Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 105, 88 Stat. 2203, 2208-09 (1975) (codified as amended at 42 U.S.C. § 215(d), 42 U.S.C. § 2004b) (federal law required to explicitly include Indian Tribes within the scope of statutory benefits previously limited to state and local governments).

<sup>165</sup> *Dean v. United States*, 556 U.S. 568, 573 (2009).

processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States.”<sup>166</sup> Applying the excise tax to Tribal employers that administer their own plans, in addition to running counter to Code Section 49801’s statutory language, also undercuts Congress’s national policy toward Indian health by disproportionately burdening Tribal employers and individual American Indians and Alaska Natives.

First, Tribes face many hurdles in maintaining a viable workforce. For example, Tribes in more remote areas often have trouble recruiting and retaining employees (particularly, health care professionals or other individuals with advanced degrees), while ongoing funding disparities and the nonprofit status of many Tribal entities can make it difficult for Tribes to offer competitive wages. As an alternative, many Tribes structure their employee benefits packages to be comparatively generous in order to attract applicants. These non-salary benefits, which can be virtually the only way for a Tribal employer to compete with non-Tribal counterparts, are a necessary cost for Tribes to do business, despite seeming inflated in a vacuum when compared to insurance costs for national or international employers that can better spread risk across thousands of urban employees.

Second, applying the tax to Tribal employers would disproportionately affect American Indians and Alaska Natives. The alleged purpose of the excise tax is to drive down health care costs by encouraging individuals to be more judicious in their use of health services. As this logic goes, in order to avoid the excise tax, employers will revise their plans by 1) reducing plan options, covered benefits, or the scope of provider networks for employees; and 2) increasing employee cost-sharing by offering plans with higher deductibles or other out-of-pocket costs. When employees subsequently must pay more for visits, tests, procedures and medications, they will be more selective and only

---

<sup>166</sup> 25 U.S.C. § 1601(1)-(2). We note that the federal government’s budgeting and expenditures do not come close to meeting the requirements of the trust responsibility: IHS is only funded at approximately 56 percent of need, and a recent contract support cost shortfall was estimated at \$90 million. NATIONAL TRIBAL BUDGET FORMULATION WORKGROUP’S RECOMMENDATIONS ON THE INDIAN HEALTH SERVICE FISCAL YEAR 2015 BUDGET 3, 6 (2013).

## INDIAN TRIBAL GOVERNMENTS

engage in “medically necessary” visits, tests, procedures and medications (thus driving down service usage and overall costs).

But this theory is premised on the notion that the provision of “Cadillac” plans encourages employees to frivolously overuse the health care system. To whatever extent this might be true among the general population, American Indians and Alaska Natives’ interactions with health care providers is neither frivolous nor over utilized. Rather, these individuals suffer from chronic diseases at a significantly higher rate than the general population,<sup>167</sup> have an increased rate of poverty<sup>168</sup> and are often entirely reliant on remote and drastically underfunded IHS facilities for their care.<sup>169</sup> If applied to Tribes, the excise tax would therefore diminish the ability of American Indians and Alaska Natives to obtain services that are more likely to be medically necessary and less likely to be readily available, and increase out of pocket costs for a patient population that can least comfortably bear that burden. This not only fails to advance the nominal purpose of and logic underpinning the excise tax, but it undercuts the federal government’s trust responsibility toward American Indian and Alaska Native health.

Third, and at the Tribal level, being subject to the tax would force Tribal employers into one of the following scenarios:

- **Option 1:** Pay the tax. Tribes must then divert their limited and finite funding away from necessary services such as law enforcement, health care and other governmental requirements in order to “pay” the IRS. The Tribe might then be forced to increase employee contribution amounts or cost-sharing in its self-funded plan to make up a portion of

---

<sup>167</sup> SAMANTHA ARTIGA, RACHEL ARGUELLO & PHILETHEA DUCKETT, KAISER FAMILY FOUNDATION, HEALTH COVERAGE AND CARE FOR AMERICAN INDIANS AND ALASKA NATIVES 2 (Oct. 7, 2013).

<sup>168</sup> *Id.* at 1.

<sup>169</sup> IHS is only funded at approximately 56 percent of need, and a recent contract support cost shortfall was estimated at \$90 million. NATIONAL TRIBAL BUDGET FORMULATION WORKGROUP’S RECOMMENDATIONS ON THE INDIAN HEALTH SERVICE FISCAL YEAR 2015 BUDGET 3, 6 (2013).

the difference, which would additionally burden the individual employees.<sup>170</sup>

- **Option 2:** Replace its existing plan, which has been carefully tailored according to the needs of the Tribal workforce and the realities of market pressures, with lower-cost insurance. The replacement coverage may be less comprehensive, include fewer in-network providers or have higher costs for the individual employee. This will result in dissatisfaction and potentially lower health outcomes for employees and difficulties for the Tribe in employee recruitment and retention.
- **Option 3:** Eliminate employer-sponsored coverage altogether. The Tribe will then become potentially liable for the ACA's employer mandate penalty, which would again force the Tribe to divert funding back to the federal government. The Tribe will also be placed at a significant disadvantage from a human resources standpoint and the employees would lack access to employer-sponsored care.

None of these options are compatible with either the federal trust responsibility or the fact that Tribal design of employee benefits packages is itself an exercise in sovereignty. The ITG Subcommittee believes that these policy considerations strongly support the statutory exclusion of Tribes from the excise tax, and we request that the IRS acknowledge that fact in any ultimate regulations.

- iii. **Even if it does not construe the statute as entirely excluding Tribal plans, the IRS should exclude coverage provided to Tribal member employees from the definition of “applicable employer-sponsored coverage.”**

In the event that the IRS construes Code Section 4980I as applying to Tribal employers who administer their own plans, we note that the tax applies to the excess benefit provided to any employee covered under any “applicable employer-sponsored

---

<sup>170</sup> Such an increase could potentially eliminate the Tribal plan's grandfathered status under the ACA, if applicable. See 45 C.F.R. § 147.140(g)(1).

## INDIAN TRIBAL GOVERNMENTS

coverage.” The term “applicable employer-sponsored coverage” means coverage “under any group health plan made available to the employee by an employer which is excludable from the employee’s gross income under section 106 [of the Code], or would be so excludable if it were employer-provided coverage (within the meaning of such section 106).”<sup>171</sup> With certain exceptions, Code Section 106 generally excludes the value of “employer-provided coverage under an accident or health plan” from an employee’s gross income.<sup>172</sup>

Coverage for Tribal member employees, however, is not excluded from income pursuant to Code Section 106, but rather by virtue of Code Section 139D, which excludes from an individual’s gross income the value of:

- Any health service or benefit provided or purchased, directly or indirectly, by IHS through a grant to or a contract or compact with a Tribe or Tribal organization, or through a third-party program funded by IHS;
- Medical care provided, purchased or reimbursed by a Tribe or Tribal organization for, or to, a Tribal member (including the member’s spouse or dependent);
- Coverage under accident or health insurance (or an arrangement or plan having the effect of accident or health insurance) provided by a Tribe or Tribal organization for a Tribal member (including the member’s spouse or dependent); and
- Any other medical care provided by a Tribe or Tribal organization that supplements, replaces or substitutes for a program or service relating to medical care provided by the federal government to Tribes or Tribal members.<sup>173</sup>

Because coverage for Tribal member employees is excludable under Code Section 139D rather than Code Section 106, it is not included in the definition of “applicable employer sponsored coverage” for purposes of Code Section 4980I. This is an

---

<sup>171</sup> 26 U.S.C. § 4980I(d)(1)(A).

<sup>172</sup> 26 U.S.C. § 106(a).

<sup>173</sup> 26 U.S.C. § 139D (b). This Code provision was implemented pursuant to Section 9021 of the ACA.

important distinction, as Tribes may provide members with health insurance as an extension of or in association with an employee plan (whether as a group plan, through premium sponsorship in an ACA Marketplace, etc.). While these benefits might at first glance seem to “mimic” a Code Section 106 plan to which the excise tax would apply, the coverage would instead be exempt under Code Section 139D and remain outside the scope of the tax. Any proposed rule issued by the IRS should clarify this fact as a definitional matter in order to ensure that the tax is not levied against benefits provided by a Tribal employer to a Tribal member employee.<sup>174</sup>

**iv. The IRS proposed “pay and reimburse” methodology for self-insured plans violates Section 4980I.**

In the event that the IRS ultimately does apply the excise tax outright to Tribal employers (which, as noted above, we do not think is supported as either a matter of law or policy), we are extremely concerned that the IRS proposed “pay and reimburse” methodology for self-insured plans will impermissibly inflate excise tax rates past their statutory limitations.

Code Section 4980I(c)(1) states that the “coverage provider” is liable for paying the excise tax. In the context of self-insured plans, the coverage provider is “the person that administers the plan benefits.”<sup>175</sup> According to Notice 2015-52, because the latter phrase is undefined in the Code or related statutes:<sup>176</sup>

[T]he excise tax will be paid . . . by the “person that administers the plan benefits” (which may, in some instances, be the employer) in the case of self-insured coverage. It is expected that, if a person other than the employer is the coverage provider liable for the excise tax, that person may pass through all or part of the amount of the excise tax to the employer in some instances. If the coverage provider does pass through

<sup>174</sup> In addition, we believe that the regulations should recognize that applying the excise tax to Tribal member plans will frustrate one of the key goals in enacting Section 139D, as Tribes will be less likely to provide such tax-exempt benefits to their members (employee or otherwise) if they are concerned that doing so could subject the Tribal fisc to liability under Section 4980I.

<sup>175</sup> 26 U.S.C. § 4980I(c)(2)(C).

<sup>176</sup> But see *infra* for a discussion of why this interpretation is not accurate.

## INDIAN TRIBAL GOVERNMENTS

the excise tax and receives reimbursement for the tax (the excise tax reimbursement), the excise tax reimbursement will be additional taxable income to the coverage provider. Because § 4980I (f)(10) provides that the excise tax is not deductible, the coverage provider will experience an increase in taxable income (that is not offset by a deduction) by reason of the receipt of the excise tax reimbursement. As a result, it is anticipated that the amount the coverage provider passes through to the employer may include not only the excise tax reimbursement, but also an amount to account for the additional income tax the coverage provider will incur (the income tax reimbursement).<sup>177</sup>

The IRS accordingly proposes that for self-insured plans: 1) the employer will calculate its excise tax liability; 2) pass that information to “the person that administers the plan benefits,” which the IRS believes may be the employer, a third-party administrator (TPA), or some other entity as determined on a case-by-case basis; 3) that third-party (if not the employer) will pay the excise tax; 4) the third party will then bill the cost onto the employer; 5) the employer will reimburse the third party the amount of the Code Section 4980I excise tax; and 6) in addition, the third party (either as part of the excise tax pass-through or as a separate process) will bill the employer an additional sum to reflect the third party’s increase in taxable income in the form of the excise tax reimbursement that it receives from the employer and the grossed up amount of the income tax reimbursement itself. We do not believe that this convoluted scenario is permissible as a matter of reasonable statutory interpretation and the clear statutory intent.

First, the IRS interpretation would impose an effective tax rate on an employer that exceeds the rate specified in Code Section 4980I. In the event that an employer provides excess benefits, Code Section 4980I(a) imposes an excise tax “*equal to 40 percent of the excess benefit.*”<sup>178</sup> But by authorizing a TPA to pay the excise tax and bill the employer, and to additionally bill a grossed up income tax amount to cover the TPA’s own income tax liability with respect to the reimbursement payment, the

---

<sup>177</sup> Notice 2015-52 at 7.

<sup>178</sup> 26 U.S.C. § 4980I (a) (emphasis added).

employer's liability for tax does not *equal* 40 percent of the excess benefit; it *exceeds* it. For example, in the event of an employer's \$2,500 excess benefit, and assuming an effective income tax rate on the TPA of 20 percent, the TPA would pay the excise tax of \$1,000, and then bill the employer for that amount, plus the \$250 the TPA will owe in income tax on the reimbursement of the non-deductible excise tax and related reimbursement of the income tax itself. That would mean that a Tribe, or any other tax-exempt entity operating a self-insured plan through a taxable TPA, would actually pay \$1,250 of tax on an excess benefit of \$2,500, or an effective tax rate of 50 percent.<sup>179</sup>

In addition, the application of this proposed methodology leads to a vicious cycle of increasing excise tax liability for the employer. In determining the cost of applicable coverage subject to the excise tax, Code Section 4980I(d)(2)(A) provides that "any portion of the cost of such coverage which is attributable to the tax imposed under this section shall not be taken into account." While the drafters acknowledge in the Notice that the computation of the excess benefit under the employer's plan will not include the excise tax reimbursement, the Notice indicates that reimbursement of the TPA's income tax most likely will be added to the cost of coverage subject to the Code Section 4980I tax.<sup>180</sup>

In practice, this means that should any ultimate implementing regulations treat the TPA as the person administering the plan benefits, and implicate the proposed pay-and-reimburse model, employers will be stuck in a cycle through their reimbursement of the TPA's income tax expenses will subsequently increase the employer's own cost of coverage. Unless the employer amends its plan, this increase in coverage cost will subsequently increase the employer's excise tax liability and its TPA income tax reimbursement obligation. This itself will once again increase the deemed cost of

---

<sup>179</sup> See Notice 2015-52 at 8-9 (explaining tax calculation formula under the scenario envisioned by the drafters of the Notice).

<sup>180</sup> Notice 2015-52 at 7-8. However, this interpretation is at odds with the plain language of Section 4980I (d)(2)(A) noting that any portion of cost of coverage "which is attributable to the tax imposed under this section shall not be taken into account." The income tax should be considered to be "attributable to the tax imposed under" Section 4980I and subsequently excluded; if not, the IRS is essentially admitting that it has created the income tax payments *sua sponte*, without statutory authorization, and in violation of the statutory 40 percent excise tax responsibility.

## INDIAN TRIBAL GOVERNMENTS

coverage and further gross up the employer's excise tax liability, thus triggering the entire cycle in perpetuity.

This has the potential to drastically compound an employer's effective liability under the statute without any increase of benefits under its plan. For instance, one Tribe has calculated that it would be liable for approximately \$250,000 in penalties on an excess benefit of \$625,000. Applying the IRS "income tax liability" formula would result in an additional \$62,500 owed to a TPA with a marginal income tax rate of 20 percent, which would then increase the Tribe's cost of coverage to \$712,500 and its excise tax payment to \$275,000: a \$25,000 increase in liability. In imposing the Code Section 4980I excise tax as being "equal" to 40 percent of the excess benefit, Congress did not leave room for an interpretation under which the end-result is an effective tax rate will almost always exceed this stated statutory amount if a TPA is responsible for administration of the plan under the terms established by the employer.

Second, and as noted above, the IRS states that this payment and reimbursement process is necessary because "Section 4980I does not define the term 'person that administers the plan benefits'" who is liable to pay the tax.<sup>181</sup> But this is not accurate: Code Section 4980I(f)(6) defines the "person that administers the benefits" as the "plan sponsor if the plan sponsor administers benefits under the plan," while Code Section 4980I(f)(7) then defines "plan sponsor" through the incorporation of Section 3(16)(B) of the Employee Retirement Income Security Act of 1974, as amended. This provision states, in relevant part, that the plan sponsor in this context is "the employer in the case of an employee benefit plan established or maintained by a single employer."<sup>182</sup>

We believe that the most natural reading of these provisions as a whole is that the employer should be considered the person that "administers benefits" under the plan, in that the employer has the ultimate administrative authority to set the plan terms, pick the TPA and usually make final benefit decisions. If that were the case, the employer itself would calculate and pay the tax, without having to involve third parties. That seems a much more logical application of the tax than the complex TPA reimbursement scenario

---

<sup>181</sup> Notice 2015-52 at 7.

<sup>182</sup> 26 U.S.C. § 4980I(f)(7) (incorporating by reference 29 U.S.C. § 1002(16)(B)(i)).

Notice 2015-52 suggests, particularly with respect to any Tribe or other tax-exempt employer.<sup>183</sup>

Third, as a matter of practical implementation and tax policy, requiring that employers coordinate tax payments with a TPA invites a host of administrative difficulties that would not exist if employers simply paid the tax themselves.<sup>184</sup> For example, Code Section 49801(e) penalizes the “employer or plan sponsor” for failure to properly calculate the tax, which, per the Notice, could mean the TPA. But how will the TPA ensure that the employer has properly calculated the tax amount, which it would then send to the TPA for payment? What recourse would the TPA have if the employer failed to calculate the tax amount accurately and in a timely manner? This would seem to suggest that TPAs would have to oversee or otherwise “check the work” of the employer; would the TPA be authorized to pass through the costs of these added burdens to the employer? Would such pass through increase the employer’s cost of coverage?<sup>185</sup>

These are just some of the many difficulties and potentially lawsuit-inducing adversarial situations that could arise under Notice 2015-52’s pay and reimburse model. As a practical matter, Congress cannot have intended to subject both employers and TPAs to the cost of undertaking such a complex and expensive system, particularly as compared to the relatively straightforward option of simply having the plan sponsor (defined as the employer, in the case of a self-insured plan) calculate and pay the excise tax on its own.

---

<sup>183</sup> In addition, the Indian canons of construction demand that the agency avoid such an anti-Tribal interpretation of an unclear statute. See, e.g., *Montana*, *supra*.

<sup>184</sup> The IRS acknowledges this point when it requests comments on a number of difficult issues related to the implementation of this process, such as the manner in which the employer can reimburse the TPA for the income tax-specific portion of the transaction, the discussed issue of whether the income tax payment goes toward cost of coverage, the formula used when calculating the income tax and other issues. See Notice 2015-52 at 7-9.

<sup>185</sup> In addition to these tax compliance issues, there would be a number of new contractual issues that would arise out of the employer–TPA relationship once this new tax goes into effect, such as the need to verify the TPA’s marginal income tax rate on which a portion of the claimed reimbursement is based. While those matters are separate from the tax compliance issues themselves, they would result from an unnecessary and questionable interpretation of tax law.

## INDIAN TRIBAL GOVERNMENTS

Absent clear statutory direction for doing so, the IRS should not unnecessarily complicate an already complicated calculation.<sup>186</sup>

### **The ongoing need to clarify and educate on the Tribal General Welfare Exclusion Act**

#### **a. Introduction**

Tribal governments, like all governments, sponsor social welfare programs designed to support their members. In the past, the IRS has questioned whether payments made through those social welfare programs are taxable. On September 26, 2014, President Obama signed into law a measure that excludes from taxable income various general welfare payments to members of Indian tribes. This new law GWEA (as described above), definitively establishes the rules applicable to social welfare programs provided by Indian tribes for their citizens.

#### **b. Background**

On June 3, 2014, the IRS released Revenue Procedure 2014-35 (the IRS Guidance), titled “Application of the General Welfare Exclusion to Indian Tribal Government Programs that Provide Benefits to Tribal Members.” The revenue procedure clarified that tribal government programs and services that benefit individual Indians and their families, that meet certain general requirements, and that fall within five “safe harbor” categories will not be subject to federal income taxation. Prior to issuing Revenue Procedure 2014-35, the IRS had imposed federal income taxes on tribal general welfare programs, many of which were identical to tax-exempt federal and state programs in the areas of healthcare, education, housing, eldercare, emergency assistance, cultural programs, burial assistance, legal aid and much more.

The GWEA was enacted by Congress to amend the Code to exclude from gross income, for income tax purposes, the value of an Indian general welfare benefit. The GWEA defines "Indian general welfare benefit" as any payment made or services provided to or on behalf of a member of an Indian tribe under an Indian tribal

---

<sup>186</sup> The Consolidated Appropriations Act, 2016 (Pub. L. 114-113), signed into law on Dec. 18, 2015, delayed the effective date of the excise tax on high cost employer-sponsored health coverage from taxable years beginning after Dec. 31, 2017, to taxable years beginning after Dec. 31, 2019.

government program if: 1) such program is administered under specified guidelines and does not discriminate in favor of members of the governing body of the Indian tribe; and 2) the program benefits are available to any tribal member, are for the promotion of general welfare, are not lavish or extravagant, and are not compensation for services.

The GWEA also directed the Secretary of the Treasury to: 1) establish a Tribal Advisory Committee to advise the Secretary on the taxation of Indians; 2) establish and require training and education for IRS field agents on federal Indian law and the implementation of the GWEA; and 3) suspend audits and examinations of Indian tribal governments and members of Indian tribes and waive any interest or tax penalties related to the exclusion from gross income of Indian general welfare benefits.<sup>187</sup>

**c. Discussion**

The GWEA recognizes local tribal government decision-making to determine the best interests and needs of tribal communities. The GWEA attempts to address tribal concerns related to the treatment of tribal general welfare programs. The GWEA amended the Internal Revenue Code to: 1) acknowledge that tribal programs designed to promote the general welfare of the community are not subject to federal income taxation; 2) clarify that items of cultural significance or cash honoraria provided by tribes to tribal citizens for cultural purposes are not compensation for services; 3) temporarily suspend GWE-related audits of tribes until IRS field agents are educated and trained in federal Indian law and the government's unique legal treaty and trust relationship; 4) establish a national Tribal Advisory Committee within Treasury to advise the Secretary on matters of Indian tax policy; 5) authorize the Secretary to waive interest, in addition to penalties, imposed on tribes in cases relating to general welfare; and 6) direct the Secretary to resolve ambiguities in implementing the GWEA in favor of tribes.

The GWEA dealt with Tribal concerns with the IRS interpretation of the new statutory requirement that the benefits be "for promotion of general welfare" as requiring a determination of individual or family financial need (as IRS has required in the past in

---

<sup>187</sup> <https://www.congress.gov/bill/113th-congress/house-bill/3043>.

## INDIAN TRIBAL GOVERNMENTS

evaluating tribal programs). The GWEA legislative history clarifies that Congress intended that the IRS will apply this requirement in a manner no less favorable than the safe harbor approach provided for in Revenue Procedure 2014-35, and in no event will the IRS require an individualized determination of financial need where a Tribal program meets all other requirements of new Code Section 139E, as added by the GWEA.

## V. CONCLUSION

It is the recommendation of the ITG Subcommittee that the IRS continue its relationship with Tribal governments consistent with trust status the Tribes have with the U.S. government and its agencies in all decision-making policies. The creation of an effective and clear communication process with Tribal governments and their entities through the ITG will allow for more effective decision-making.

- ITG staff should continue to participate in annual or semiannual meetings of tribal organizations such as the National Congress of American Indians and the Native American Finance Officers Association to update tribal organizations on any decision-making policies.
- IRS should continue to present relevant and timely webinars, which can be virtually attended by tribal finance personnel as well as tribal leaders. ITG should provide timely regional face-to-face training to tribal governments and entities on substantive tax topics.

The ACA's employer mandate is unaffordable for many Tribes, as both the penalties and the insurance payments would require Tribes to divert already-scarce resources that would be far better allocated toward funding direct Tribal services and programs. The mandate also forces Tribes to subsidize IHS programs and insurance company profits, and acts as a federal directive that many AI/ANs pay for their health care in direct conflict with the federal trust responsibility. The fact that AI/ANs must (directly or indirectly) pay for such private insurance similarly undercuts the ACA's AI/AN exemption from the individual mandate, acts as a disincentive for enrollment in Marketplace plans, and can result in disqualification from tax credit eligibility. The ITG Subcommittee

therefore recommends that the IRS exempt Indian Tribes and Tribal Entities from the employer mandate.

Code Section 4980I has the potential to seriously affect a Tribe's ability to structure employee benefit packages in accordance with Tribal-specific needs. Because the statute excludes Tribes from the list of covered governmental entities, and by its terms does not apply to health benefits provided by a Tribe or Tribal organization to a member of an Indian Tribe, ITG Subcommittee does not believe that Tribal employers who administer their own plans should be subject to the excise tax. Should the IRS disagree on this point, however, we believe that the Notice 2015-52's proposed pay and reimburse model will impermissibly inflate Tribes' excise and income tax based liabilities far beyond the statutory rate specified in Code Section 4980I. The IRS should abandon this payment model both as a matter of law and tax policy in favor of allowing employers to calculate and pay the tax themselves on any excess benefits they may provide.

ITG Subcommittee strongly recommends that the IRS resolve uncertainties that have arisen since the passages of the Tribal General Welfare Exclusion Act. The IRS should clarify issues and communicate the information to the tribal governments. The IRS should consult with the newly-established national Tribal Advisory Committee within Treasury and the ITG Subcommittee to advise the Secretary on matters of Indian tax policy including general welfare determinations.

## APPENDIX A

### Example ITG Survey Letter

**Tino Batt, Stefani Dalrymple and Marcelino Gomez, Indian Tribal Government Representatives  
Advisory Committee on Tax Exempt and Government Entities  
Internal Revenue Service, Department of the Treasury**

October 9, 2015

Dear Tribal Organization:

We are members of the IRS Advisory Committee on Tax Exempt and Governmental Entities also known as the “ACT.” We are writing to ask you to complete the enclosed survey to assist us in our information gathering for a public report that we are preparing for the IRS and the public from the ACT.

We do not work for the IRS. Rather we were appointed to the ACT to represent the interests and concerns of tribal governments and tribal entities in matters of federal tax administration. The TEGE ACT is an organized public forum for discussion of relevant employee plans; exempt organizations; tax- exempt bonds; and federal, state, local and Indian tribal government issues. We serve on the ACT in a volunteer capacity. In our professional lives we work for or on behalf of tribal governments and entities.

One of our responsibilities as members of the ACT is to provide feedback from tribal governments and tribal entities to the IRS regarding tax administration matters affecting tribes and tribal governments. This year we have decided to prepare a report regarding tribal governments and entities interaction and communication with the IRS and the use and awareness of the IRS Indian Tribal Governments’ website.

As part of our information gathering for this report, we are seeking your valuable input regarding these matters by completing the enclosed survey or having an appropriate person or persons at your tribal organization complete the survey. You need not sign the survey if you prefer not to do so. However, if you are willing to be contacted for further discussion of the issues in the survey, please provide your name and contact information.

We will not share any specific answers that you provide to us with the IRS or include any specific answers in the report, only compilations of data gathered from all of the surveys. If you choose to provide your name so that we can contact you further, we will not share your name or your tribe with the IRS.

We would really appreciate your taking the time to respond to the survey and respond to it on or before November 6, 2015. You may begin survey on the following link:

<https://www.surveymonkey.com/r/ITG2015Survey>

We will be happy to share our findings with you. Our report will be completed and available to the public in the June 2016 IRS TE/GE Advisory Committee Annual Report.

If you have any comments you may reach the 2015 ITG Advisory Committee  
at [2015ITGvolunteer@gmail.com](mailto:2015ITGvolunteer@gmail.com)

## APPENDIX B

### Example ITG Survey Questionnaires

#### Indian Tribal Government Representatives Advisory Committee on Tax Exempt and Government Entities Survey

##### 1. Tribal Organization

This survey was developed to gather feedback from Tribal Government and Tribal Entities for annual report. As members of the IRS Advisory Committee on Tax Exempt and Governmental Entities, we do not work for the IRS, rather we are appointed volunteers to represent the interests and concerns of Tribal Governments and Tribal Entities. We would like to thank you for your participation in this survey.

##### 1. Please identify your job title/position

##### 2. How long have you been in the current position?

- 0-5 yr.
- 6-10 yr.
- 11-15 yr.
- 16+ yr.

##### 3. Please identify your type of tribal organization.

- Governmental
- Commercial
- Non Profit
- Other

##### 4. How many employees are employed by your Tribal organization?

- 1-500
- 501-1000
- greater than 1001

##### 5. Does your Tribal organization prepare their own quarterly and annual payroll reports?

- Yes
- No

## INDIAN TRIBAL GOVERNMENTS – APPENDIX B

6. Does your tribal organization prepare and issue Form 1099 to contractors?

- Yes  
 No

7. Does your Tribal organization plan to prepare reports related to the Affordable Care Act?

- Yes  
 No  
 Not sure if we're required

8. What are the top three federal tax issues from your Tribal organizations perspective?

### Indian Tribal Government Representatives Advisory Committee on Tax Exempt and Government Entities Survey

#### 2. ITG Indian Tribal Government Website

9. Is your Tribal organization aware of the ITG website?

- Yes  
 No

10. On a yearly average how many times have you viewed the IRS Indian Tribal Government website?

- 0  
 1-5 times  
 6-10 times  
 11 + times

11. Do you find it easy to access the information on the ITG website?

- Yes  
 No  
 Have never access it

12. Do you believe the information on the ITG website is adequate to meet your Tribal organization needs?

- Yes
- No

13. Is there sufficient information available regarding the General Welfare Act to meet your needs on the ITG website?

- Yes
- No
- Not familiar with the General Welfare Act

14. Is there sufficient information available on the Affordable Care Act as it relates to the Tribal Employer mandate?

- Yes
- No
- Not familiar with the Affordable Care Act

15. Overall, do you believe information on the ITG website is updated in a timely manner?

- Yes
- No

**Indian Tribal Government Representatives Advisory Committee on Tax Exempt and Government Entities Survey**

**3. IRS Resource Training**

16. Have you participated in an IRS webinar?

- Yes
- No
- Not aware of IRS webinar

## INDIAN TRIBAL GOVERNMENTS – APPENDIX B

17. If yes, what is the average number of webinar(s) you have participated in the last year?

- 0  
 1-5  
 6-10

18. Do you receive the IRS Indian Tribal Governments' newsletter?

- Yes  
 No  
 Not aware of ITG Newsletter

19. If No, Do you plan to subscribe in the future?

- Yes  
 No  
 N/A

### Indian Tribal Government Representatives Advisory Committee on Tax Exempt and Government Entities Survey

#### 4. Other Tax Resources

20. Please select organizations that you receive additional information on tax related issues.

- NAFOA  
 NITA  
 NCAI  
 IRS-ITG

Other (please specify)

21. What type of federal tax information do you obtain relating to your Tribal organization?

22. Where do you obtain other information on the Affordable Care Act employer mandate?

**Indian Tribal Government Representatives Advisory Committee on Tax Exempt and Government Entities Survey**

**5. IRS Interaction**

23. Has the Tribal organization received any IRS notices in the last 2 years?

- Yes
- No

24. Has the Tribal organization been involved in an IRS audit, compliance check, or review in the past 5 yrs.?

- Yes
- No

25. Please rate your overall experiences with the IRS.

Least Positive			Moderate		Very Positive
1	2	3	4	5	
<input type="radio"/>					

26. Please rate on how the IRS has recognized/treated your Tribal organization.

Least Positive			Moderate		Very Positive
1	2	3	4	5	
<input type="radio"/>					

27. Please rate on how the IRS exhibited knowledge and recognition of tribal cultural traits.

Least Positive			Moderate		Very Positive
1	2	3	4	5	
<input type="radio"/>					

## INDIAN TRIBAL GOVERNMENTS – APPENDIX B

28. In the past year have you contacted your regional ITG specialist?

- Yes  
 No  
 Not aware of regional ITG specialist

29. Please rate your interaction with your regional ITG specialist.

Least Positive		Moderate		Very Positive	
1	2	3	4	5	Not Applicable
<input type="radio"/>					

### Indian Tribal Government Representatives Advisory Committee on Tax Exempt and Government Entities Survey

#### 6. Advisory Interaction

30. Are you familiar with the Advisory Committee on Tax Exempt and Governmental Entities?

- Yes  
 No

31. Are you aware of the context of the ACT on Tax Exempt and Government Entities Reports and Recommendations?

- Yes  
 No

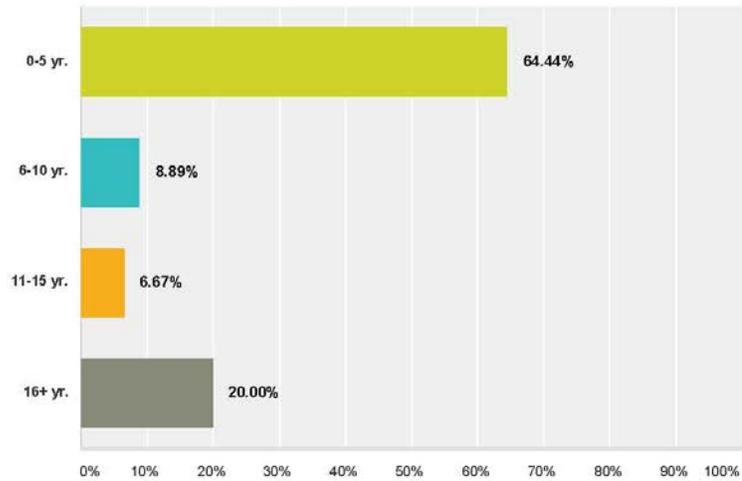
32. Do you have issues that you would like the ITG ACT committee to address in future reports?

APPENDIX C

Indian Tribal Government Subcommittee TE/GE Survey  
Survey Graph Results

Q2 How long have you been in the current position?

Answered: 45 Skipped: 0

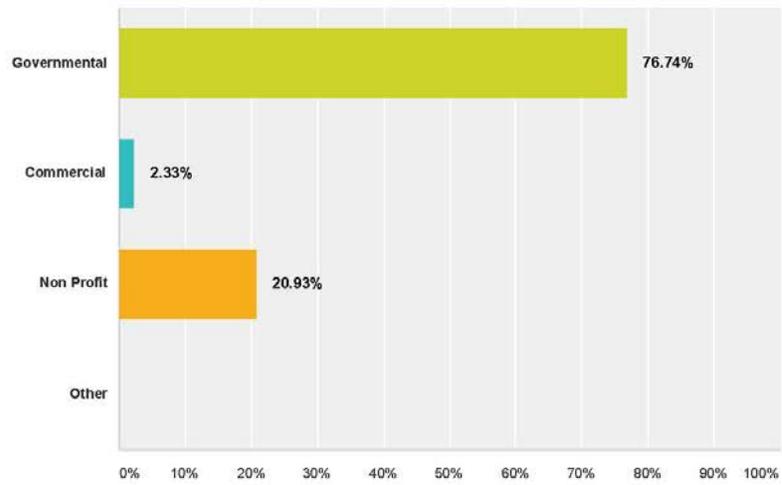


Answer Choices	Responses	Count
0-5 yr.	64.44%	29
6-10 yr.	8.89%	4
11-15 yr.	6.67%	3
16+ yr.	20.00%	9
<b>Total</b>		<b>45</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q3 Please identifying your type of tribal organization.**

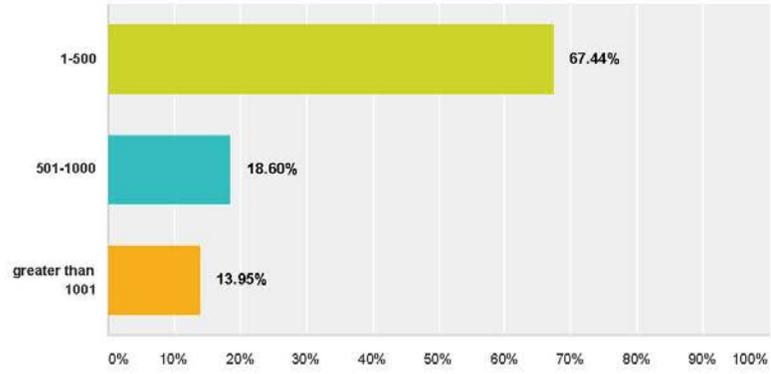
Answered: 43 Skipped: 2



Answer Choices	Responses	
Governmental	76.74%	33
Commercial	2.33%	1
Non Profit	20.93%	9
Other	0.00%	0
<b>Total</b>		<b>43</b>

**Q4 How many employees are employed by your Tribal organization?**

Answered: 43 Skipped: 2

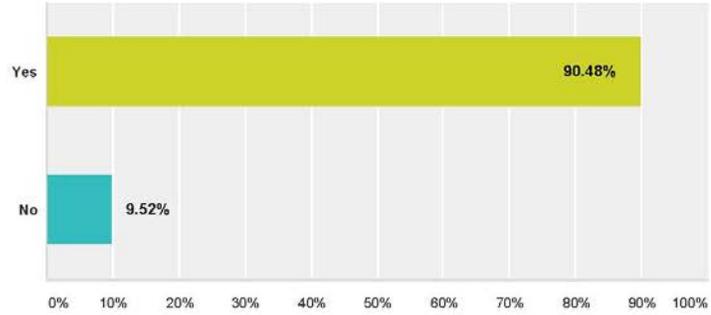


Answer Choices	Responses	
1-500	67.44%	29
501-1000	18.60%	8
greater than 1001	13.95%	6
<b>Total</b>		<b>43</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q5 Does your Tribal organization prepare their own quarterly and annual payroll reports?**

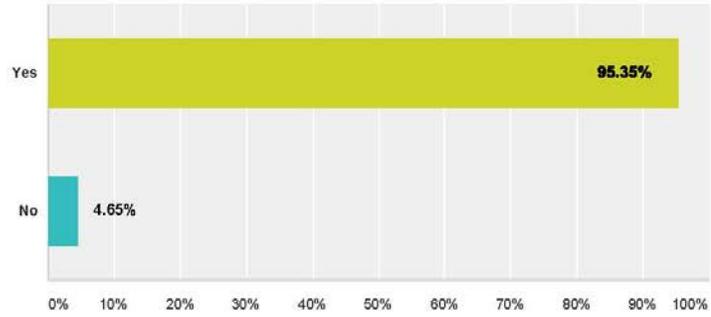
Answered: 42 Skipped: 3



Answer Choices	Responses	
Yes	90.48%	38
No	9.52%	4
<b>Total</b>		<b>42</b>

**Q6 Does your tribal organization prepare and issue Form 1099 to contractors?**

Answered: 43 Skipped: 2

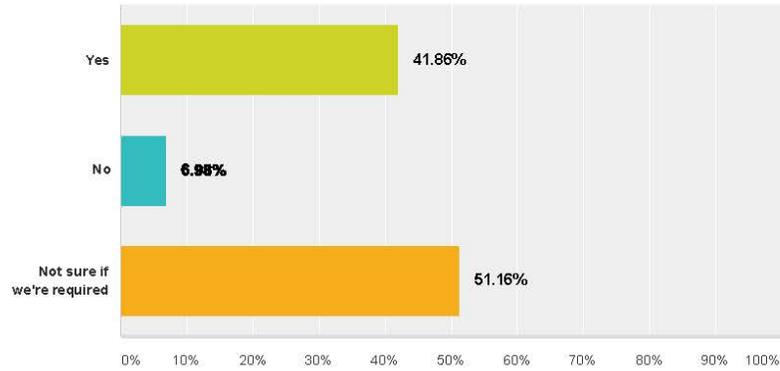


Answer Choices	Responses	
Yes	95.35%	41
No	4.65%	2
<b>Total</b>		<b>43</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q7 Does your Tribal organization plan to prepare reports related to the Affordable Care Act?**

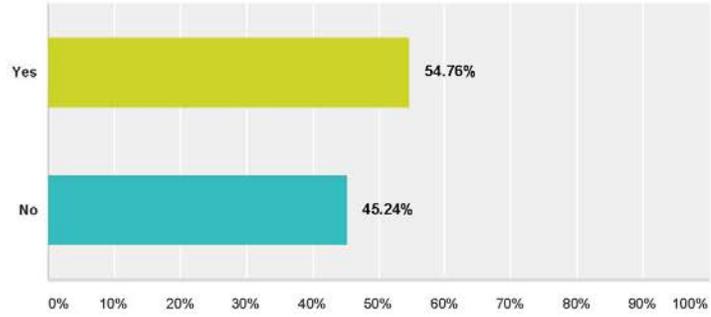
Answered: 43 Skipped: 2



Answer Choices	Responses	
Yes	41.86%	18
No	6.98%	3
Not sure if we're required	51.16%	22
<b>Total</b>		<b>43</b>

**Q9 Is your Tribal organization aware of the ITG website?**

Answered: 42 Skipped: 3

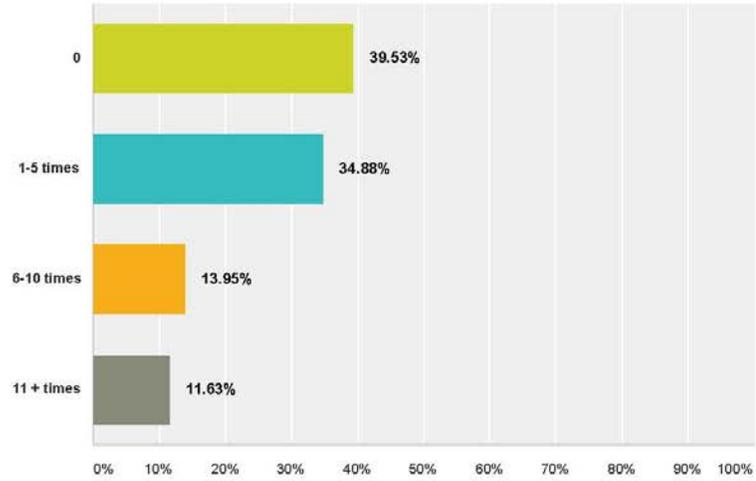


Answer Choices	Responses	
Yes	54.76%	23
No	45.24%	19
<b>Total</b>		<b>42</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q10 On a yearly average how many times have you viewed the IRS Indian Tribal Government website ?**

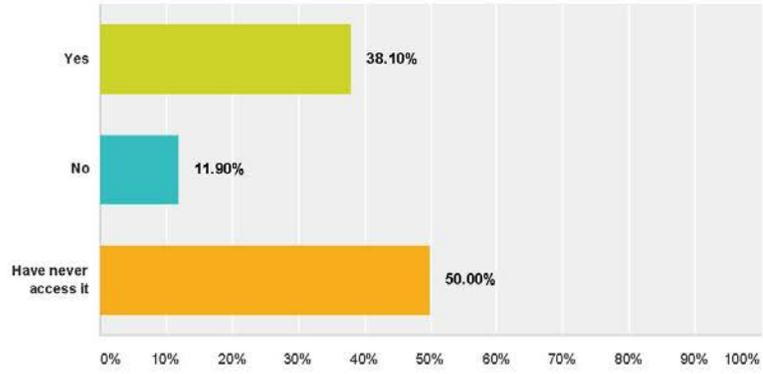
Answered: 43 Skipped: 2



Answer Choices	Responses	
0	39.53%	17
1-5 times	34.88%	15
6-10 times	13.95%	6
11 + times	11.63%	5
<b>Total</b>		<b>43</b>

**Q11 Do you find it easy to access the information on the ITG website?**

Answered: 42 Skipped: 3

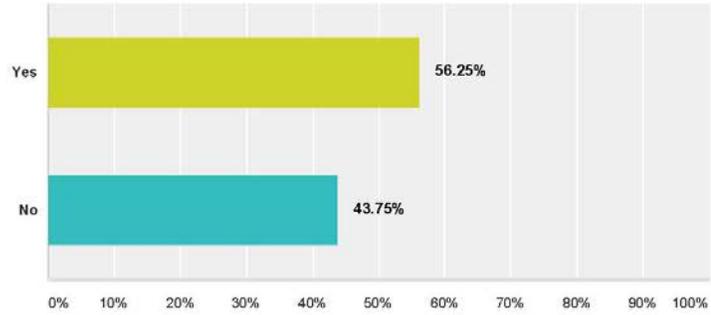


Answer Choices	Responses	
Yes	38.10%	16
No	11.90%	5
Have never access it	50.00%	21
<b>Total</b>		<b>42</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q12 Do you believe the information on the ITG website is adequate to meet your Tribal organization needs?**

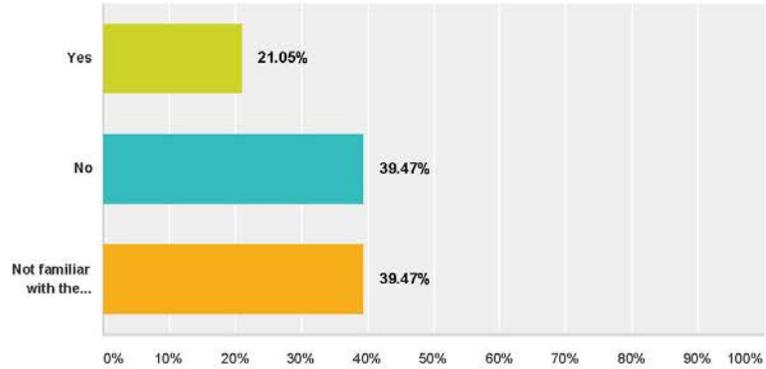
Answered: 32 Skipped: 13



Answer Choices	Responses	
Yes	56.25%	18
No	43.75%	14
<b>Total</b>		<b>32</b>

**Q13 Is there sufficient information available regarding the General Welfare Act to meet your needs on the ITG website?**

Answered: 38 Skipped: 7

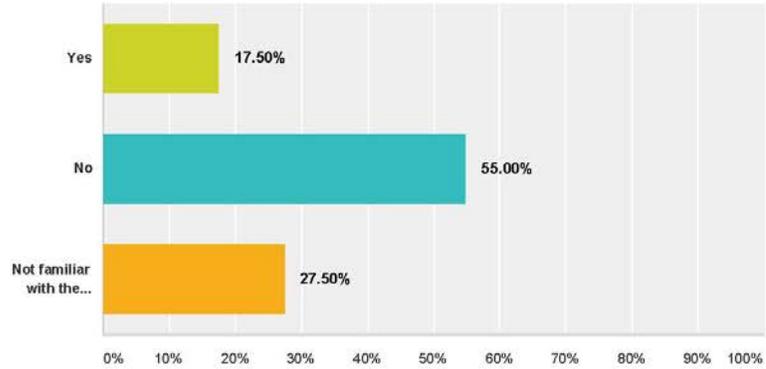


Answer Choices	Responses	
Yes	21.05%	8
No	39.47%	15
Not familiar with the General Welfare Act	39.47%	15
<b>Total</b>		<b>38</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q14 Is there sufficient information available on the Affordable Care Act as it relates to the Tribal Employer mandate?**

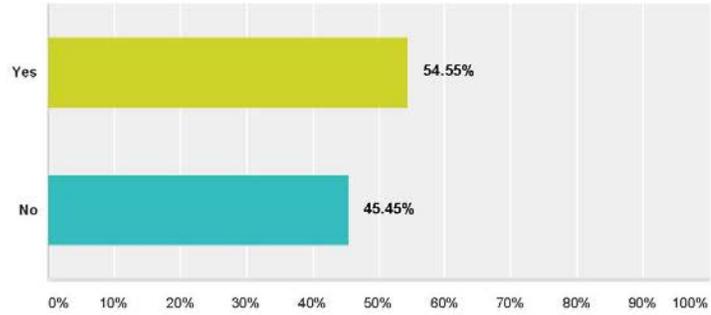
Answered: 40 Skipped: 5



Answer Choices	Responses	
Yes	17.50%	7
No	55.00%	22
Not familiar with the Affordable Care Act	27.50%	11
<b>Total</b>		<b>40</b>

**Q15 Overall, do you believe information on the ITG website is updated in a timely manner?**

Answered: 33 Skipped: 12

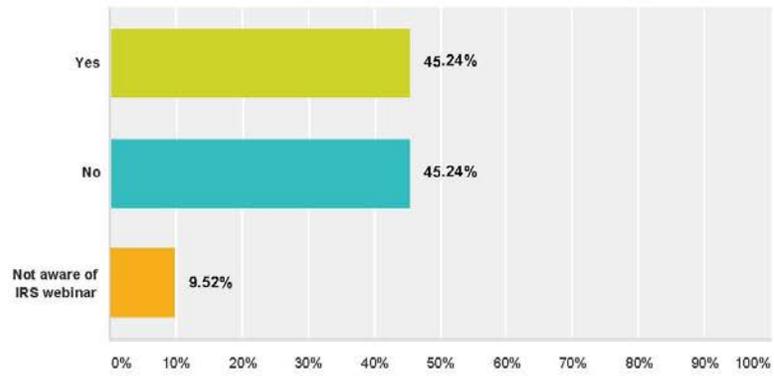


Answer Choices	Responses	
Yes	54.55%	18
No	45.45%	15
<b>Total</b>		<b>33</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q16 Have you participated in an IRS webinar?**

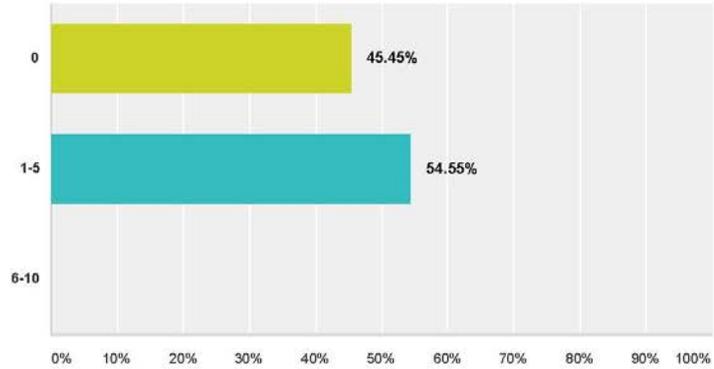
Answered: 42 Skipped: 3



Answer Choices	Responses	
Yes	45.24%	19
No	45.24%	19
Not aware of IRS webinar	9.52%	4
<b>Total</b>		<b>42</b>

**Q17 If yes, what is the average number of webinar(s) you have participated in the last year?**

Answered: 33 Skipped: 12

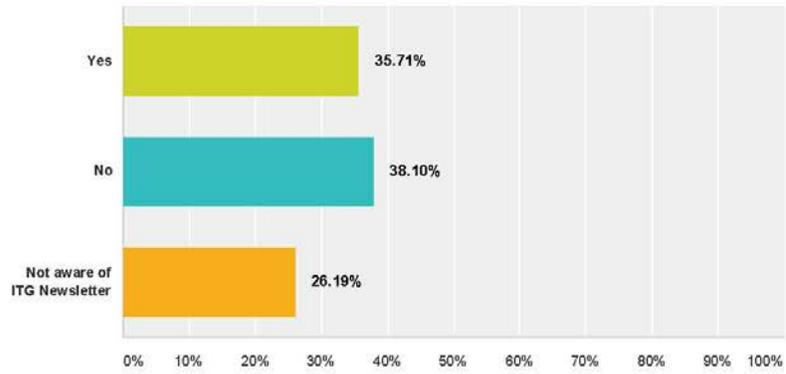


Answer Choices	Responses	
0	45.45%	15
1-5	54.55%	18
6-10	0.00%	0
<b>Total</b>		<b>33</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q18 Do you receive the IRS Indian Tribal Governments' newsletter?**

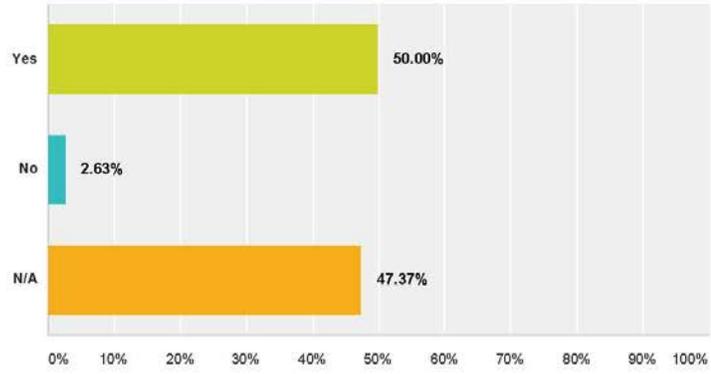
Answered: 42 Skipped: 3



Answer Choices	Responses	
Yes	35.71%	15
No	38.10%	16
Not aware of ITG Newsletter	26.19%	11
<b>Total</b>		<b>42</b>

**Q19 If No, Do you plan to subscribe in the future?**

Answered: 38 Skipped: 7

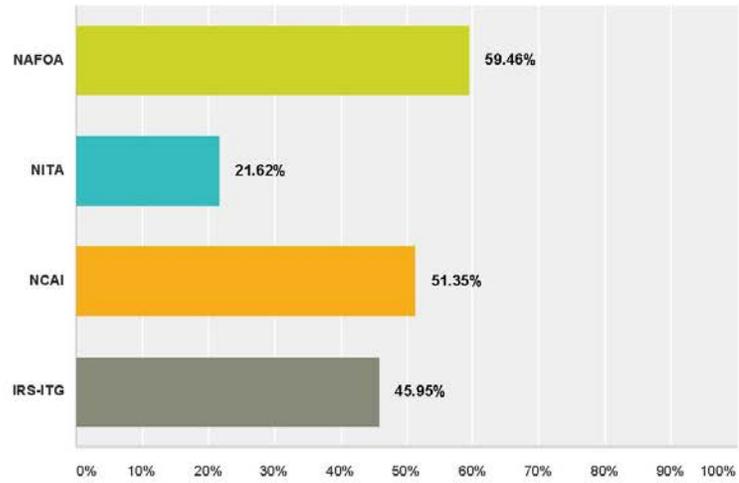


Answer Choices	Responses	
Yes	50.00%	19
No	2.63%	1
N/A	47.37%	18
<b>Total</b>		<b>38</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q20 Please select organizations that you receive additional information on tax related issues.**

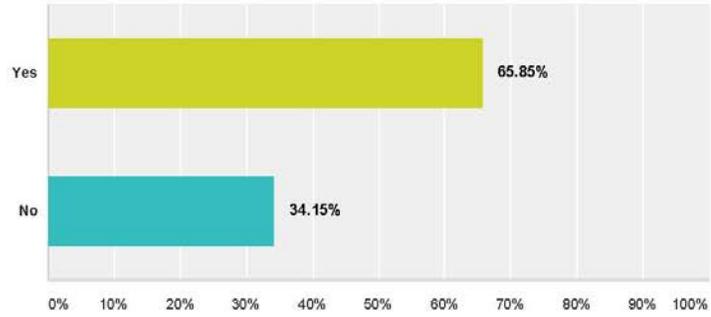
Answered: 37 Skipped: 8



Answer Choices	Responses	
NAFOA	59.46%	22
NITA	21.62%	8
NCAI	51.35%	19
IRS-ITG	45.95%	17
<b>Total Respondents: 37</b>		

**Q23 Has the Tribal organization received any IRS notices in the last 2 years?**

Answered: 41 Skipped: 4

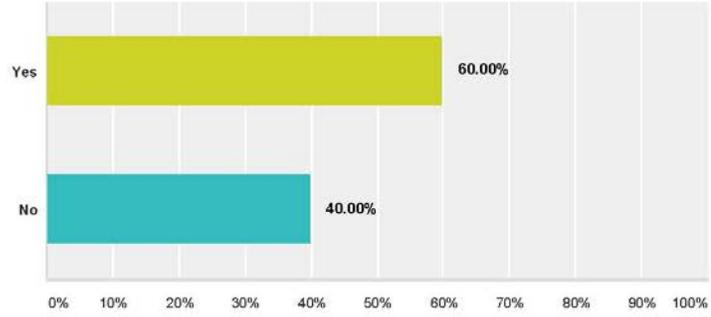


Answer Choices	Responses	
Yes	65.85%	27
No	34.15%	14
<b>Total</b>		<b>41</b>

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q24 Has the Tribal organization been involved in an IRS audit, compliance check, or review in the past 5 yrs. ?**

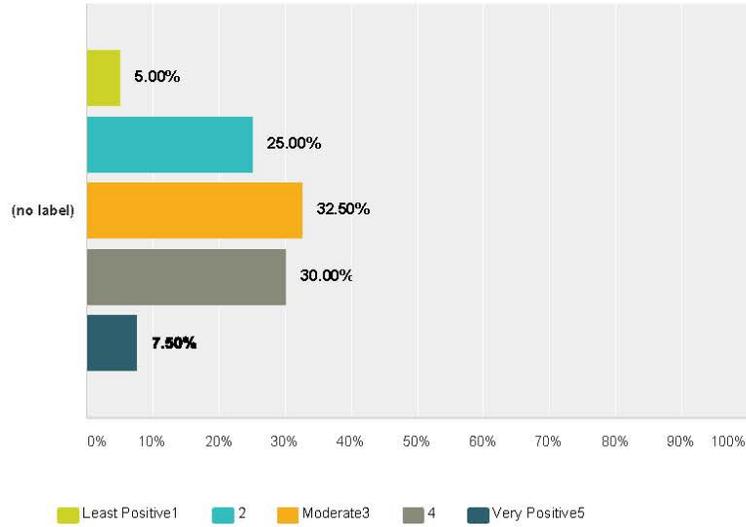
Answered: 40 Skipped: 5



Answer Choices	Responses	
Yes	60.00%	24
No	40.00%	16
<b>Total</b>		<b>40</b>

**Q25 Please rate your over all experiences with the IRS.**

Answered: 40 Skipped: 5

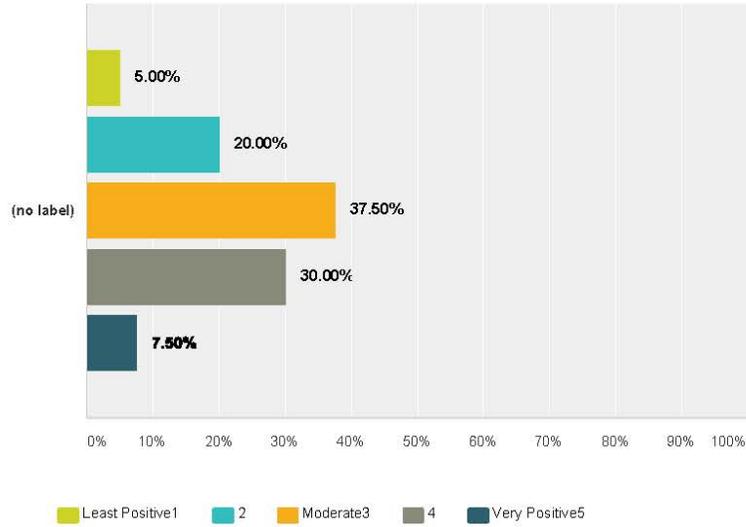


	Least Positive1	2	Moderate3	4	Very Positive5	Total	Weighted Average
(no label)	5.00%	25.00%	32.50%	30.00%	7.50%	40	3.10
	2	10	13	12	3		

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q26 Please rate on how the IRS has recognized/treated your Tribal organization.**

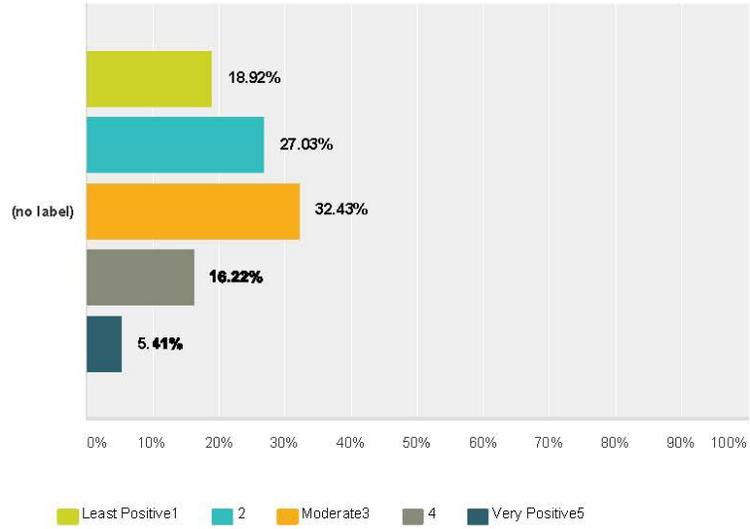
Answered: 40 Skipped: 5



	Least Positive1	2	Moderate3	4	Very Positive5	Total	Weighted Average
(no label)	5.00%	20.00%	37.50%	30.00%	7.50%	40	3.15
	2	8	15	12	3		

**Q27 Please rate on how the IRS exhibited knowledge and recognition of tribal cultural traits.**

Answered: 37 Skipped: 8

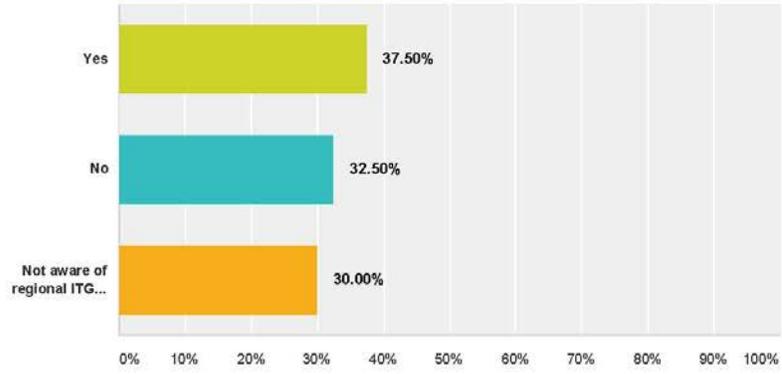


	Least Positive1	2	Moderate3	4	Very Positive5	Total	Weighted Average
(no label)	18.92%	27.03%	32.43%	16.22%	5.41%	37	2.62
	7	10	12	6	2		

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q28 In the past year have you contacted your regional ITG specialist?**

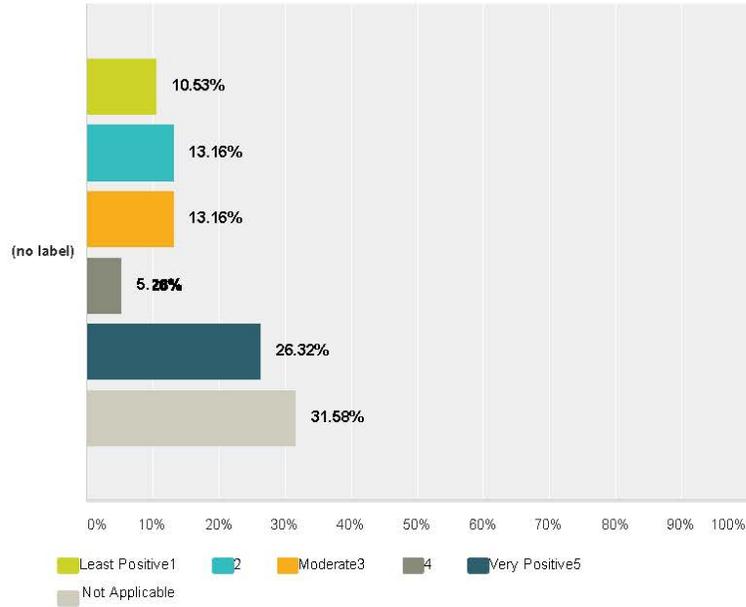
Answered: 40 Skipped: 5



Answer Choices	Responses	
Yes	37.50%	15
No	32.50%	13
Not aware of regional ITG specialist	30.00%	12
<b>Total</b>		<b>40</b>

**Q29 Please rate your interaction with your regional ITG specialist.**

Answered: 38 Skipped: 7

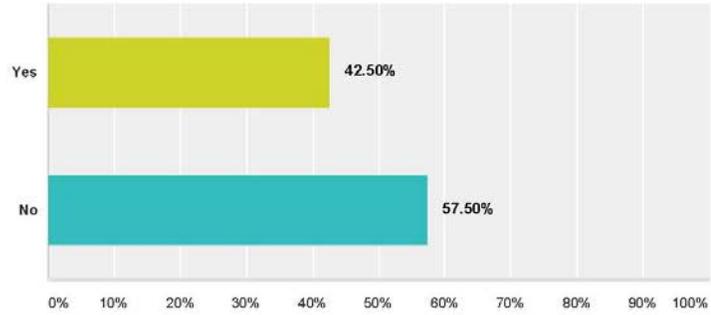


	Least Positive1	2	Moderate3	4	Very Positive5	Not Applicable	Total	Weighted Average
(no label)	10.53%	13.16%	13.16%	5.26%	26.32%	31.58%	38	2.29
	4	5	5	2	10	12		

**INDIAN TRIBAL GOVERNMENTS – APPENDIX C**

**Q30 Are you familiar with the Advisory Committee on Tax Exempt and Governmental Entities?**

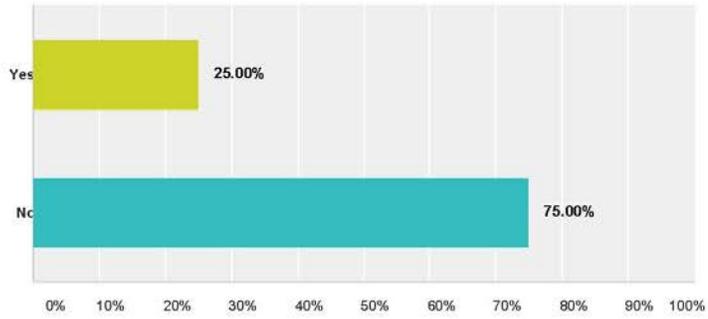
Answered: 40 Skipped: 5



Answer Choices	Responses	
Yes	42.50%	17
No	57.50%	23
<b>Total</b>		<b>40</b>

**Q31 Are you aware of the context of the ACT on Tax Exempt and Government Entities Reports and Recommendations?**

Answered: 40 Skipped: 5



Answer Choices	Responses	
Yes	25.00%	10
No	75.00%	30
<b>Total</b>		<b>40</b>

This page intentionally left blank.

**ADVISORY COMMITTEE ON  
TAX EXEMPT AND GOVERNMENT ENTITIES  
(ACT)**

**Tax Exempt Bonds:**

**Recommendations for Continuous Improvement and  
Enhancing Resources in the Tax Exempt Bond Market**

David Danenfelzer  
William Johnson  
Floyd C. Newton III

**June 8, 2016**

This page intentionally left blank

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY.....[275](#)  
II. INTRODUCTION.....[275](#)  
III. RECOMMENDATIONS.....[277](#)  
IV. CONCLUSION.....[283](#)

This page intentionally left blank

## I. EXECUTIVE SUMMARY

The Tax Exempt and Government Entities (TE/GE) Division of the Internal Revenue Service is in a time of transition, and the role of the Bond Subcommittee is changing as well. Rather than focusing on projects involving specific regulatory or interpretive changes, the role of the Bond Subcommittee is more advisory, serving as a sounding board for changes being considered by the Tax Exempt Bond division (TEB) in TE/GE, as well as making recommendations about improvements to outreach, education and operations. To further this role, and the effectiveness of the Bond Subcommittee, the Bond Subcommittee recommends more regular communication between the Bond Subcommittee and TEB. The Bond Subcommittee also recommends more targeted outreach by TEB and further review of TEB publications to enhance the effectiveness of these efforts and to better leverage TEB resources. The Bond Subcommittee further recommends revisions to IRS Form 8038, including electronic filing, as a means of providing better information about market segments which need additional examination for tax compliance, and those segments and transactions that may not need frequent examination, other than on a random basis. The Bond Subcommittee recommends that examinations be more targeted and focused in recognition that requesting extensive documentation from issuers which is not related to the focus of the examination is disruptive to, and expensive for, issuers and is not an effective use of TEB resources. Finally, the Bond Subcommittee compliments TEB for its outreach efforts, and recommends further involvement by TEB with industry associations and market participants as a means of more effectively using TEB resources.

## II. INTRODUCTION

TE/GE has gone through organizational changes in recent years. These changes have moved lawyers previously embedded in parts of TE/GE to the Office of the Chief Counsel of the IRS, and with those moves, the role of the Subcommittee on Tax-Exempt Bonds (the Bond Subcommittee) of the IRS Advisory Committee on Tax-Exempt and Government Entities (the Act) has changed as well. In the past, many of

## TAX EXEMPT BONDS

the projects undertaken by the Bond Subcommittee<sup>188</sup> have proposed specific regulatory or other interpretive changes in the law or regulations relating to the exclusion of interest on state or local bonds from federal income taxation; consideration of most of those changes, however, now falls into the Office of Chief Counsel or to representatives of Treasury responsible for tax policy.

Nonetheless, the view of the Bond Subcommittee is that the Bond Subcommittee can, and does, serve a valuable function to the IRS and to the tax exempt bond community generally, although the role of the Bond Subcommittee has evolved and will continue to. Rather than focusing on “projects,” the principal focus of the Bond Subcommittee is becoming more of a “sounding board” for changes being considered by TEB. In some instances, that advisory function may relate to enforcement policies or changes to review procedures, and addressing their impacts on issuers and market participants. In other instances, the advisory function may be to assist TEB in assessing the effectiveness of its outreach efforts, assisting TEB in preparing and evaluating education materials or identifying additional areas for education or guidance, and assisting TEB in identifying ways to focus its efforts, both in outreach and in enforcement, to better utilize the limited resources available to TEB, while at the same time providing better guidance for issuers and market participants and lessening the negative impact on issuers of routine TEB examinations. Last year’s report by the Bond Subcommittee<sup>189</sup> discussed a number of ways in which knowledge management and other tools could be used by TEB to improve the efficiency of TEB’s efforts and operations. At the same time, a more efficient and focused effort by TEB would also lessen the impact of enforcement activities on market participants.

With that view in mind, this year’s work by the Bond Subcommittee has been less “project” oriented, and more advisory. We expect this trend to continue. One of the objectives of this report is to describe and make some recommendations as to improving this advisory function.

---

<sup>188</sup> To obtain copies of the prior reports, See [https://www.irs.gov/Government-Entities/Reports-of-the-Advisory-Committee-on-Tax-Exempt-and-Government-Entities-\(ACT\)](https://www.irs.gov/Government-Entities/Reports-of-the-Advisory-Committee-on-Tax-Exempt-and-Government-Entities-(ACT)).

<sup>189</sup> Fourteenth Report of the Advisory Committee on Tax Exempt and Governmental Entities, dated June 17, 2015.

### III. RECOMMENDATIONS

#### **Recommendation: Establish Regular and More Extensive Communication between the Bond Subcommittee and TEB.**

The Bond Subcommittee and TEB have established, and recommend to TE/GE, a standard pattern of calls and other communication between Bond Subcommittee representatives and members of the ACT who are interested in Bond Subcommittee matters and representatives from TEB. As the primary members of the ACT interested in Bond Subcommittee matters, we have found these calls to be interesting and informative. The regularity of the periodic calls (generally monthly in our case, although supplemented with additional calls when there is a need) has led to a level of familiarity and trust that has produced effective and frank communication on various issues. While there may not always be agreement on the solution to an issue, or in fact, whether there is an issue, the Bond Subcommittee believes that increasing the level of communication leads to better and more consistent results, and avoids unnecessary burdens on both TEB and the industry. Of course, all these communications must occur within the applicable rules regarding taxpayer confidentiality under Section 6103 of the Code. We also believe that the value of these communications would be greatly enhanced by periodic in-person meetings between ACT representatives and TEB. While issues relating to the overall IRS budget in recent years, and the budget allocation to TE/GE in particular, have greatly limited the ability of TE/GE to subsidize the cost of “in person” meetings between members of the ACT and TE/GE, there is no substitute for the enhanced value of periodic face to face communication. In fact, the Bond Subcommittee endorses the concept behind the former plan for four “in person” meetings of the ACT with TE/GE management during the year. These meetings are a valuable opportunity for members of the Bond Subcommittee and TEB management to learn of efforts going on within other portions of the ACT and TE/GE, which might also work well for the Bond Subcommittee and TEB. Another alternative would be to consider having ACT members pay for their own travel expenses. If a member was unable or unwilling to his or her own expenses, then the currently available conference call option could be utilized.

## TAX EXEMPT BONDS

As an example of the value of these regular communication efforts, TEB instituted very helpful programs relating to voluntary compliance which encourage issuers and other market participants to monitor compliance with the oftentimes complex requirements relating to tax exempt bonds. For efficiency reasons, some of these programs specify “standardized” means of settling issues which might otherwise be identified in normal TEB enforcement activities as “non-compliance.” Voluntary compliance programs can be very helpful in avoiding unnecessary time and expense on the part of an issuer which might otherwise be entangled in a time-consuming enforcement action, while at the same time focusing the resources of TEB on resolving questions in a manner which is more fair and predictable. We believe that the Bond Subcommittee has provided valuable input to TEB on some of these proposed programs both as to their scope, efficiency and as to the terms of standardized closing agreements.

### **Recommendation: More Targeted Outreach.**

Similarly, in the outreach area, the Bond Subcommittee has had discussions with TEB representatives about outreach programs and the target audiences, the appropriate level and complexity of outreach materials and publications, and their effectiveness, and other similar discussions. All of these discussions serve to better inform issuers and market participants, and make the efforts of TEB more effective and efficient. TEB publications oftentimes must balance the need for providing information to a large group of issuers which access the capital markets infrequently, with the needs of more sophisticated issuers and market participants which access the market frequently. We recommend further review of publications and other informal guidance in the tax exempt bond area with an eye toward targeting these outreach efforts for maximum effectiveness.

### **Recommendation: Revisions to IRS Form 8038; Institute Electronic Filing.**

Section 149(e) of the Internal Revenue Code sets forth certain information reporting requirements which must be satisfied with respect to tax exempt bonds. In order for issuers to satisfy these requirements, the IRS published Form 8038 and its instructions. There are several variations of Form 8038 for different types of bonds, and even some

variations of Form 8038 which relate to the payment and reporting of arbitrage rebate payments.

Section 149(e)(2) sets forth certain basic information to be included in the information filing. The list in this section includes the name and address of the issuer, the date of the issue, the amount of net proceeds of the issue, the stated interest rate, term and face amount of each bond which is part of the issue, the amount of issuance costs, the amount of reserves of the issue and certain other information. The section further provides that such form shall contain “such other information as the Secretary shall require.”

Since Section 149(e) became part of the Internal Revenue Code, a number of changes have been enacted which permit tax exempt bonds to be issued for different purposes, or which change the requirements for bonds issued for a particular purpose to be treated as tax exempt bonds. These changes have led to a proliferation of Form 8038 variations as described above.

Form 8038 filings provide the primary source of information regarding the amount and types of tax exempt bonds which are issued, and are a valuable resource, not just to TEB but for tax policy purposes. In addition, the Form 8038 filings can assist TEB in determining what segments of the bond market may need additional examination for tax compliance, and, maybe more importantly, those segments and transactions that may not need frequent examination, other than on a random basis. For these reasons, Form 8038 filings can serve an important function for TEB, issuers and other market participants.

In recent years, the availability of technology has expanded to the point where virtually every issuer has the ability to make electronic filings. To date, however, Form 8038 filings must be made on paper, and then presumably are transcribed or scanned into IRS records. This process is wasteful and time-consuming, both for the issuers who have to complete and mail the forms, and for the IRS, which has to process the forms. In addition, it runs the risk of transcription errors which may lessen the quality of the data. While we acknowledge the limited resources that the IRS has available to it for

## TAX EXEMPT BONDS

technological changes, we believe that an investment in electronic processing for Form 8038 filings is long overdue, and we recommend a move to electronic filing of these forms.

For a number of years, recommendations have been made about changes to the information required as a part of Form 8038. In fact, the Eleventh Report of the Bond Subcommittee, issued in June 2012, made a number of recommendations regarding specific changes to information reporting relating to tax exempt bonds, including detailed revisions to certain of the information reported and even suggested the addition of a new Form 8038-N for notification of certain events, including the establishment of a defeasance escrow. While we do not necessarily endorse all the changes recommended by that Subcommittee, they do provide a very thoughtful analysis and will be useful in making revisions.

More recently, TEB management has described to the Bond Subcommittee members some of their own views regarding the need for revisions to Form 8038 filings. Those ideas are generally consistent with the ideas of the current Bond Subcommittee members and include:

- Establishment of a “core” Form 8038, which contains basic information such as the name of the issuer, the address of the issuer and certain basic information about the bonds which are the subject of the form and provide much of the information required by Section 149(e) of the Code;
- Supplemental schedules to this core form which would provide information regarding the type and purpose of the bonds which are the subject of the form. For example, in the case of private activity bonds, the supplemental schedules would ask for information which would demonstrate compliance with any additional requirements of Sections 142 to 145 of the Code which may be applicable, as well as compliance with Section 146 of the Code (relating to volume cap) and Section 147 of the Code (requirements relating to private activity bonds, including the public hearing requirement, 2 percent

- cost of issuance limitation, limitation on land acquisition and other similar requirements).
- Inclusion of a specific schedule for refundings which would identify whether the transaction is a current or advance refunding, and if an advance refunding, whether the escrow established was funded with securities purchased from the Bureau of Public Debt, State and Local Government Series (commonly referred to as SLGs) or with other securities purchased on the open market. Similarly, the schedule could also provide information regarding whether any reinvestment of amounts in the escrow is contemplated during the term of the escrow.

This year's Bond Subcommittee generally agrees with these ideas. We believe that a project to institute electronic filing is the time to make specific recommendations regarding the changes to Form 8038, which will be facilitated by the enhanced capabilities that come with electronic filing.

We view that the point of these changes is not to make completion of the required filing forms more difficult or time-consuming, but rather to enhance the value of the information collected. While some would argue that this may provide TEB with a "roadmap" for its enforcement efforts, our view is that issuers and market participants would be better served by providing sufficient information to the IRS for TEB to be more productive. For example, as a general matter, the Bond Subcommittee's view is that an escrow for defeased bonds which is funded with SLGs as opposed to open market securities is unlikely to present a transaction which is worthy of examination on the question of whether a market price was paid for the escrow. Similarly, better information in filings might eliminate the wasted effort in examining bond issues which have been retired for several years prior to the commencement of the examination.

## TAX EXEMPT BONDS

### **Recommendation: More Targeted Enforcement Efforts Make Sense for the IRS and the Industry.**

The theme of the Bond Subcommittee portion of the 2015 ACT Report was doing more with less in a time of diminished resources. That report encouraged a number of steps intended to improve TEB efficiency, including knowledge management improvements in TE/GE and changes to examination efforts in TEB. We continue to advocate for more targeted examination efforts of transactions which present profiles which make them better candidates for examination as opposed to more random examinations or examinations in very broad market segments. We also support and recommend further efforts by TEB to focus document requests and information requests during the examination process. Routinely asking for volumes of information not clearly related to the rationale behind the examination is disruptive and potentially a waste of issuers and examination team resources. We believe improvements and enhancements to the Form 8038 filings would aid TEB in making more focused examination efforts which is beneficial to issuers and a more effective use of TEB resources.

### **Recommendation: More Involvement by TEB in Industry Outreach and Education.**

Finally, we compliment TE/GE and TEB in particular for their efforts with outreach and communication with issuers and with market participants. We believe that those efforts further better compliance. We note that issuers in the tax-exempt bond space have their own motivations to assure compliance with the applicable rules in the Internal Revenue Code and regulations relating to tax exempt bonds. The issuers face political risk from instances of non-compliance which are uncovered, as well as adverse reactions from investors which can affect future access by the issuer to debt markets. In short, issuers and the IRS generally share a common interest in compliance with the applicable rules. While there are occasionally instances of market participants who may, for their own reasons, push positions which are not in compliance with applicable Code provisions and regulations, we believe that those instances are rare, and that an effective enforcement program and vigorous pursuit of those participants who are not operating in compliance with applicable Code and regulations would limit these instances.

TEB is very active in terms of its interaction with issuers and market participants. In addition to its periodic publication of guides and other materials, representatives from TEB make appearances at various gatherings of industry participants, and participate in meetings of the National Association of Bond Lawyers and the 103 Committee of the American Bar Association's Tax Section. We believe these efforts are a very effective use of TEB resources which serves the industry and the efforts of TE/GE well. We recommend and urge continued participation in these efforts, even in a time of diminishing resources.

We also encourage further communication by TEB with industry participants and press regarding issues and concerns of TEB regarding developments in the industry. While Section 6103 of the Code appropriately protects the disclosure of information regarding tax returns and limits certain communications, we believe that further communication from TEB about its efforts and concerns would further compliance in the market. For example, TEB management is very careful not to disclose market segments which it has identified for examination efforts; however, we believe that the disclosure of this information would actually result in greater compliance efforts by market participants. Finally, we note that additional communication by Bond Subcommittee with industry participants, including ACT members focused on Bond Subcommittee matters as well as with member of the National Association of Bond Lawyers and members of American Bar Association committees would allow TE/GE to leverage the thoughts and efforts of TEB personnel in a time of diminishing resources.

#### **IV. CONCLUSION**

In a time of limited resources, TEB, issuers and market participants must continually re-examine their relationship and operations to continue to improve compliance with respect to tax exempt bonds, use resources more efficiently and reduce the burden on issuers. This continuous improvement effort has changed the role of the Bond Subcommittee and its functions with respect to TEB. Enhanced communication between TEB and the Bond Subcommittee can improve compliance and limit unnecessary burdens being imposed on issuers. Similarly, the outreach and education efforts of TEB

## **TAX EXEMPT BONDS**

which are already in place should be expanded to enhance the flow of information between TEB and issuers. Further improvements in information reporting on Form 8038, including revision of the form and instituting electronic filing, would be beneficial to both TEB and to issuers, as well as improve efficiency and accuracy. While examinations are necessary to assure compliance, both on a targeted and on a random basis, targeted examinations should be more focused on the particular issues being targeted as a means of lessening the disruption of examinations on issuers and using TEB resources more effectively.