

Transcript for ESOP EP Phone Forum

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Moderator: Good day, everyone, and welcome to the ESOP Determination Letter Phone Forum. Just a reminder, today's phone forum is being recorded.

At this time, I would like to turn the call over to Mr. Mark O'Donnell. Please go ahead, sir.

M. O'Donnell: Hello, everyone. I'm Mark O'Donnell, Director of Customer Education and Outreach for IRS Employee Plans. Welcome to our Employee Stock Ownership Plan Phone Forum. Today, we'll be hearing from Don Kieffer, an Area Manager in the IRS Employee Plans Determination Letter Program, and Michelle Owen, a member of the EP Determinations ESOP Cadre. Both are involved in reviewing ESOPs and other plans submitted for determination letters.

Before we start, I'd like to point out a couple of things. Everyone registered for this forum will receive a certification of completion by e-mail approximately one week after the forum. You must attend the entire live forum to receive a certificate. Enrolled agents, enrolled retirement plan agents, and enrolled actuaries are entitled to Continuing Professional Education credit for this session. Other types of tax professionals should consult their licensing organization to see if this session qualifies for Continuing Professional or Educational credit.

As with all our presentations, the comments expressed by our speakers should not be construed as formal guidance from the IRS. For more information regarding ESOPs, please visit our retirement plans website at www.irs.gov/ep, as in employee plans. You can also get there by going to the main IRS webpage and clicking on the Retirement Plans Community tab along the top. Look to the left-hand navigation bar and select Types of Plans. Then click on Employee Stock Ownership Plans.

While visiting our website, you might also want to subscribe to our free electronic newsletters. The link for newsletters is also on the left-hand navigation bar. We have two newsletters – The Retirement News for Employers for small employers sponsoring retirement plans, and The Employee Plans News for retirement plan professionals.

So, without further ado, here are Don and Michelle.

D. Kieffer: Okay. Thank you, Mark, and good afternoon, everybody, and good morning to those of you on the West Coast. My name is Don Kieffer and I'm one of the Program Managers for the EP Determination Letter Program. With me shortly will be Michelle Owen, who is an EP Determinations Specialist who reviews ESOPs, and together we are going to give you an

overview of the IRS's ESOP DL Program.

If you look at the second slide, we have a general overview of the topics we're going to discuss. I'm going to start by talking a little bit about the state of the program as we have it right now, give a little bit of the background as to what has brought us to where we are, and then talk about some of the resources that we have available to you on our website in the form of some ESOP guidance memoranda that you might want to refer to if you have submissions with us.

Then Michelle's going to take over and talk about some recurring issues. These are the types of things we encounter in our day-to-day review and things you might want to be aware of because we will be looking for them on submissions that come in, and also talk about some of our efforts to expedite the process to try to take an accelerated review so that we can get more applications through because we recognize we do have a bit of an inventory challenge with ESOP.

Then I'm going to come back and talk about some future things that you might see in this program. We are frequently asked, for example, has the IRS ever considered a pre-approved ESOP document? Some other developments that you might see down the road and then hopefully we'll have about five or ten minutes to answer questions. I have about 30 or so in front of me, so I don't know if we're going to get to all of them in this presentation. For those of you that did submit questions in advance, we will answer you individually at some point afterwards.

However, I'd like to start off by taking two that were submitted so at least I can do some. Here's a question – "I have an ESOP which we'll need to file for a new letter in the second cycle. However, I filed for my letter in the first cycle and have yet to hear anything from the IRS. What should I do if I don't get the first cycle letter in time?" I have a second question that's similar. "We've sent in our amendments, received a document locator number, which indicates we would expect to hear within 145 days, but I hear it takes about 2 years to be approved. Is that correct?"

And with that, I'd like to start the presentation by using that as an introduction and if you want to follow along, I'm on Slide 4 of our handout. Right now, today, we are reviewing the average case that Michelle or any of our ESOP Cadre Specialists works on. It's roughly a Cycle C submission that was filed in September of 2008. If we're looking at terminating applications, Form 5310, we're roughly a year further, October of 2010.

So this is, to be honest with you, not what any of us like to have to have this type of a gap between the date you submit an amendment and when we are starting to review it is a considerable amount longer than we would like to have. I recognize for those of you are that are waiting, and especially for people that have exempt loan provisions and need this letter to get a loan, this type of delay is, from your point, unacceptable and from ours, certainly something we don't want either.

Let me start briefly by giving you one reference. If you look on Slide 5, we do put up on our webpage a kind of chart that shows where we are with regard to different types of applications. You'll note that chart is sorted by forms, but we differentiate ESOPs from among the other forms that we have because they're a little bit out of sync.

If you go to this webpage, this is on Slide 6, if you want to check the status. "Hey, I haven't heard from the IRS. Where are you and should I be calling to find out what the story is?" If you look at this webpage, this will give you a general idea roughly of where we are and you can assume if your submission is before this we either just started it or you might want to call and follow up. If it's after it, we probably didn't get to it.

If you want to turn now to Slide 7, let me try to give a little bit of an explanation as to why we have the type of delay we have and I don't want this to be sounding like an excuse, but it's at least an explanation why we're confronted with a two and a half cycle delay. First of all, quite frankly, we just don't have the resources to handle the volume that we've seen. The ESOP Cadre that we have are a group of very skilled and dedicated people and, quite frankly, in The Service, we just don't have enough of them. Staffing and appropriations and getting more resources is always a challenge and it's especially so here. The number of people we have to bear to review the work that we have is below what we need.

Now, we've done some improvements recently. We were able to get more people to put onto the task and I do think we'll start to see some improvement shortly, but one of the reasons we have this kind of backlog today, quite frankly, is we just don't have enough people to review it.

Another, if you want to go down to Slide 9, and I'm going to come back to Slide 8 in a minute, is that the law changed somewhat significantly in 2001. Prior to the GUST remedial amendment period, the requirements for ESOPs were really entirely put in place in the Section 4975 era. In EGTRRA, Congress reacted to a whole series of ESOP abuses, especially in the small closely held sector, by enacting, for example, Section 409(p) requirements. That has caused us to really take a look at this work and realize we need to be far more vigilant to look at these applications and consider them more carefully than we had.

Previously, we kind of treated ESOPs just like a generic individually designed plan. We didn't apply any type of differentiated case management techniques to them. They were kind of just folded into our general individually designed program, so we didn't necessarily separately track them. We didn't assign them to specialty reviewers and I guess the good news is the deficiencies in the inventory didn't necessary stick out like a sore thumb.

Well, now, after looking at the Sub S abuses, the changes in the law, we realize we really need to create a cadre of people that is specifically trained and obviously highly skilled to work with ESOP document review. If you think of qualified plan tax work as a niche and ESOPs are a niche within the niche, certainly, ESOPs document writing and review is a corner of a niche, so we needed to get specialized. We needed to be far more consistent in our approach.

The way we would review ESOPs was really to assign them as just a regular individually designed case and therefore, we really didn't have a consistent review process that we could say every person doing any like case, was taking for example the same position. Problem number one was that we didn't have enough people. Problem number two is that the law became more complicated and we needed to be far more vigilant in exercising our responsibilities to administer it.

Let's go to slide number 10. Problem Number 3, if you will, is endemic to all individually designed plans, not just ESOPs, and that is we effectively lost one full cycle in the review process. As I note here, about three quarters of the individually designed plans for Cycle A are submitted roughly within the last two weeks before January 31. Over the other cycles of the initial EGTRRA ... that has maybe been a little bit less, but in general, people tend to file late in the cycle, while with ESOPs we've basically lost a year of the ability to work on Cycle A receipts, so when we go into Cycle B, we are already one complete cycle behind.

Challenge Number 4 is on Slide 11 and that is that in getting into the review of our Cycle A ESOPs, we realize we need some more interpretive or instructional guidance. I think this is the case anytime The Service takes on work that is somewhat new. You don't realize what you need until you start working to see what you have. What we have in ESOP is in direct parallel, for example, to the cash balance moratorium work that we did where as you get into the review of receipts, you recognize that there is additional guidance that is needed. Certainly, that's the case with ESOPs.

In fact, before this, and I don't want to get ahead of myself, but before some of the information I'm about to share was made available, if you were to go and research ESOP document provisions or plan documents writing for ESOP purposes on the web or in tech services, you would find there is very little material out there at all. That's, quite frankly, because there's not that much material to begin with this, especially in terms of enabling language.

So, here we go. We start working in Cycle B and realize that in looking at our Cycle A receipts, we do need a substantial amount of interpretive guidance, especially with regard to the Section 409(p) requirements for Sub S ESOPs. That effectively caused us to suspend work for I want to

say the better part of three quarters of a year while we virtually put all our plans on hold until we could get in place the necessary guidance that we needed to work on them.

Before I get into the guidance, I just want to talk about some resources that we've shared. One of the things is the guidance I'm about to go into. We've also shared a practitioner worksheet and the other thing we shared is in I think the Spring EP Newsletter article from last year we said, "Since we're this far behind and we're trying to stay consistent and we're developing all this guidance that I'm about to get into, to put everybody on the same page, maybe we can work more efficiently if when we make contact out to you and there is a provision that we identify as needed in your document, if that affects, let's say, six or seven other submissions of yours, you can respond back to us within the context of this individual's mission we're working and say, 'Oh, by the way, I have five other plans that have identical language and we're going to need this identical amendment. The Service, we would respectfully have you treat this, respond to this as it applies to all these other plans.'

We put that in the newsletter article, which is link accessible on the web I think at the exact navigation bar that Mark talked about as his introduction and basically said, "For ESOPs, if we raise an issue on a plan document then you can apply that provision to all the other concurrent submissions that you have." That's one way we try to get everybody on the same page with regard to all this guidance.

Let's go into the guidance and I'm now on Slide 13. If you look, for example, at Slide 14 first, I put a screen shot of the webpage as it exists right now. To navigate to this page, you would start at our irs.gov/ep homepage. Click on the word Determinations and that will take you into a kind of determination letter subpage. From there, there's a link to go to Helpful Information or Other Important Guidance, and on that the next page that comes up should give you some choices to pick, of which one relates to ESOPs. From there you can select a couple of different alternates.

Now let's start with the memoranda that are here on the screen. Again, we're into the middle of Cycle B looking at Cycle A receipts and realize we need to get some enabling interpretative guidance for our work. In response, we developed five separate technical assistance memoranda, which answer a lot of key provision interpretation questions that we had. If you look at these memoranda, these are styled like internal assistance or purely internal guidance and in general, we don't share that with the public. We have a process to clear out formal guidance and final guidance, but things that are interpretive for ourselves, which is basically internal work product, we rarely share.

But here I thought it was very important for us to do it because we're acknowledging we're having inventory problems. We want to get everybody on the same page and most importantly, when our reviewers like Michelle raise issues to you, such as the plan's 409(p) language is deficient, we are able to say, "Look. Here is the national set of standards that we are going to follow." We need to get some guidance out there so that everybody can see why we are taking

the positions we take and most importantly, so we can be transparent in our analysis of the law and how we feel that it should work.

We did put these five technical assistance memoranda up on the web. We also put an employee check sheet there, which is kind of like a tool or a reviewing aid for our reviewers to look at when reviewing the plans.

Let me go through these very quickly. There are five separate technical assist memorandums. The first was with regard to Subchapter S stock and we concluded that it was acceptable to have a mandatory repurchase provision, as long as there wasn't some discretion to pick who you're going to repurchase from and who you weren't going to.

Number two was a definition of year of participation within the context of Section 401(a)(28) diversification context. This is an example of recognizing a need after you start working on it. The existing guidance for purposes of year of participation was an IRS notice in 1988, Notice 8856, which kind of left open the definition of years of participation and we had to decide could this would be restricted to years, for example, when a participant has an account in the plan?

Request Number 3 is the 409(p) guidance. We conclude that this is essentially a quasi-qualification requirement to plans that are ESOPs sponsored by a Sub S and therefore would be subject to an EGTRRA good faith amendment. I'm going to try to answer a little bit more about that later because I have a couple of questions about 409(p), but in general, this one says this is a requirement that's almost akin to the document requirements in the 401(a) context.

Assist Numbers 4 and 5 are what we would call the reshuffling and rebalancing memorandum. We would say rebalancing we're more or less okay with, but reshuffling, which are transfers to avoid a non-allocation year where you're not trying to just equalize the mix, you're trying to avoid having a 409(p) issue, we're not okay because there's an inherent benefit rate and feature problem. You have a right to direct whatever investments are available to any participant's account. If the employer's going to remix them that might be a violation of BRF standards because it won't be effectively or currently available to non-highly compensated employees. That's a very quick summary of what's on Slide 14, if and when you get to that webpage and take a look at those documents.

We've also put up, as I said, our worksheet. It's, I think, a two-page document. Now our reviewer work papers for regular determination cases are available on the web. They're a public document that's cleared out, essentially, as published guidance. They are referred to as The Alert Guidelines, of which there are 12 separate check sheets and deficiency items with explanations.

Those have always been publicly available, but obviously we make a lot of kind of homemade reviewer material to enable people to look at applications and have a checklist to see that they've got everything compliant. That's what Michelle, for example, uses when she reviews plans. We thought it was important to put this out there too, number one, because it has the links to these different technical assistance memoranda so you can see why we're asking for different things and the purpose. But also, number two, this is a way for you to know, "Hey, here are the things the IRS is going to look for when they scrutinize your application."

If you take a look at that check sheet, for example, you can essential self-audit your own plan document and know I have to have this material in the plan. These are the things the IRS is going to routinely scrutinize and review for. And for that purpose, although this is not a formal published product, we wanted to put this there so that everybody, again, could be on the same page so that you've got a view into the types of issues The Service is considering. You can take a look at your own plan and anticipate that we might raise questions about where some of these provisions are located. For that reason, we put that on the website, as well.

Well, I don't want to talk too much more about what we have on the website. I think it's more important for us to talk about what we are doing with this material, so I'd like to turn it over to Michelle, who is an EP Determinations Specialist, and is going to discuss the recurring issues that we find with regard to ESOPs.

Just before I do, in general, we do compile a lot of recurring issues information. Sometimes we make a report on it. The recurring issues Michelle's going to talk about we don't necessarily publish. Some of her material is related specifically to ESOPs or ESOP language failure. Some of it is rather endemic to all determination letter requests for individually designed plans, so I think you'll hear a little bit about both.

I will come back a little bit later and talk about some future enhancements and things you might see in the program, but for right now the important part if for you to hear what we are currently seeing and let me turn it over to Michelle.

M. Owen: Thanks, Don. Right now I'm going to talk about our new accelerated processing procedures before we get into the recurring issues. We are now on Slide 19 of the PowerPoint. As Don mentioned earlier, we have just now started the new accelerated processing procedures and they have been developed in order to expedite the review of ESOP cases.

As of right now, two of the cadre members have been selected to do the accelerated processing work. Under these new procedures, applications will be first assigned to one of the two people and based upon their review, either they will send a request for additional information if it appears resolution to the items can be done within a single contact. If that is not the case then the application will be put back into inventory to be assigned at a later date to the rest of the cadre. Lately, the timeframe on when these cases are being reassigned to the rest of the cadre has been relatively short, however, this may not always be the case in the future.

Both Forms 5300 and 5310 are under these new procedures and are generally being assigned in postmark date order. One exception to this rule is if we are at a postmark date and we have a batch of a cases from one practitioner, all of the cases in the batch will be assigned together.

Under the new accelerated processing procedures, if contact has been made to you and we don't receive a response within the timeframe given, the application may be returned to you as incomplete under Rev. Proc. 2011-6. Additionally, if you provide some of the information but not all, depending upon the outstanding issue(s), your application may be placed back into inventory to be assigned later to the rest of the ESOP cadre.

Moving on to Slides 20 and 21, these slides discuss the situation where multiple applications have been submitted for the same plan. For example, if you have an ESOP that has an EIN that ends in a five. One application was submitted in Cycle C because the plan met the new plan rules requirements under Rev. Proc. 2007-44 and this application is considered a C "deemed on-cycle" application. Another application was submitted in Cycle E. This is their on-cycle filing.

In the past, once the Cycle C "deemed on-cycle" application was assigned we would contact you to see if you still wanted the determination letter for the C filing because, in most cases, this letter would be expired when it was issued. Effective November 1, we will no longer be making this contact. We are going to continue to review the deemed on-cycle application, even if the determination letter is expired. However, if you want to contact us and withdraw the deemed on-cycle application, you can send a withdrawal request to the attention of Julie Heckler and the fax number is listed on the PowerPoint. Also, please be aware, in this example, the Cycle E on cycle application will remain in the inventory until we start reviewing applications in that cycle. We would not pull that application out of postmark date order in order to review it under Cycle C.

On to Slide 22, if you submitted an on-cycle application under one of the first five-year cycles, for example, say you submitted a Cycle B application by January 31, 2008 and you have not received a determination letter and now the second five year cycles is open or will be opening soon, for example, the Cycle B application submission cycle is going to be opening up February 1, 2012. You should still file the application in the second five-year cycle if you want a

determination letter for that period. Do not hold off sending an application just because you have not received a determination letter for the prior submission. Also, indicate in the cover letter of the other pending determination letter application that you already submitted.

I have been asked by several people about converting applications from one cycle to the next. I want to make sure everyone is aware of that we do not convert any applications from one cycle to another.

On to Slide 23, as Don said, we are currently processing Cycle C 5300 applications. If you have not been contacted about any application from Cycle A or Cycle B under the first five-year cycle, these are applications generally submitted on or prior to 1/31/08, and you have not been contacted, please fax the plan information in care of Julie Heckler at the number on the PowerPoint and we will look into those cases.

That was a breakdown of the new ESOP processing procedures and now we will go over some recurring issues with ESOP plans. As Don said, some of these items are specific for ESOPs and some are just general items.

Moving on to Slides 25 and 26, the first recurring issue is that all amendments, specifically for ESOPs under Cycle C, are not being submitted. This would include the EGTRRA good faith amendment; the amendment to the final 401(a)(9) final regs; the 401(a)(31)(B) amendment (often this is referred to the automatic rollover amendment), the 415 final regs amendment, and if the employer is an S corporation, the 409(p) amendment.

If your plan is a KSOP, that is a plan that includes both an ESOP portion and a 401(k) portion, the final 401(k) and (m) amendment needs to be included. Additionally, if the employer is electing to include Roth 401(k) contributions in the plan, that amendment has to be submitted too.

On Slide 27, the next issue is with documents. We receive plan documents, amendments, and/or trust documents submitted signed but not dated, or they are dated but not signed.

Also, on Slide 28, portions of the 5300 are not being completed in its entirety, the attachments to certain line items are not being submitted or the 5309 is missing.

On Slide 29, plans try to incorporate 409(l) by reference for their definition of qualifying employee securities. Plans may use a similar term, such as stock, employer stock, company stock, or something similar. IRC 409(l) cannot be incorporated by reference - there is no authority that would allow this to be incorporated by reference.

Slide 30, an election made by the participant to not enter into the plan must be irrevocable. Also, Item 12 on the memo dated January 5, 2010, indicates that it is not permissible to have waiver language in the plan for 409(p) purposes.

On Slide 31, debt forgiveness language pertaining to exempt loans needs to be removed from the plan. This is covered in Item 7 in the memo dated January 5, 2010.

On Slide 32, this is the most common recurring issue - Language in the plan that provides the proceeds from the sale of stock held in a suspense account are considered earnings and not counted as annual additions. The position of the Service is this type of language is considered a hypothetical future transaction and we will not rule on this language until the transaction has occurred pursuant to Rev. Proc. 2008-4. This is also discussed in item #6 on the memo dated January 5, 2010.

On Slides 33 and 34 pertains to 409(p). The first item is that plans need to include the definitions of impermissible allocation and impermissible accrual, amendments for 409(p) are not being submitted if the employer is a S Corporation, the transfer prevention language is either insufficient or it has not been amended into the plan and lastly, incorporating 409(p) by reference is not permitted in the plan. However, this could have been incorporated by reference in the 409(p) amendment. T/A # 3 dated December 9, 2009 and Item 5 on the memo dated January 5, 2010 covers some of these items.

Slide 25 covers segregation language. This is sometimes referred to as reshuffling or rebalancing. The preferred method is that you remove this language from the plan, but if it remains in the plan, it must conform to the technical assistance memo dated February 23, 2010.

Moving on to Slide 36 - incorporating the exempt loan language by reference is not permissible. Additionally, some plans contain exempt loan language which is not completely compliant with the regulations under 4975. These items are discussed in the Item 4 in the memo dated January 5, 2010.

Slide 37 discusses the changes under the final 415 regulations. The first item is the post severance compensation. The definition of 415 compensation must include regular compensation, overtime, shift differentials, commissions, bonuses and other similar compensation if paid by the paid by the later of 2 ½ months after severance from employment or the end of the limitation year that includes the date of severance from employment if such payments would have been paid to the employee while the employee continued in employment with the employer. The 415 compensation definition can optionally include payments made for sick leave, unused sick leave, vacation leave or other leave the employee could have used if employment continued, or payments received by the employee from a non-qualified under-funded deferred comp plan.

The second item on slide 37 is the change under the final 415 regulations which is the repeal of the methods used to correct excess annual additions. These two changes are effective for limitation years beginning on or after July 1, 2007.

Moving on to Slide 38, IRC 401(a)(31)(B), sometimes called the automatic rollover provision in a plan, must conform to Notice 2005-5. A plan needed to do one of three things: (1) lower the involuntary cash out limit to \$1,000, provided the cash out limit is above that amount, (2) add in the automatic rollover provision for cash out distributions between \$1,000 and \$5,000, or (3) eliminate involuntary cash out distributions from the plan.

On Slide 39, the underlined portion of the 1042 election language in the PowerPoint is another recurring issue. Starting with the 25%, it should read 25% of any class of outstanding stock or 25% of the total value of any class of outstanding stock.

Moving on to Slide 40, language needs to be in the plan that provides that if there is a transaction between the plan and the disqualified person, the valuation date is determined as of the date of the transaction.

Slide 41, this is a change under EGTRRA to the top-heavy ratio which was effective January 1, 2002. The look back period changed when adding back in distributions from five to one year. However, the five-year look back period is still retained for any in-service distributions. This is, for distributions made for any reason other than severance from employment, death, or disability. In the PowerPoint, the words "severance from employment" is underlined because this replaced the words "separation from service" under the Job Creation and Workers Assistant Act of 2002 (JCWAA).

And, finally, Slide 42 talks about the key employee definition. The dollar amount of \$150,000 for a 1% owner is not indexed for cost of living increases.

And that's the end of the list of the recurring issues. I will now hand it back to Don and he will talk about the future developments of ESOPs.

D. Kieffer: Okay. Thank you very much, Michelle. I'm now picking up with Slide 43. I think the next thing that you'll see down the road in terms of new or future ESOP developments, at some point we will probably issue final regulations under Section 4975. The existing regulations that are there go back to, I think, the mid- to late-70s and we're going to need to do an update to take into all those things like Section 409(l), 409(h), 409(p). Obviously, because 4975 is an exception to prohibited transaction rules, these things have to be coordinated with the Department of Labor, so right now we're only in our initial stages.

Let's go to the next slide and I think the other thing that's a possibility down the road is the pre-approved plan for ESOPs. Depending on whether you're an optimist or pessimist, whether you

think the glass is half filled or half empty, this is either a very good idea or it may not work. It's a very good idea in the sense that there are really a very limited number of ESOPs document writers.

Whenever I look at a niche like this and see there's just a very few amount of providers, that says the preapproved program would work. We would take a couple off to write LRMs, to review specimen submissions, get some guidance in place, and then we could fit everybody onto these providers' plans. We could easily solve a backlog that I described as an introduction to what we see on individually designed plans. That's certainly the optimistic view.

The pessimistic view, Michelle talked about our efforts to expedite and streamline the accelerating processing of cases and, honestly, we have very mixed nominal results because, although, I think a lot of these documents start out as a similar document among providers, from my sense is that there is a substantial amount of customization that goes on that takes us somewhat away from what would be the terms we would be willing to preapprove.

If were to try to do this and let's say take people off of reviewing these plans and instead review specimens and get LRMs out and then ultimately, again, probably have to stop and get administrable guidance when we find we need more thought on how narrow we want to take an interpretation because now we're going to go into a pre-approved context. If we're going to do all that and then take 10% of the population, let's say, into the specimen design and that's the only capacity it's going to hold. The rest of them still have to go to individually designed plans or, from my perspective, then that would be wasted effort.

I think that's something we do want to think about though and maybe we need to do some dialogue with the community. "Hey, how many of you clients could fit if we did this? If we put out an ESOPs prototype, which, from today's vantage point, might seem unlikely, but if we were to do that and expand the preapproved program to do that, would you as a vendor/provider take advantage of it?" If the overwhelming response was, "Yes," you know, we could probably fit 95% of our clients onto it, depending on how broad you were going to do it. I think that would be something we would want to try because that would certainly help us out over here on reviewing individual plan by plan by plan submission.

Obviously, if we do that, that takes away some of the flexibility, especially with exempt loan considerations, but if you were to trade flexibility for frequency and expedition of results, maybe you might want to enter into that bargain. That's something we want to think about, maybe we need to engage in some dialogue with. We obviously right now have the six-year program for submission of second run DC documents open and we don't have ESOP LRMs and we don't have a program open for it, so this would be something that would kick in about 11 to 12 years, if we were going to do it at all.

Okay. So that brings us, thankfully, to the end of our prepared presentation and I'd like to take some questions. I've been reading some that have been coming into me on e-mail. I'm trying to put some order to how I'll answer them. I'll try to take the ones that were obviously submitted first. I have some that are specific to ESOPs, some that are generic, so I'll try to put them in some kind of order so I can get through as many as possible.

First one, "I have an ESOP that was filed in the first cycle and now we're ready to do the second cycle. What should we do?" Well, you do need to file for a second cycle application. We tried to avoid having where we didn't get the first one finished for Cycle A before the next one came up, but if that does happen, what we suggest you do is make your second cycle filing. In your cover letter notate if you have a document locator number, but if you have a number of an agent to whom it's assigned, notate that when you file it and maybe even advise the agent. We'll try to pair it up, if we can, but please notate the existence of the other one that's out there pending.

Let's go to another question. "Is there a one-stop shop where we can go to on the website that will spell out all the different various changes?" Well, yes, there is. We've actually tried to improve the determination letter layout and content on our webpage. Among other things, as simple as putting the word determinations on the landing page I think will help people find their material, but yes, we did put a cumulative list page where you can basically find all this material in one place. I think we've got two separate sub-links with a current cumulative list and like newer guidance. I honestly haven't been there in a while, but there is a one-stop shop. You go to Determinations then click Update a Plan then click Current Cumulative List.

Next question, "Are ... required to file ESOP determination letter applications? Notice 2011-6, the IRS exempted 5300, 5307, but didn't talk about 5309." That's an excellent question, but somewhat beyond the scope of today. In general, the 5309 cannot stand on its own. That's really viewed as a supplement to a 5300. Although, I think the notice was intended to be an all-inclusive list and if it's not on the list, it's not exempt. I think this was an oversight.

You might want to stay tuned. We might have to have some additional guidance that clarifies it. We forget about ESOPs Form 5330, which does the reporting for a whole list of sundry excise taxes, is kind of in the same vein. It's not in the notice, but it's generally thought of, not as a supplement to a 5500, but as a requirement that's triggered by plan operations.

Should that be resolved in the same way? I would say stand by. We might have to do some guidance. I don't think it was intended to omit that when we issued the notice. The 5309 is really just a supplement to the 5300 file.

Next question – "We've got a letter issued but it has the wrong dates in the letter. How can we get it corrected?" Well, I think Mark talked about our resource customer service connection on our webpage. If we didn't, it's 1-877-829-5500, or if you look at the last slide we have here in

our PowerPoint, we have the link for retirement planning questions where you can e-mail in the contact, or you can send Michelle, ..., and myself an e-mail.

I would prefer if you're going to send me an e-mail for disclosure purposes please don't identify your client. Send me an e-mail that says, "We haven't heard and I got the wrong documents in the letter. We tried to contact somebody to get it straightened out." Just send me that you need this type of assistance and let me call you back and we'll talk about it because I don't want you to e-mail anything specific about your client in an e-mail.

Next question, this is a general DL question. "When will the IRS publish the new 8717 with the new user fee schedule?" The answer is soon. We've just issued notice 2011-86, which is the guidance on the zero dollar fee user exemption under Section 610 of EGTRRA and that guidance very briefly says the small plans and new plans are exempt. And new means within the first five years or within the remedial amendment period for the first five years of the plan. The remedial amendment period for the first five years of the plan can be very complicated, so let's just make it a flat 10 basically. That's what 2011-86 says.

The actual fee structure would be appearing in Rev. Proc. 2012-6. That's usually issued in the first week of January, like the 4th or 5th or something, of next year. The Form 8717 itself usually comes out once it's cleared, I don't recall off the top of my head the publishing calendar for forms and publications, but it's in the process to clear out through forms and pubs. Whenever that's finished, it will be there. Ideally, you want to have the form in place when the new Rev. Proc. is in place because, obviously, if the fee schedule increases that increased fee isn't recited on the old forms so we are certainly aware of that and ... to getting it done on time.

Next question, and by the way, I tried to pair up anything that had a fact pattern I couldn't read in a sentence of two. "An employer sponsors a 401(k) plan with a component. The employer acquires a 401(k) plan. The acquiring entity has an integrated plan. The employer would like to merge this other integrated plan into this new and just basically fold all the monies into this common trust. Is this permissible?"

And I assume the question relates to Section 54 for amendment 7511(a)(72) of the regs, which basically says you cannot have a post-1977 ESOP that's integrated. Here the prior plan was integrated. You're going to stop the prior plan and just move it in. I think that's okay. If you were to continue the allocations and designate that portion, for example, as being part of this ESOP, that wouldn't be okay, but as long as you're going to literally just transfer money into the trust, I don't think there's any problem.

"For a determination letter request, is the plan required to use the April 20, 2011 Form 5300, or can we use the prior version of the form?" The answer is you can still use the prior version of the form. Usually we put the new one out there, let it go for a little while, and then obsolete the old one maybe eight or nine months down the road. If at the time we obsolete it you are into us

on the old form, we generally don't ask you to resubmit it on the new one. We might ask you for information that the new one collects and contact you to give us that information, but we wouldn't say, "Go back and resubmit the whole application." We figure about a couple more months you can still use the old form.

Another question – "Company X is a Sub S. It has an ESOP for its employees. Assume the ESOP distributes Company X stock to a non-resident alien or a surviving spouse who was a non-resident alien. All this distributed stock is subsequently repurchased. This is a lump sum distribution. Question – does this terminate the ESOP's S election if it's instantaneously purchased?"

That's an excellent question. There's a rule in Rev. Proc. 2003-23, I believe, and 2004-14 involving IRA and it basically says if you take this distribution and immediately repurchase it back on the same date, you basically can protect it from taint but there's no equivalent rule that I'm aware of that would involve the same type of extension of this protection to an NRA. Off the top of my head, I don't think we have a parallel that invokes this type of principal in 2004-14 to an NRA. That's a very good question. I think you have a problem.

Next question – "Will the IRS issue a determination letter on a plan that includes price protection in it?" Price protection, for example, if a plan says that the stock bought with allocated cash contributions will be valued by an independent appraiser without regard to debt that is incurred by the ESOP to a former shareholder, even if this debt is reflected on the company's balance sheet. Then it would be later purchased in a leverage transaction such as the debt ... won't be reflected basically in the appraiser's valuation. Will we raise any issues in this in the determination letter process?

Well, quite frankly, we don't like it. Now valuation is generally an operations issue and on the determination side, we're reviewing the plan to see that you've got plan provisions that are compliant with the law. Here you have a plan provision which says this is what we're going to do when we conduct a valuation. And the valuation that we're going to conduct is basically going to ignore a substantial factor that might influence or affect the fair market value of the underlying security. So we're going to do this valuation. We're not going to consider this other factor and we're going to put an enabling plan language in there.

Quite frankly, we don't like this for two reasons. One, you have a provision that is setting the plan up to perform a valuation that won't necessarily reflect true value. Number two, this is really a hypothetical future event that you're asking us to endorse at the time the submission is made. You're saying without regard to any debt that is incurred by the ESOP to the shareholder to a later purchase of the stock in a leverage transaction, that's talking about something that's going to happen in the future that you want us to basically approve today. We would say, "I don't think that's appropriate. We would have a problem with it."

Let me take a question that just popped in off of e-mail only because I happen to be looking at it. “We were recently contacted by an IRS agent who requested that we identify whether the employer is a C or S and said that if it is a C Corp. all the S provisions should be deleted. Is this an IRS rule and why?” Well, as a general rule, forget about ESOPs for the minute. We generally are not too happy with what I would call contingency language.

Now the only one that we have publically expressed disdain for is the default ADP in a Safe Harbor 401(k) plan and that was subject to I want to say a 1997 or so guidance memorandum that we put out where we said you can’t write a Safe Harbor 401(k) plan which says, “In the event we don’t make the Safe Harbor contribution, we’re just going to test it for ADP ACP.”

Those are two separate entities – Safe Harbor status and traditional 401(k) plans – and you can’t have that automatically default from one to the other. That was an example of contingency language, which we said is not good. Now, having said that, we’re kind of okay with other contingency language as long as it really doesn’t cross over the readability of the plan or conflict with the different operating requirements the plan has to carry.

For example, we might get in an S Corp ESOP which has Section 1042 language for restricted stock and if we question it, we are told, “Well, this is in case we ever break the S collection and go to C.” Or we have a C Corporation, which in this questioners set of facts, sponsoring an ESOP and their 409(p) language in the case they ever elect S status. Well, eventually, if the plan were to be loaded with all of these various contingency languages, what it is at any given point in time and what rights the participant has and what it is that we have to evaluate to determine whether the plan is compliant becomes almost a very difficult analysis, especially here with ESOPs where you have Cs that can do all these things that S plans can’t, like on Section 1042 transactions. You have S Corp ESOPs that are subject to non-allocation years to disqualified persons regarding synthetic equity.

If you have all these terms cross in the various entity’s document, it becomes difficult to understand what this plan is trying to administer, so as a general rule, we’re not too fond of contingency language. Perhaps in the ESOP context the one that we see the most is regarding exempt loans. We frequently get submissions in where the applicant identifies that this is a non-leveraged ESOP. Yet, when we go into the document, it contains exempt loan features.

To be honest, we’d rather not see that in there, but we do understand, okay, the employer wants to set this up so that they can go get a loan and then not have to re-file for the determination letter. Okay. That may not affect the actual structure of the document and the benefits that are provided. Although that’s not a ..., that loan actually brings other things into play, but okay, we might be allowed to take that in and approve it.

But let's say the 409(p) language, well, we're not going to make a non-allocation to a disqualified person. By the way, this is subject by a C Corp. What does that even mean to hold it in the plan? That we would say that this type of thing we'd like to see you take out.

"Biggest problem we hear is that there is apparently a banking regulation" – I'm reading the question – "there's apparently a banking regulation that does not permit the opening of a money market account without having obtained a determination letter. We're told the status of a pending request is not good enough. Some ESOPs are caught in the quandary of not being able to get an account until a letter is issued, but not being able to get a letter issued because it's sitting at the IRS." There is not a question here, but I cringe when I hear this that people have business transactions adversely affected because we basically can't get through the submission quick enough.

We know that there are a lot of lenders out there that want the proof that the IRS thinks a certain design is good before they're willing to commit the funds into a leveraged ESOP. To be honest, we're very sensitive to a need that we've got to be a little bit more timely in getting our products delivered. The only thing I can say is we've repeatedly said that this is the type of "urgent business need" for which we would accelerate a case, for example, from going out of its status of being off cycle filing and to treat it as if it's on-cycle. But as we talked earlier, with regard to the amount of stress we have on our inventory, even to accelerate the submission on to the top of the level of all the people that we have working is difficult because we're just very stretched for resources to begin with.

Moderator: Mr. Kieffer, you have two minutes. This is Vicky.

D. Kieffer: Okay. I've got two more minutes. I'm going to wrap up. I want to say, first of all, on behalf of Michelle and myself, thank you very much for attending today's session. A very quick note – I got a couple of questions here that what we were covering was not what looked like what you had in your paper. We actually made a couple of very minor changes to the slide show. We increased some fonts really for readability, corrected a typo, and we did put up a revised version, I think, a couple hours before we got here. If you're looking at the prior version, to be honest with you, I don't think you need to go back and download the newer one. It was really just to clean it up a little bit, but we did put a new one out there.

Secondly, I'd like to turn to the last slide. I did put our contact information. I have a stack on my desk in front of me of probably another dozen questions, which I'm going to go back and answer to each of you probably the early part of next week. If we didn't get the question that you have today or you would like some clarification on any of the material that either of us covered, by all means, send us an e-mail. We will get back to you.

We do have a customer service and a retirement.plan.questions e-mail avenue for you to contact us if you ever forget or loose this PowerPoint and can't find us. Especially like for example

letter corrections, if down the road you've got issues, where is my letter? How do I get it fixed? Please, by all means, contact us through our customer service line.

And, with that, I think it's time to draw this presentation to a close. On behalf of Mark, Michelle, and myself and the rest of us in the IRS's Customer Education and Outreach effort, I want to thank all of you for attending today's ESOP Determination Letter Presentation. Thank you.

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