

Transcript for Governmental Plans Proposed Guidance Phone Forum

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Moderator: Welcome to the Governmental Plans Proposed Guidance Phone Forum. At this time, all participants are in a listen-only mode. Later, we will conduct a question and answer session. Instructions will be given at that time. As a reminder, today's conference is being recorded.

I would now like to turn the conference over to your host, Mr. Mark O'Donnell. Please go ahead.

M. O'Donnell: Hi, everyone. I'm Mark O'Donnell, Director of Customer Education and Outreach for IRS Employee Plans. Welcome to our phone forum. Today's topic is on the Advance Notice of Proposed Rulemaking, the ANPRM that was published in the federal register on November 8, 2011. The ANPRM addresses the definition of governmental plan for purposes of section 414(d) of the Internal Revenue Code.

The purpose of this phone forum is to impart information to you and to listen to the comments and concerns of the governmental plans community with regard to the ANPRM as well as the draft proposed rules. This phone forum will last for two hours. We'll start the phone forum with a presentation by our governmental panel.

After the presentation, we'll move on to your questions and comments. We have representatives on our panel today from three separate IRS functions and the Department of Treasury. The IRS functions are Employee Plans, Chief Counsel and Federal, State and Local governments. Employee plans is responsible for the regulation of retirement plans meant to be qualified for favorable tax treatment under section 401(a) of the Internal Revenue Code including governmental plans intended to be qualified.

Representing employee plans today is Andy Zuckerman, Director Employee Plans Rulings and Agreements and Ingrid Grinde, Manager Employee Plans Technical Guidance and Quality Assurance Group One. The Office of Chief Counsel is charged with responsibility for drafting employee plans regulations. From Chief Counsel today, we have Pamela Kinard, Senior Technician Reviewer, Qualified Plans 2, Office of Division Counsel Associate Chief Counsel, Tax Exempt and Government Entities.

Our Federal, State and Local Government's Office is primarily the point of contact for governmental entity matters within the IRS. Representing FSLG today is Lynn Shelton, Manager, FSLG Field Operations. We also have Bill Evans from the Department of Treasury on the line.

INTERNAL REVENUE SERVICE

Host: Teresita Laureano

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While visiting our website, you might also want to subscribe to our free electronic newsletters. The link for newsletters is on our Retirement Plans Community landing page. One of our newsletters called *Governmental Plans Update* might be of particular interest to you. So, without further ado, here's Andy Zuckerman.

A. Zuckerman: Hi. This is Andy Zuckerman. I'm the Director of Employee Plans Rulings and Agreements. I'm going to briefly talk about some general information before I turn it over to Lynn Shelton to discuss a little bit about what the Federal, State and Local Governments Division does.

As Mark indicated, there were two ANPRMs published back on November 8, 2011. They deal with the determination of what governmental plan status is and a second one dealing with Indian Tribal governments in our Indian Tribal Government Division and what special rules apply to those entities. We are going to be holding hearings on July 9th in Washington dealing with the general definition of what a governmental plan is and on July 10th dealing with the special rules for the Indian Tribal Government Plans.

Now, the question comes up what is an ANPRM. Normally, the IRS and the Department of Treasury issues regulations in the form of proposed regulations. We have hearings. We get comments on these regulations. We take the comments into account and we come out with final regulations.

The ANPRM is something a little bit different. You can look at it as if it is a draft proposed regulation. In essence, we are saying we believe because of the sensitivity or importance or some other reason, that we need an extra round of feedback from the public sector. In the case of governmental plans, we believe that this feedback is necessary because of the political sensitivities and because of wanting to make sure that we, at the IRS, Treasury and Chief Counsel's Office, really understood the views, the special needs of government plans community.

So, the process is we came out with the ANPRM. We're doing something that's a little different. We've held two town hall meetings, one in Oakland, one in Cleveland, where people came and

gave us some comments on our, in essence, our draft proposed regulations, and we're also having this phone forum to try to answer any questions and get a little bit of feedback on issues relating to government plans to be considered in our development of the proposed regulations which is going to be our next step.

So, in essence, an ANPRM is a draft or a pre-proposed regulation that is issued to get an additional round of comments to make sure that we're all on the same page when ultimately we get our regulations out. We are requesting formal comments. We view this as a dialogue, the beginning of a dialogue of what these regulations should say. If you want to send in formal comments, we'll be discussing later on in the phone forum how to do that, but that can be submitted electronically or mailed in. We're looking forward to a good discussion today and being able to answer, hopefully, any questions or concerns that you may have.

So, with that, I'd like to turn it over to Lynn Shelton.

L. Shelton: Thanks, Andy. My name is Lynn Shelton, and I'm the Field Operations Manager for FSLG. We are the primary point of contact for governmental entities at the IRS. I'm on the panel today because my employee division in the TEGE family, which stands for Federal, State and Local Governments, or FSLG, has as its primary objective to ensure compliance with federal employment tax laws by governmental entities through the use of review and examination activities as well as through educational programs.

FSLG is responsible for ensuring federal tax compliance by federal quasi-governmental and State agencies and city, county and other units of local government. Our compliance activities also relate to various employee benefits which may impact employment tax liability of our taxpayers. I'll turn it over now to Andy again.

P. Kinard: My name is Pamela Kinard, and I'm going to be talking to you now about the guidance under consideration. Before we start, let's go over the basic definition of section 414(d), the definition of governmental plan, and you can find it in section 414(d) of the code. That definition says that the term governmental plan means a plan established and maintained for its 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 of the foregoing.

Now, from this definition, the guidance on the consideration is basically defining some key terms. The key terms are "established and maintained," "United States," "States," "political subdivisions," "agency or instrumentality of the United States," "agency or instrumentality of a State or local government." So, those are the key terms that we're defining in this guidance in the consideration.

As you know, we don't have any proposed—have any regulations defining the term government. This is the first time and this is why we have this additional process of doing an ANPRM with attached draft proposed regs. The definition under section 414(d) is pretty much identical with the definition that DOL has in section 3(32) of ERISA and also that PBGC has in 4021(b) of ERISA. The only difference is that in 3(32) of ERISA, instead of them saying established and maintained, it's established or maintained.

Now, even though we don't have regulations defining the term governmental plan, guidance has been issued before on what is a governmental entity. If you look to Rev. Rul. 57-128, you'll see that there's guidance there that tells you whether an entity is a governmental instrumentality for purposes of the exemption of employment taxes under sections 3121(b)(7) and 3306(c)(7). The Service also issued guidance on the definition of governmental plans, Rev. Rul. 89-49, and basically, it's a facts and circumstances test for determining whether an entity is an agency or instrumentality for purposes of section 414(d) and ultimately whether that entity established and maintained a governmental plan.

In both tests, if you look at both revenue rulings, you'll see that there are facts and circumstances tests. We take that same approach of using a facts and circumstances test, and I will discuss in a minute with you what those factors.

Now, what we did provide in the ANPRM and also in the preamble to the attached draft proposed regs is that these rules apply only for purposes of section 414(d) and not for any other purpose under the Internal Revenue Code. We also say that we worked very closely with the Department of Labor and also the PBGC in drafting this guidance under consideration. They actually were with us in the drafting meetings, and we worked very closely on this. This was a project that's been years in the making.

As you know, the PBGC and DOL issued advisory opinions, and the IRS issues private letter rulings. It was decided at least about four or five years ago to get together and start working on coordinating opinions and rulings on governmental plan determinations. After that, we decided that it was necessary to look at the factors and to agree on a similar set of factors that we can use in governmental plan determinations. Soon after, it was decided it would be helpful to have guidance because the factors that were listed in the 89-49 were outdated.

So, what I'm going to do now is talk to you about the two main tests. First is the test for determining the factors that are used for determining whether or not you have a federal agency or instrumentality. Those factors are as follows, basically, we look to see whether the entity performs or assists in the performance of a governmental function. We look to see if any private interests are involved or if the U.S. government has all the powers and interests of an owner.

We look at the control and supervision of the entity. Is the control and supervision of the entity vested in the United States? We look to see if the entity is exempt from federal, State and local taxes, whether the entity is created by United States, if there was any type of specific enabling statute. We look to see if the entity had received any sort of financial assistance from the United States.

We also look to see whether any determinations have been made by a federal court that that entity is a federal agency or instrumentality. We also look to whether any other governmental entities recognized and rely on that entity as being an arm of the United States government. We also look to the employees to see whether the employees are treated in the same manner as federal employees.

If you look to the draft attached regs, they're proposed regs that we drafted that are attached to the ANPRM. Just to give you a better idea of what we were thinking about, you'll see that we also include an example in there. Another definition before I get into the definition of the factors relating to a State agency or instrumentality, is a definition of a State and also the definition of a political subdivision of a State. We use the definition of State that is found in the Internal Revenue Code basically in section 7701(a)(10), which says a State is any State of the United States and the District of Columbia.

Now, when you look at the political subdivision, basically we have various factors that we're looking at. We define it as a regional territory or local authority that is created or recognized by State statute to exercise sovereign powers. Those powers are listed as the power of taxation, eminent domain and the police power. In addition, we look to see how the governing officers of the authority are appointed. Are they appointed by the State officials already publicly elected?

Once again, this definition of political subdivision of a State only applies for purposes of section 414(d) and not for any other purposes of the Code, for example, section 103 dealing with tax exempt bonds. So, then what I want to do is talk to you a little bit about the factors of State agency or instrumentality. Just going back historically, most of the private letter rulings that were issued from Employee Plans going with 414(d) rulings were related to State agencies or instrumentalities.

When we went through this, we started as a base with the factors that were used in RR 57-128. We also used some of the factors in rr 89-49 that we thought that were—we modified them a little bit to get away from day-to-day control. We also looked at court cases. We looked at DOL advisory opinions, our own rulings, to come up with a list of factors.

Then, we separated those factors in two categories. One is what we call main factors. Those factors really relate to control. What we're doing in all of these factors is looking at the

relationship between the entity and the particular governmental entity, whether it be a State or a local government.

We look to see if the entity's board or body is controlled by a State or political subdivision. We look for whether members of the governing board or body are publicly nominated and elected, whether the entity's employees are treated in the same manner as employees of the State. We look to the financial responsibility for the general debt and other liabilities of the entity, and also, the last factor is whether the entity is delegated authority to exercise any sovereign powers of the State, and those would be the sovereign powers I mentioned earlier for political subdivisions being the power of taxation, eminent domain, and the police power.

Other factors that we for governmental plan determination would include the following factors, whether the entity is created by a State government or political subdivision pursuant to a specific enabling statute, whether the entity is directly funded through tax revenues or any other public sources, whether the entity is treated as a government for employment tax or income tax purposes, whether the entity's operations are controlled by a State or political subdivision of a State, whether the entity is determined to be an agency or instrumentality for purposes of State law and also whether the entity is determined to be a State agency or instrumentality for purposes of any State or federal court.

In addition, I said there were two categories, but there's really a third category and that's the additional factors. They're framed in a sense as negative factors. For example, if an entity does not serve a political governmental purpose, then it's pretty much presumed that that entity would not be a governmental entity for purposes of section 414(d).

Another one is if a party other than a State or local subdivision has ownership interest in the entity, that's another presumption that the entity is not a governmental entity. So, there are two main facts and circumstances tests, one for the federal agency or instrumentality and one for State agency or instrumentality. We've already received some comments on that so far, and Ingrid will go into that in a minute.

The next thing I want to do is talk to you a little bit about what it means to be established and maintained. If you remember, when I talked about the definition of what's a governmental plan earlier, it says a plan established and maintained. The way that we define that, we say that to be established and maintained, there are three basic requirements that must be met. First, the plan must be established and maintained by an employer within the meaning of section 1.401-1(a)(2) of the Income Tax Regulations. Second, the employer must be a governmental entity. Third, the only participants covered by the plan are employees of that governmental entity. There is an exception to the last rule permits participation by employee representatives within the meaning of section 413(b)(8).

In addition to just that basic definition of what is meant by established and maintained, the guidance under consideration addresses changes in entity status. This is when you have an entity that was either a private entity and because there is a stock acquisition or sales and asset transfer, whatever reason, that entity becomes a governmental entity or in the reverse what happens if you have a governmental entity where there is a change in status, so that entity is no longer a governmental entity and is now a private entity. Basically, this is talking about ceasing to be a private entity - if an employer becomes a governmental entity and this is either because of a result of a stock acquisition or a sale, that entity becomes a governmental entity on the date of the change. So, it would be a governmental plan on the date of the change either because of an asset transfer or a stock acquisition or sale.

Now, we have slightly different rules if that entity was a governmental entity and now is a private entity. Basically on the date of the change, that plan will be treated as a private plan. Before that, it would be a governmental entity. However, we do have one exception and basically it would say that if the plan wants to maintain its governmental plan status, it could still be treated as a governmental plan if the governmental entity continues to be the plan sponsor and the assets are frozen. So, the formal governmental employer would not be relieved of its responsibility for the benefits, and this would probably be in the case of something like an asset transfer that the governmental entity that either sold the company or sold the entity or whatever, there would be a governmental entity maintaining that plan and the plan would be pretty much frozen as of the date of that change that we would say then that plan would still be a governmental plan.

The final thing I want to talk about is that, as I said, this is the ANPRM and ANPRM does not typically have an effective date because it's just guidance under consideration. Once those regs are published as proposed regulations, we will provide that that will be the effective date will be prospective. If you look at the new notice that we issued, Notice 2012-29 that is the notice dealing with the applicability of the normal retirement age requirement to government plans, you'll see the two-prong sort of effective date that could be similar to what we would do at whatever point in time that these regs are proposed for sometime in the future, basically to take into account not just to have a date but also to take into account the time required for States to complete their legislative process.

Now, I'm going to turn it over to Ingrid, and she's going to talk about comments and transition periods.

I. Grinde: Thanks, Pam. As Pam said, I'm going to go over some areas where we asked for specific comments in the ANPRM and then Pam and I will go over some of the advance questions we received. After that, we'll do the question and answer session. I want to note of course, that we've already received many very helpful detailed comments and we're looking at those, and we'll be considering them as we work to improve this product. We welcome

comments on all aspects of the proposed draft guidance, but there are some particular areas that we asked for comments on that I wanted to highlight.

One of these relates to a request for comments when an entity changes its status from private to governmental or vice versa due to an asset transfer or an acquisition. Pam has already gone over what we provided in the proposed guidance, but we also asked for comments as well. So, when a plan changes from a private plan to a governmental plan should the regulations address the rights and obligations that accrued before the conversion to a governmental plan including the responsibility of the former private plan sponsor or former private plan for benefits that accrued before the conversion?

We also asked for comments in the other situation if a governmental employer ceases to be a government entity where the plan would be treated as having been established by a private employer thereafter under the draft. So, we asked for comments in this area. Another area where we asked for specific comments on is on the factors for determining the connection whether an entity is an agency or an instrumentality of a State or a political subdivision. In the proposed draft guidance, as Pam noted, we include factors for determining whether an entity is an agency or instrumentality of a State or a political subdivision of State, and we include five main factors and eight other factors that Pam went through.

Ultimately, it's a fact and circumstances test, and we included eight examples in the draft proposed guidance illustrating how some of these factors could relate to each other. So, we asked for comments on whether the final regulations should eliminate or retain the distinction between the main and other factors, the way we have it set up right now. We also asked for comments on the ordering and the application of the main and other factors. We asked as an alternative, should we provide a safe harbor standard, and if we do provide a safe harbor standard, should we still keep the distinction between the main and other factors.

We also suggest some possible factors to be identified in a safe harbor test, and it could focus perhaps on control and fiscal responsibility - if a majority of the entity's governing board or body is either controlled by a State or political subdivision or elected through periodic publicly held elections and also consider is the State or political subdivision fiscally responsible for the general debts and other liabilities of the entity, and should we consider that the entity was created by a specific enabling statute describing how the entity is established and operated? So, this is just a proposal that we have for a possible safe harbor standard, and we've gotten several comments welcoming some safe harbor rules -something that could provide more predictability. Those are some of the comments that we have received in this area.

Another area where we haven't specifically proposed rules or relief yet but we ask for comments on include the possible application of a de minimis rule where some private employees could be

allowed to keep participating in a governmental plan and related issues. So, we ask should we have an exception for this under certain circumstances, which isn't currently addressed in the guidance under consideration.

We focus on parameters that could address particular circumstances including whether there was some prior connection such as were the private employees previously employees of the governmental entity, were the private employees previously participating in the governmental plan, is the number or percentage of these former employees de minimis and what is de minimis, is the coverage pursuant to preexisting plan provisions and whether the employer is ineligible to sponsor the particular type of governmental plan. These are just some ideas and thoughts that we had expressed and that we're asking for comments on.

Related issues would include how to treat multiple employer plans, section 414(h) pickup contributions where a governmental employer picks up plan contributions on behalf of an employer and these are contributions that could only be made from a governmental plan so there's an issue if there is a multiple employer plan other than governmental employers, differences in how the federal employment taxes are applied to a private employer participating in such a multiple employer plan, the application of the minimum funding rules for a private employer participating in a governmental multiple employer plan because the funding rules would apply to a private employer, so how would these rules work, how the prohibited transaction rules of 4975 would apply in this situation where a private employer participates in a multiple employer plan, how the 415 rules would apply and what treatment should apply where the plan was previously a funded section 457(b) plan of a State or local government. There are a lot of thoughts there. We've gotten some comments already and we welcome your comments.

We also specifically request comments on possible transition rules. We note that we expect there will be a reasonable transition period for cases involving a change in employee status in which the governmental plan continues to cover private employees who are formerly government employees if the final regs don't provide for a special de minimis rule. One solution could be a governmental plan spinning off a portion of the assets and liabilities with respect to those former employees as a separate nongovernmental plan. We also could provide transitional relief for entities that thought they were governmental and operated that way but later were determined to be private entities under the regs. We asked for comments and ideas on that and we stress that we anticipate there would be a reasonable transition period following the final regulations for a plan to revise its arrangements to avoid the adverse tax consequences of failing to comply with all of the requirements of a private retirement plan.

Detailed comments with factual information are very helpful to us. We have gotten many comments with detailed factual scenarios and it helps us learn what's out there. We don't know everything that's out there. So, we really do want and need your input.

We are currently reviewing and categorizing what we've received up to this point, but the comment period ends June 18th. So, you still have time to submit comments. As Andy mentioned, we've had outreach already. We've had town hall meetings in Oakland on March 15th and in Cleveland on May 3rd and this is our phone forum today, and we welcome your comments.

You can go to www.IRS.gov and the easiest way is to type in Town Hall Meetings on the search bar there, and the first—I tried this today and the first item that popped up is Town Hall Meetings for Governmental Plans and the address to submit comments is in there. And also, for electronic, you can go to www.regulations.gov to submit electronic comments. The address is kind of long, so rather than going over it today, you can just go online and get that. For any additional information, you can also go to www.IRS.gov/retirement.

Next, I wanted to go over, Pam and I will go over some of the questions that we received in advance. Let me say this at the outset, that we did receive some questions asking whether a particular fact scenario would cause an entity to be an agency or instrumentality of a State or a political subdivision based on the factors in that question. This is really something that we couldn't answer at this point because the guidance is an ANPRM, an Advanced Notice of Proposed Rulemaking. We haven't even issued proposed regulations yet.

So, at this point, we're mainly asking for your input and your thoughts on how it could be improved. So, it's not meant for us to make particular determinations with respect to any particular entity at this point. Also, we don't issue letter rulings on whether or not a plan is a governmental plan at this point. We do issue determination letters on the form of a plan but not whether or not an entity is eligible to have a governmental plan. Eventually, we expect to have a type of rulings program where entities could come into the Service and ask for a letter ruling based on their particular facts, but that wouldn't be implemented until these rules are finalized.

As you know, it's ultimately a fact and circumstances test and a determination would only be made under a formal procedure where we'd be confident that we could get all of the relevant facts needed to make a determination. But that being said, even if we can't give you a specific answer today on the phone relating to your facts and circumstances, your questions are significant to us because they give details on how entities operate. So, we're taking them into account as valuable comments that we can use as we work to improve the guidance project.

For example, one question discussed four counties establishing a regional community health board and described to us how the members are appointed, the purpose of the board, how the funding is received and what benefits the employees receive. The writer asked whether the entity would be an agency or instrumentality based on the facts submitted. We can't reach a conclusion for the reasons I stated, but it really was helpful to us because it shows and highlights areas where we may need to clarify our guidance.

We've gotten detailed comments on many of the factors used to determine whether an entity is an agency or instrumentality. For example, what does it mean to be publicly nominated and elected? One reason for this factor is to ensure that a small group wouldn't be controlling the nominations like a self-perpetuating board, but others have pointed out to us that there are many ways to nominate. So, the example of four counties establishing the regional community health board has details on how members are selected by each county and it highlights the need for more clarity.

We've also received comments on charter schools noting that the application of the ANPRM to charter schools may be uncertain. One suggestion was that we consider incorporating a safe harbor definition of a charter school and someone else asked whether we intend to cover charter schools and state that they're an agency or instrumentality. One writer suggests that we include a definition from federal law such as the definition of charter school in section 5210 of the Federal Elementary and Secondary Education Act. We thank you for this information. We also note we've received many comments and questions from the charter school community, and we're going to take your concerns and suggestions into account as we begin the drafting process of the proposed regulations.

Now, I'm going to turn it over to Pam, and she's going to go over some of the other comments and questions we received prior to this phone forum.

P. Kinard: Thank you, Ingrid. We also received questions asking us what the result would be when there is a relationship between a tax-exempt nongovernmental entity and a governmental entity. Commentators have suggested that future guidance address what the result would be in various fact patterns such as a joint venture where one governmental entity controls a nongovernmental entity.

We were also asked about dual-status employers. That means entities that consider themselves to be both a section 501(c)(3) organization and an agency or instrumentality of a State or local government. We also received a comment that a nonprofit employer, nonprofit entity can be a governmental plan if it is also treated as a governmental entity.

Other comments we received asked whether a governmental employer in question that is a tax-exempt organization under section 501(c)(3) could continue to sponsor a section 403(b) plan if it is also a governmental employer. If an entity is determined not to be an agency or instrumentality of a State, can it continue to have a 403(b) plan and a 457(b) plan operating in good faith? If not, what are the implications for the entity's participants with accounts under those plans?

We do note in the preamble to the draft proposed regs that are attached to the ANPRM that we wouldn't alter rules relating to the eligibility of an employer to establish or maintain a particular

type of retirement plan. An employer that is considering a change in status should evaluate whether it's eligible to sponsor any plan that it maintains, taking in account any type of employer eligibility rules.

We also note that a good-faith standard applies in the case of controlled group situations, but we haven't, as you can see in the preamble and also in the draft proposed regs, that we haven't addressed these scenarios in the guidance under consideration. We do ask for comments on all different types of scenarios. So, in that sense, your questions are very helpful to us because these are things that we are definitely going to take in account as we work on the drafting of the proposed regulations, particularly relating to the controlled group rules. This issue also relates to our request for comments on the transition rules and grandfather rule. For example, what happens if an entity thought it was governmental but it turns out not to be?

There were a couple of questions not directly related to the discussion of the draft proposed guidance, one relating to the impact of pensions on social security benefits and another relating to the confidentiality rules relating to personal data. We unfortunately cannot address those particular types of questions here because this particular phone forum is related to the governmental plans ANPRM. But in any event, the answers to some of your questions could be a matter of State law or in other areas that aren't directly within the jurisdiction of the IRS or are not in the jurisdiction of employee plans. So, it would be not appropriate for us to answer those right now, but we will try to turn those questions over to other parties that would be able to answer those questions and get back to you on those questions.

Another question that we received is—will the definition of governmental employer be extended to Code section 457(b) plans. I think what we said in the preamble to the draft proposed regs that many of the rules that are relating to the definition of governmental plan could potentially apply for purposes of section 403(b) and 457, but those are things that we would work in as we continue to work on the draft proposed regs.

So, those are the sort of—we may have gotten one more question. Do the proposed regs impact post-employment health plans? If so, how? I'm not sure exactly what that means. The writer did not elaborate.

As we said, these rules will only apply for purposes of section 414(b) of the Code, not for any other purpose under the Code. Hopefully, that answers that writer's question. If you care to elaborate, then please feel free to do so.

So, right now, we're going to turn it over, Michael, to you for live questions.

Moderator: Thank you very much. We will take our first question. Caller, please go ahead.

M: Yes. Am I on?

M: Yes.

M: I have an issue with a hospital that was formerly owned by a county and has been transferred to a private entity and all the employees become employees of the private entity, private employer. The plan was frozen as of the date of sale so no further benefits will be accruing. My issue is what is the status of the plan after the transaction? Is it now subject to all private plan rules, or is it because of the transition and freeze still grandfathered as a governmental entity?

P. Kinard: Well, those rules relating to changes and the established and maintained rule changes in entity status, it's just guidance under consideration right now. That's where we hope to go, but they're not effective right now. Once these rules do become effective, for your particular factual situation, that the plan, the hospital, now is a private entity and they froze the plan basically on the date of the change or before the date of the change I believe. Is that what you said?

M: Yes, that's correct.

P. Kinard: Then, as long as whatever the governmental entity that was involved is going to be responsible for the benefits of that plan, then that plan would still be a governmental plan. It wouldn't be a private plan. It would be still subject to the governmental plans rule.

M: If there are future funding requirements, then that's paid by the private entity, then that would be the different answer.

P. Kinard: It could be a different answer.

M: It could be but not necessarily.

P. Kinard: Not necessarily, yes. But of course, like I said, this all depends on if we—this is just guidance under consideration. If they stay the same as the rules as we go throughout this process

M: So, I have to do further research as to what the rules currently would say for this situation?

P. Kinard: Yes.

M: Thank you.

Moderator: We'll take our next question. Caller, please go ahead.

M: I was wondering if you could comment on—I know you said you received a lot of comments on the factors, and you've asked for comments on the different factors, I'm wondering if you can comment if there's any plan as to providing guidance as to how the factors will be weighted and whether you've received comments on that so far.

I. Grinde: We have received comments on the factors. Some people have asked us not to have main and other factors because there's been a concern that we might just pay attention to the main factors and ignore the other factors and also that it creates uncertainty in people's minds if they just meet one of the main factors, but we did not get into weighting the actual factors.

P. Kinard: We started that as an exercise in the beginning and as you can see, there are quite a few factors there, and the problem is that when you're looking at it may be easy to rank the top five and then when you get to six versus seven and eight versus nine, it was getting very difficult. So, we thought that instead of having that ranking that what we would do is have these categories of main and others. However, as we're learning now as we went through the town hall meetings and just in general comments, there is this anxiety that if you only have one of the main and you may meet four or five of the other ones, you might feel that you're not going to be a governmental entity. So, that's one thing we're going to take into consideration whether we need to have a distinction at all.

M: Okay. But if you take away the distinction, I'm talking about you have ten factors, do you need to meet six of them? Are some more important than others? How does the practitioner know if you've met nine out of ten, are you good, or do you have to have all ten, or if you meet one but it's a real important one? It's somewhat other areas of the law where it's just unclear to get in terms of like the voluntary correction program under ..., whether something can be self corrected beyond two years. There are a list of factors, but it doesn't tell you how to apply them.

A. Zuckerman: You're raising a very good point where one of the things we're wrestling with is we want to provide as much clarity as possible, but while some individuals are advocating for a bright line test, there are others that are advocating for flexibility. So, what we're trying to do in using the factor approach is to set out what we think we're going to be looking for and that's what we need comments on, one of the things we need comments. What should we be looking for and how should we apply the factors? But I think it's going to be extremely difficult to have both a bright line and flexible test. So, we're trying to figure out how to make this work in a world of many differences.

P. Kinard: One thing we might be able to do is to get to capture that as much as we can is to have a safe harbor, the possibility of safe harbors in addition to a facts and circumstances test that has served all our people well since 1957 with RR 57-128. It's difficult to say exactly how many of these you need to meet. In fact, if you look at RR 89-49, it says you can have one

and meet it or you can have all of them and not meet it. So, that will cause some confusion I think for some people. Of course, we had a rulings program then. So, I think of the combination of maybe if we had some safe harbors in addition to this flexible test, that might be helpful.

I. Grinde: Also, in the future, a suggestion or comment was made that perhaps we could have some sort of expedited rulings process with a checklist, and I don't know whether that's in the future after these are finalized, but that's just a comment that could also provide some certainty.

A. Zuckerman: One point I want to reinforce is I know it was mentioned before that an entity can come in and get a determination letter on the status of their plan, but please keep in mind that a governmental entity that is coming in and making a representation to us that they are a governmental entity, unless it's absolutely clear on its face, for example, Joe's Bar and Grill, that they are not a governmental entity, we will accept their representation for purposes of the determination letter. If it turns out that they are not in fact a governmental entity, then they would not be able to rely on that determination letter to the extent it's inconsistent with a nongovernmental plan technical provision. So, just asking for a determination letter saying you're a governmental plan is on the status of the plan and it is not a ruling that you are in fact a governmental plan.

I. Grinde: But we understand your concern though. We've gotten a lot of comments on concern about the uncertainty for practitioners, and it might be difficult for them, but on the other hand, there are so many different entities out there and we need to have a flexible test. I don't see any other way to do it, but maybe we can combine it with the safe harbors.

A. Zuckerman: This is one reason why we're doing this in the form of an Advanced Notice of Proposed Rulemaking so we can get this kind of feedback, correct the rules based on the feedback and give the public another chance at commenting on what we're suggesting if it works.

Moderator: We'll take our next question. Caller, please go ahead.

G. Tornow: My name is Gerald Tornow, and I have a question, maybe this isn't quite on point, but I would just like to hear your comment, is there any consideration being given to expanding Rev. Proc. 2008-50 EPCRS Rev. Proc. to more governmental plans situations so that if there are errors discovered, this community can come in under VCP submission?

A. Zuckerman: Well, not per se. We're always looking for ways as Congress asked us to do, to expand EPCRS. We do have issues coming to us under EPCRS in the Voluntary Compliance Program, but if you believe that there are other types of issues that you think we're not looking at that we should be in the governmental plan arena, please let us know because we will, again, we want this program to be as broad as possible.

P. Kinard: I think we mentioned a little bit about EPCRS. It wasn't in the general one, but it was in the ITG asking for comments about eventually expanding EPCRS to ... it's in the ITG ANPRM, but we can expand it to the general governmental ANPRM as well.

A. Zuckerman: We do and have in the past entered into agreements under the voluntary compliance program for correction of governmental plans. So, it wouldn't be as if we're starting a new program.

G. Tornow: Okay, thanks.

Moderator: We'll take our next question. Caller, please go ahead.

W: I was wondering if you could speak to whether or not you're coordinating with the Department of Labor on the ERISA issues related to the governmental plan to private plan transition.

P. Kinard: Absolutely. We worked very close with PBGC and DOL. They are at all our drafting meetings. They work with us during the drafting process.

A. Zuckerman: As far as a specific issue of entities going from nongovernment to government or government to nongovernment and the continued or applicability or non-applicability of ERISA, that is a matter of which we have had discussions with the Department of Labor and the PBGC and hope to continue to do so.

W: Do you anticipate anything in the final regs in terms of a joint reg? Or in ITG context, specifically this is a huge issue where you may have a private sector participant transferring to a governmental plan or the plan itself transferring to governmental status. We're wondering about the ERISA status of the money.

A. Zuckerman: I'm not sure that we will actually be able to issue a joint reg because of technical—joint regs have to meet very, very specific requirements and I'm not sure we can meet those requirements but the IRS, PBGC and DOL have informally agreed at least that the IRS is going to take the lead in coming out with these regulations and those other entities, government agencies, we believe, will follow what we're going to come out with because they are very much involved with the development of these regulations. So, the ITG world is so unique in and of itself that we're going to make sure that we're doing it right and be listening to that group. We've had separate phone forum with them in the tribal government community and we'll continue to talk to that community particularly through our Indian Tribal Government Division to make sure that we truly understand the needs of that community.

W: Just one last followup—have you had discussions or are you anywhere near taking a position on whether trustee to trustee transfers between governmental and nongovernmental plans are appropriate?

P. Kinard: Right now, we're in the listening mode. We haven't gone back to working on the regs. The first phase, I would say is done where we issued the ANPRM. Right now, we're just in the listening mode, so we haven't developed anything in addition to what we already have. Then, after we have the hearings in July and maybe later in the summer, we'll start getting back to working on it and it'll all be based on some of the comments that we've already received.

A. Zuckerman: Is this a problem?

W: Yes. Well, it's a problem for the individual participants. We're just concerned about whether or not there are concepts at play that would prohibit us from moving a participant's balance between a government plan and private sector plan if that individual participates in both.

A. Zuckerman: I can give you my gut, but it's not official. To me, going from a qualified plan to a qualified plan under the normal rules should work, but I can't tell you it's not anything I've really focused on. So, don't take it to the bank.

W: That's one of the questions that I'm curious about DOL's position when they're working with you on it because I think from the code perspective, I understand it, but we have ERISA dollars and non-ERISA dollars.

W: Have you submitted a comment

W: We have.

A. Zuckerman: Okay, great. Thank you. That's very helpful.

I. Grinde: We've gotten over 800 comments so far, and we're looking at them, but we haven't gone through every single one, but we will be so that's good.

P. Kinard: We share all our comments with DOL and PBGC.

W: Okay, thank you.

P. Kinard: But that's something obviously, if you issued a comment, we'll look at as we start

A. Zuckerman: That's a very good point, and again, we really don't have a definitive answer so

just knee-jerk response.

Moderator: We'll take our next question. Caller, please go ahead.

M: I have a question on the subject of whether something is established and maintained by a governmental entity. I'm thinking about special highway districts and transportation districts in California, and one of the districts that I may be involved with has a plan that's collectively bargained single employer plan, and the plan is administered jointly by half of the trustees or union are trustees and half of the trustees are appointed by the governmental entity. I'm wondering if there's a problem in terms of is the plan being established and maintained by a governmental entity, if the board of trustees in fact has the authority to do plan amendments and operate the plan.

P. Kinard: I remember looking at this before. It's not directly addressed in our regs, but I do remember looking at court cases, and I had always thought that when you have a situation similar to what you're talking about where there's a collectively bargained plan and some of the employers are private and other employers are governmental that that plan is considered to be—the courts have determined, those plans are considered to be private plans, not governmental entities.

M: No, there are no private employers. It's one governmental employer, but it's a collectively bargained plan. So, half of the trustees are union trustees and half are the governmental employers appointees.

P. Kinard: Okay, I'm sorry. I misunderstood what you said.

A. Zuckerman: So, the question is who actually—

P. Kinard: Who's actually establishing and maintaining it?

A. Zuckerman: That may depend on the State statute that sets out who has the authority to do what.

M: Well, the statute definitely—there's a statute that created this district, and it says that this district can have a plan, and the plan happens to be collectively bargained, and like other collectively bargained plans, there's half of the trustees are union, half are management. It's kind of important because he's taking the position that the plan is a governmental plan, and we've gotten several determination letters for it, and everything gets approved, but it has to get approved—it's clear, for example, that the management, the governmental entity has veto power because they can stop any changes that they don't want. So, that's my feeling is that it should be treated as being established and maintained by governmental entity despite the fact that there's collective bargaining.

A. Zuckerman: That's a good ... for us to look at.

P. Kinard: That is, and if you can send in—have you sent in a comment?

M: I haven't.

P. Kinard: Okay.

M: I read the ANPRM, but I didn't send a comment in.

P. Kinard: Okay. Well, I think we've gotten some other comments relating to collectively bargained plans similar along those lines, either one, where there's the combination of the private and the government and then another one where the union reps are involved. So, I—

M: Because in this one, there was no private employers, but there are union reps.

P. Kinard: I do think we have comments on that. That's something we didn't address in the proposed, but we'll have comments and we'll look at it as we proceed with working on the proposed regs.

M: Thank you.

Moderator: We'll take our next question. Caller, please go ahead.

M: I was wondering when these regs are finalized, will they also provide definition for purposes of other Code sections, for example 457, and will an employer who's sure that they are 414(d) governmental plan for other purposes, can they then assume that their 457 plan should be a funded plan rather than an unfunded plan?

P. Kinard: I think that if I'm thinking about it right, when we did the preamble that we had some language about 414 and 457 in the preamble, and if I can just really quickly get to it, I'll ...

M: Well, I thought that was confusing because it also says many times, that this applies solely for purposes of 414(d), but then you have all these other code sections that use very similar definitions of governmental.

P. Kinard: Right. I think that we list that, and if you look in some of the special rules that we provide, we talk about the definition of a governmental plan within the 457(e)(1) an eligible employer and I do believe that we said that they will generally apply for those purposes, that we put that in the preamble of the draft proposed regs but are not ...

M: They're not ... clear.

P. Kinard: That's something we can look at, definitely.

A. Zuckerman: They didn't make it to the proposed.

M: Thank you.

Moderator: We'll take our next question. Caller, please go ahead.

M: I've got a question. You had mentioned previously that you'd received a lot of comments from charter schools, and I was wondering whether you'd received many comments from public utility districts. So, in my experience, and I've worked with a number of them, they just start—they always consider themselves governmental entities and they are generally a creature by statute, but they're not as connected with other governmental entities or political subdivisions and I know a number of the public utilities now are getting a little bit nervous as to which side of the line they fall on. Have you received many comments from that group?

P. Kinard: I do remember reading a few of them from public utility districts, comments.

M: One of the concerns, and this goes to one of the prior questions as to how you're going to weight the various factors, but I think on most of the factors, the public utilities that I'm familiar with would pretty clearly be a governmental entity but then there's the one factor that talks about the ability to exercise sovereign powers of the State, police action and that sort of thing, which isn't something that a public utility generally has. I guess the question is—is the absence of those sorts of powers, is that a fatal flaw that then would make a public utility treated as a nongovernmental entity?

P. Kinard: If you had to satisfy every single factor, then it wouldn't be a facts and circumstances test. It would just be you have to have these to be a governmental entity. Part of the reason why there's so many factors is, for example, we went to the town hall meeting in California, one person said there are over a thousand different types of governmental entities just in the State of California. If we don't include, for example, let's say because—it wouldn't work. For example, if we said, we're a public utility district that does not have sovereign powers, let's not include them, then we're going to get a lot of other people saying wait a minute, we do have sovereign powers. Why don't you include them?

So, it's not meant—the factors are not tailored to a particular entity. They have to be tailored to thousands of different entities. So, we're not expecting that you have to have every single factor. It's meant to cover a broad group, and that's why we talked a little bit about we understand some of the anxiety about I don't need all the factors. Does that mean I'm not governmental? That's

what—it wasn't implied and we actually say in the preamble that no one factor is determinative or whether or not an entity is a governmental entity. So, it is just basically a list of factors that will cover a broad group and then it has to be applied to a particular set of facts, and maybe that's why we might need have safe harbors and things of that nature because this is just merely a list of factors covering a broad thousands of different types of entities.

M: Thank you. As a final related question, how do you envision this shaking out how people go about determining whether they are governmental? If the determination letter process doesn't specifically address it, will people who are unsure just need to go get a private letter ruling, or there'll be some other ...?

P. Kinard: Ultimately, that's why we talked a little bit about the possibility—would it help to have a streamlined private letter ruling program that if we list things and then you can come in and get a private letter ruling? That's where you'll have the certainty. You don't have just a list of factors. You have something saying yes, you're governmental or no, you're not governmental. So, that is where the certainty comes in. The other way would be through some possible safe harbors.

M: Okay. Thank you.

Moderator: We'll take our next question. Caller, please go ahead.

M: I had a question with respect to examination and enforcement. I'm wondering if there are currently any initiatives to examine governmental or entities that claim to be governmental, and if so, how would exam apply to the current proposed ANPRM?

A. Zuckerman: Well, because it's proposed, we would not be applying it. Actually, this isn't even proposed. This is pre-proposed regs, and while our exam function has looked at governmental entities per se, I don't believe we've got a program in place that is out looking for entities that are claiming to be governmental entities when in reality, they're not. That doesn't meant that if we saw something, we wouldn't try to move on it when it's clearly—again, if it's Joe's Bar and Grill, and all they do is serve up burgers and beer and they're saying it's a governmental entity, then I believe that our examination division would say well, you guys really aren't a governmental plan, and therefore, you had to meet all the additional code requirements that don't apply to governmental entities.

Have we gone out and done exams on governmental entities? Absolutely. Have we done compliance checks? Yes, I believe so. But do we have any formal program to go look for these things? I do not believe so.

M: Thank you.

Moderator: We'll take our next question. Caller, please go ahead.

W: I'd just like to know if you have an example or a clarification of what the difference between a entity's operations are controlled by the State under other factors versus the governing board or bodies controlled by the State, if you have an example of where that would be different.

P. Kinard: I'm not sure I understand your question. Do you want an example of a type of entity?

W: Just under the facts and circumstances, you've got under the main factors were the entities governing board or bodies controlled by the State and under other factors, you've got the entity's operations are controlled by the State. I wondered if you give me an example of a type of entity, like are you looking at the charter schools or something else that would fall into one category and not the other, if you have something in mind.

P. Kinard: No, we didn't go after factors in line with respect to a particular type of entity. The best that I can tell you is that we have quite a few examples in there illustrating how the factors work, but we didn't draft factors with respect to a type of entity.

W: Can you describe what you would consider by the operations being controlled by the State as opposed to the board or the governing body?

P. Kinard: Well, do you mean where it says entity operations are controlled by State or political subdivision?

W: Yes.

P. Kinard: It's meant to be sort of a little less than the day-to-day control where the State may be involved in, not direct management, but like overall, like a sort of corporate management of the entity as opposed to if you look at Rev. Rul. 89-49 where we talk about the day-to-day management and control of the entity. What we were looking at is getting away from having the State or the local government being involved on a day-to-day with the operations of a particular entity and getting more towards corporate-type control.

W: Could this be considered like a regulatory control where there is some sort of—

P. Kinard: Well, I do think we also put in here it has to be a little bit more than regulatory control like where the State or the federal government may provide regulations for a particular type of entity like say a bank. It has to be more than something of that nature. It has to be a little bit more detailed than that.

W: Okay, thank you.

I. Grinde: I think we've gotten a comment or suggestion that we combine those two factors. Maybe we need to clarify it. There could have been a question on that before.

Moderator: We'll take our next question. Caller, please go ahead.

W: I was wondering what consideration's been given to grandfathering for a plan that today considers itself or it's been treated like a public utility district, as an example, someone else gave, of being a governmental plan but following the rules if that entity is no longer considered a governmental plan. Have you thought about how they would be treated going forward?

I. Grinde: People have asked us for grandfather rules. Some people have asked us to grandfather the entire entity meaning that present and future employees would be grandfathered and others have suggested just the employees, that current employees would be grandfathered but not future. We've gotten a lot of concerns about how can you kick people out of a governmental plan. It's very difficult due to State constitutions and for practical reasons, litigation. So, we know that we have to give careful consideration to this.

That's why we asked for comments on that. I think we proposed a spinoff would be a possibility and people have raised concerns with that as well. It might be difficult to do. So, no.

P. Kinard: We didn't put any transition rules in the ANPRM or the attached draft proposed regs. We asked for comments on what type of transitions and that will fall in that and we have received comments on that, and that's something that we'll consider as we work on the second stage of the project which would be the proposed regs.

W: Thank you.

Moderator: We'll take our next question. Caller, please go ahead.

W: This question may be slightly off your topic today, but I have heard inklings that this service or the Treasury Department is ready to exempt the governmental plans from the normal retirement age regulations, and I was just wondering if you have any update on that topic.

P. Kinard: No. We issued Notice 2012-29, I believe, just a couple of weeks ago. What it said was it provided sort of—we did three things relating to the applicability of the normal retirement age to governmental plans. One was to sort of delay the effective date, and two was to have a special rule for the ... safe harbor that currently exists for public safety employees, basically to say that you don't have to be in a plan that's substantially all the employees of public safety employees but you can be in a plan or a category of those employees of public safety employees. The third thing that we did was to provide clarification that when we start working on the regulations that if a plan that does not provide for in-service distributions before age 62, does not

have to worry about satisfying the normal retirement age rules in the reg or they don't need a normal retirement age, but if a plan—on the alternative, if a plan does provide for in-service distributions before age 62, we have not made a determination whether those rules are applicable and that won't be done until we work on the regs.

W: But the notice basically pulls the original reg back to the age of retirement or in-service distribution issue instead of just a broad-based requirement of a retirement age for all determination distributions?

P. Kinard: Well, the rules were always meant to be for satisfying the definitely determinable requirement and basically that you have to provide benefits upon attainment of normal retirement age or after retirement. So, it was meant to define what it meant by normal retirement age for purposes of the definitely determinable requirement and it still does that. For example, I think in 411, if I'm not mistaken, it's also a definition of normal retirement age. So, it's meant to—what is the definition of normal retirement age for purposes of the definitely determinable requirement.

W: There's a lot of confusion that those regulations shouldn't be applied in whole to governmental plans because of the 411 extension.

P. Kinard: No, that's why I said the regs under 411 would not apply to them because governmental plans are not required to satisfy the requirements of regulations under section 411 because of section 411(e)(2), but those rules are not about 411. Those rules are about 401(a), the general qualification requirements and the governmental plans are subject to the definitely determinable requirement. There are two types of rules where you can find the definition of normal retirement age. One is under the 401(a) qualification rules and one is under the 411 rules. These rules that we're talking about are in the 401(a) qualification rule.

W: Thank you.

Moderator: We'll continue with our next question. Caller, please go ahead.

M: I was wondering—it seems like the regulations deal with State or local agencies or United States instrumentalities or agencies. Is there any discussion of if you have an entity that meets some of the factors by being funded by the federal government but other factors because it's subject to State control, basically by federal or State agency?

I. Grinde: What kind of agency, what are you thinking of?

M: It's a public defender. So, half of the office is funded by the Administrative Office of the U.S. Courts, the other is funded by local government.

P. Kinard: That's interesting. I've never heard of that, and that's something that would be good to get comment on because we've never—what we've done is basically use the definition in 414(b) which says either a federal agency or instrumentality or a State or a local government agency or instrumentality based on those trends, the concept of having it be both federal and a State agency, I just haven't really come across before. So, it'd be interesting to get a comment on that for something for us to think about and maybe an example of how that would work.

Moderator: We'll take the next question. Caller, please go ahead.

M: We were talking a few minutes ago about control of operations where there was not ... entity. I thought of an example, I don't know that it's very common, the privatization of certain prisons where the State might very well be controlling a large part of the operations and yet the entity owning it would be a private entity. Has anybody commented on that?

P. Kinard: I don't think so, not as of yet.

M: I don't have specifics though, so I don't know that I've got exactly how the thing would work but that's what comes to mind anyway.

P. Kinard: Could you just state that one more time? I'm sorry.

M: Let's assume part of a prison system has been privatized, that is to say there's a private entity that operates under a State regulatory agreement, but it's more than just regulations where the State has actual visitation, control, power to oust, where the employees are still employees of the private entity, I suppose that still would be a private plan though. I don't see how it would get into your

P. Kinard: So, part of the prison system is privatized. The employer is ... providing the services, and the employees are private employees

M: Yes, but the State controls day-to-day operation. I don't know if that fits into the rubric that you've got.

P. Kinard: But who controls the operations, the private entity?

M: Initially, but the State retains—if the private entity controls anything, I suppose it's a private plan. You're looking at where the State controls completely, I guess.

P. Kinard: In terms of when you're talking about the State having control, is it just sort of like in a regulatory way, but if you are going to be a private entity running a State prison you have to satisfy X, Y and Z rules or do they have more say?

M: The hypothetical I'm posing is that the State would actually have visit—yes, but that's regulatory still visitation rights are still regulatory, the right to oust them is still regulatory. I don't think it works after all. Okay, thank you.

Moderator: We'll take our next question. Caller, please go ahead.

M: Have you looked at the section 218 agreements for the Social Security Administration and considered how they would be a factor in this process?

I. Grinde: We did get comments on that about maybe making that a possible safe harbor. We have received a few comments on that.

Moderator: At this time, I show that we have no further questions in queue.

M: Mark?

M. O'Donnell: Well, thank you for attending our phone forum and for your questions and comments. Remember, the official comment period with regard to the ANPRM during which you may provide formal comments ends on June 18, 2012. Please see the ANPRM for instructions on how to provide formal comments. The public hearing on this will be held in Washington, DC on July 9, 2012. Thanks to everybody.

M: Thanks, everybody.

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