

**Advisory Committee on Tax Exempt and Government Entities (ACT)
Public Meeting
1111 Constitution Ave., NW.
Room 3313
Washington, D.C., 20224**

June 13, 2007

Meeting Begins at 9:00 a.m.

AGENDA

Meet and Greet (8:30 a.m. – 9:00 a.m.)

Welcome and Opening Remarks

- Kevin M. Brown, Acting Commissioner, Internal Revenue Service
- Steven T. Miller, Commissioner, Tax Exempt and Government Entities
- Steven J. Pyrek, Designated Federal Official of the ACT
- Charles F. Plenge, Chair of the ACT

Review of Voluntary Self-Compliance Program for Indian Tribal Governments

Lenor A. Scheffler

A Proposal for an Exempt Organizations Voluntary Compliance Program

Sean Delany

After the Bonds Are Issued: What Then?

Maxwell D. Solet

Improving Compliance for Adopters of Pre-Approved Plans

Charles M. Lax

A Prototype for Public Sector Defined Contribution Plans

Julian Regan

Public Employers' Withholding and Reporting for Non-Resident Aliens

Steven W. Hoffman

Closeout

GENERAL REPORT OF THE ADVISORY COMMITTEE ON TAX EXEMPT AND GOVERNMENT ENTITIES

This is the sixth public meeting of the Advisory Committee on Tax Exempt and Government Entities (the "ACT"). The ACT members appreciate the opportunity to report to the Internal Revenue Service and the public regarding the interaction of the Tax Exempt and Government Entities Division of the Internal Revenue Service ("TE/GE") and its stakeholders, including employee retirement plans, charities and other tax exempt organizations, tax-exempt bond issuers, and federal, state, local and Indian tribal government entities. This year several of the reports address the issue of voluntary compliance, which is designed to enable stakeholders to address and correct non-compliance, and other reports address the need for additional outreach and resources to enable stakeholders to comply with the often-times complex requirements associated with the maintenance of their tax-exempt status. As former Commissioner Everson and Acting Commissioner Brown have noted repeatedly, enforcement of the relevant tax laws cannot be achieved through the audit function alone. The ACT hopes its recommendations in this year's reports will assist the IRS in furthering the achievement of proper compliance.

The six reports the ACT is presenting this year are as follows:

Indian Tribal Governments: Review of Voluntary Self-Compliance Program for Indian Tribal Governments

In December 2005, the IRS Office of Indian Tribal Governments ("ITG") established a voluntary self-compliance program which affords Tribal Governments the opportunity to perform their own IRS compliance checks. The program has not received much interest by Tribal Governments, and ITG asked the ACT to evaluate the reasons for the lack of Tribal participation in the Program and to make recommendations for increasing participation. This ACT report includes, among others, recommendations to improve communication, enhance promotion of the internal use of the self-compliance form, compartmentalize the Program by tax issues, and create Compliance Check Toolkits.

Exempt Organizations: Proposal for an Exempt Organizations Voluntary Compliance Program

In the U.S. there are some 1.6 million exempt organizations which control more than \$2.4 trillion in assets. Exempt organizations, like taxable enterprises, sometimes discover that they are out of compliance with the tax law and wish to correct the problem themselves, rather than waiting for enforcement attention from the IRS. However, exempt organizations currently have no formal self-correction program of

general applicability. This ACT report recommends the creation of a broad-based, formal, and continuing voluntary compliance program similar, where appropriate, to the voluntary correction programs established by other Divisions of TE/GE.

Tax-Exempt Bonds: After the Bonds Are Issued: Then What?

Many governmental issuers of tax-exempt bonds and private, nongovernmental conduit borrowers are not adequately prepared to monitor ongoing compliance with federal law affecting those bonds. There is particular concern for newly-elected or appointed officials who might have little prior experience with tax-exempt debt. This ACT report presents an informational paper on post-issuance compliance in a format appropriate for inclusion in the "Information for the Tax Exempt Bond Community" section of the IRS Web site. The informational paper presented in this report is designed to be at a level of generality suitable for elected or appointed officials, and to identify areas requiring compliance procedures without attempting to ask and answer all possible questions.

Employee Plans: Improving Compliance for Adopters of Pre-approved Plans

Currently, the IRS estimates that at least 94% of all qualified retirement plans are Master and Prototype plans and Volume Submitter plans. This report arose from the ACT's belief that there is a need to provide compliance assistance to employers who have adopted these plans, since many of those employers are neither equipped to comply nor willing to pay for compliance with the complex requirements for tax-qualified retirement plans. This ACT report contains a series of recommendations designed to provide employers adopting these plans with material designed to inform them of the legal requirements associated with maintaining these plans. These recommendations include, among others, the distribution of a form which advises adopting employers of the responsibilities associated with these plans and includes a list of the parties responsible for performing various administrative functions on behalf of the plan; and the provision of additional education, outreach and guidance to these employers regarding the compliance requirements for these plans.

Federal, State and Local Governments: A Prototype for Public Sector Defined Contribution Plans

The ACT perceives a need to further improve operational and plan document compliance for Code Section 401(a) defined contribution plans adopted by government entities. This project will span two years, with the final report being delivered in June 2008. This year's Act report will provide anecdotal evidence of compliance challenges, along with preliminary findings and a plan for possible recommendations, which might include the adoption of a prototype system for government 401(a) plans similar to the system currently available to corporate 401(k) plans, and recommended educational content tailored to the needs of government 401(a) plan practitioners and sponsors. The educational information could be included or referenced in the Federal, State and Local Government (FSLG) Toolkit that is included in the FSLG section of the Government Entity Division's web site.

Federal, State and Local Governments: Public Employers' Withholding and Reporting for Non-Resident Alien Taxation

The US Census Bureau reported in March, 2002 that there were 87,525 state and local government employers, employing 18,349,000 workers, with payrolls amounting to 525,235 million dollars. It has been estimated that 20% of the American workforce is now employed by federal, state, or local government entities. Prior ACT reports have noted that public employers have long promoted voluntary compliance as the key to effective and efficient tax administration. Voluntary compliance by public employers requires not only executing specific withholding and reporting functions, but also identifying and eliminating barriers which prevent voluntary compliance. This ACT report contains recommendations to enhance the "Toolkit" on the IRS website to assist government payroll officers in determining the correct amount of withholding and the reporting requirements for non-resident aliens, and to increase contact with the public sector employment community through informational seminars and targeted mailings.

Having completed its fifth year June 2007, the ACT this year undertook with the TE/GE leadership an evaluation of its mission and its current advisory role in an effort to determine whether its activities and reports were consistent with the underlying purpose for its establishment – namely to provide an organized public forum for discussion of relevant issues between officials within TE/GE and representatives of the appropriate stakeholder communities; and to enable the IRS to receive regular input with respect to the development and implementation of tax administration issues affecting those communities. As part of this evaluation, separate meetings were held between the appropriate TE/GE officials and the various stakeholder groups represented by the ACT membership. The ACT and the TE/GE leadership concluded after this evaluation that the ACT's mission as originally envisioned was still appropriate, and that the ACT and TE/GE would continue to engage in the introspective dialogue established this year in order to ensure that both groups were engaged in the sort of interaction envisioned when the ACT was established.

Since service on the ACT carries a maximum term of three years, the following members are completing their term this year:

- Robert E. Donovan, Rhode Island Health and Educational Building Corp., Providence, RI
- Julie Floch, Eisner LLP, New York, NY
- Charles M. Lax, Maddin, Hauser, Wartell, Roth & Heller, P.C., Southfield, MI
- Suzanne Ross McDowell, Steptoe & Johnson LLP, Washington, DC
- Charles F. Plenge, Haynes and Boone, LLP, Dallas, TX
- Lenor A. Scheffler, Best and Flanagan LLP, Minneapolis, MN

The ACT thanks them for their service and dedication throughout their term.

The ACT also would like to express its sincere appreciation and thanks to the TE/GE personnel with whom it has worked this year. In particular, we would like to thank former Commissioner Mark W. Everson and Acting Commissioner Kevin M. Brown for their interest in the ACT and its activities. We also would like to thank TE/GE Commissioner Steven T. Miller, Deputy Commissioner Christopher Wagner and the current directors, Joseph Grant, Michael Julianelle and Lois Lerner, as well as Christie Jacobs, Cliff Gannett, Sunita Lough and the other IRS staff and former staff for their valuable time and responsiveness as we undertook our evaluations and the preparation of our reports.

The ACT would especially like to thank Steven Pyrek, the ACT's Designated Federal Official, without whom none of us could have functioned as effortlessly and efficiently during and between our meetings in Washington, D.C. His management and organizational skills are only surpassed by his willingness to provide whatever assistance we needed.

The ACT's success depends not only on the hard work and dedication of its members, but on the cooperation and willingness of the TE/GE personnel to provide the time and information the ACT requests. The friendliness and professionalism shown by all of the TE/GE personnel is appreciated by the ACT, and is the main reason for the ACT's continued ability to fulfill its mission.

Charles F. Plenge
Chairman

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

**REVIEW OF VOLUNTARY SELF-COMPLIANCE PROGRAM FOR
INDIAN TRIBAL GOVERNMENTS**

**Lenor A. Scheffler, Project Leader
Sandra Starnes
Mary J. Streitz**

JUNE 13, 2007

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Review of Voluntary Self Compliance Program for Indian Tribal Governments

to Section 7605(a) of the Internal Revenue Code. Rather, a compliance check is a tool to help tribal officials and employees increase their voluntary compliance with the federal tax laws and to minimize the risk of errors in preparing and filing various tax and information returns. An important feature of a compliance check is that it is entirely voluntary, unlike an examination. A Tribal Government or member of another customer group need not acquiesce in an IRS request to do a compliance check. If the Tribal Government or other customer says “no,” it increases the likelihood that the IRS will select the returns in question for an examination in the near future, given the criteria that the IRS uses to select returns for examination. However, it is possible that the IRS will not select the returns for examination.

The Voluntary Self-Compliance Program allows Tribal Governments who are current on all taxes to perform their own review and reconciliation of these reports and report their findings to the IRS. Any problems that are then encountered can be corrected at little to no cost above the mandatory taxes owed.

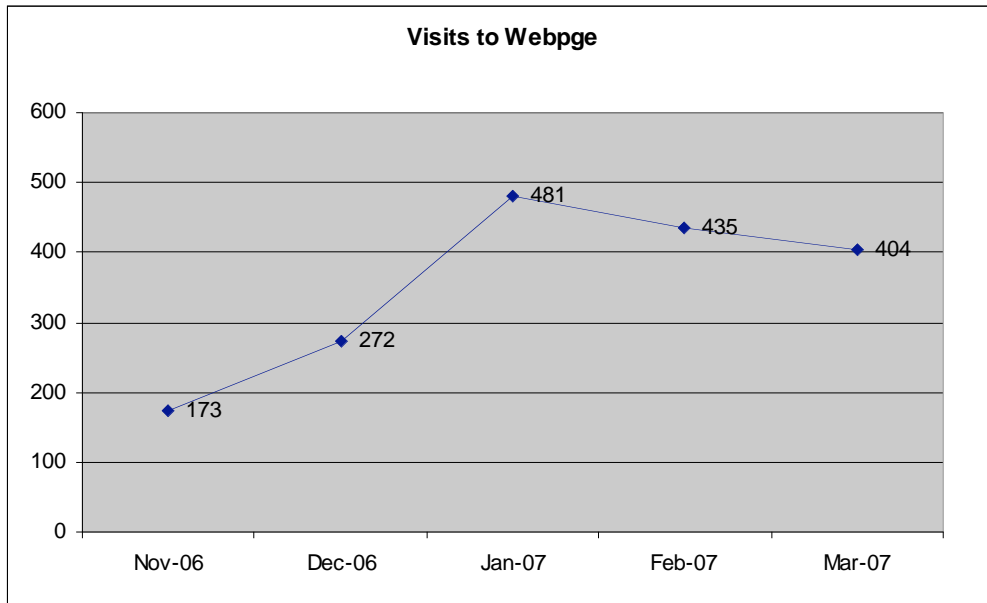
After the April 2003 listening meeting, ITG floated the idea regarding the Program at other listening meetings over the next year and got a generally positive reaction to the idea. In November 2004 the Commissioner for the Tax Exempt and Government Entities Division of the IRS gave ITG the go-ahead to develop a Voluntary Self-Compliance Program for Tribal Governments, and by the summer of 2005 ITG had developed the pilot Program.

Because ITG has been invited to USET’s meetings on a regular basis since ITG was established in late 1999, ITG discussed its plan to implement the Program at a USET meeting in early 2005. Representatives of USET informed ITG that USET’s member Tribes would like to volunteer for the “pilot” phase of the implementation of the Program and ITG accepted their offer.

Three USET Tribes tested the Program, and the IRS selected one entity within each of the Tribes for the initial compliance checks.² The entities selected included a convenience store enterprise, a small bingo enterprise, and a small manufacturing enterprise. Of the Tribes that participated in the Program in the testing phase, one Tribe discovered some mistakes in its information returns and used the Program to correct the mistakes without penalties. For the other two Tribes, no compliance issues of any consequence were uncovered during the compliance checks, but the Tribes provided feedback to ITG regarding their experiences in conducting the compliance checks.

ITG made additional adjustments in the Form 13797 as a result of the testing phase and then formally launched the Program, which is known by the acronym “TEFAC” within the IRS, in December 2005. Tribal Governments wishing to participate in the Program and qualify for assistance from ITG in resolving any adverse findings from the compliance check must complete an on-line form entitled “Request to Conduct Tribal Evaluation of

² Tribal Governments often use more than one Employer Identification Number for tax reporting purposes, depending on the organization of their revenue raising activities and other government programs. The Form 13797 was designed for Tribal Governments to report their compliance checks on an entity-by-entity basis, with each EIN used to be considered one entity for this purpose.

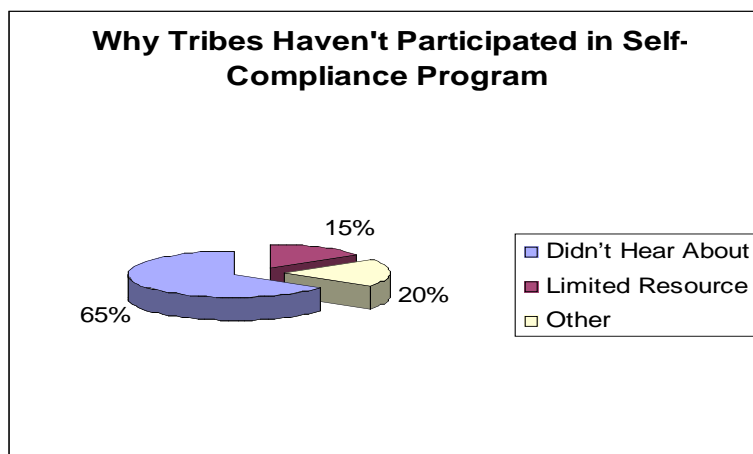


Our survey seeking feedback from Tribal Governments regarding the Program was mailed to Tribal Governments in January 2007, which likely contributed to the increase in visits to the webpage commencing that month.

During the months of January through the middle of March we received 39 responses to our survey from Tribal Governments. Our survey was not scientific, and there were some ambiguities in some of the responses. Nonetheless, we obtained a great deal of valuable feedback regarding the Voluntary Self-Compliance Program from the Tribal Governments.

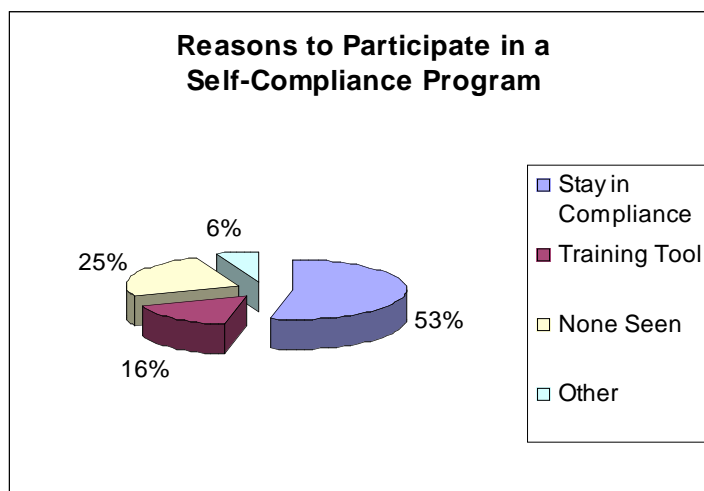
As discussed in more detail below, 64% of the Tribes responding to the survey did not know about the Program before the survey. Of the Tribes that had heard about the Program, only 42% knew what it was called. Many of the responding Tribes do not appear to have arrived at any viewpoint about whether it would be beneficial to participate in a self-compliance program. Others are skeptical that anything that the IRS is promoting could be beneficial for the Tribes.

Only 25% of the responding Tribes stated that they had considered participating in the Program. Of those that had not considered participating, nearly two-thirds stated they had not done so because they had not heard of the Program and 15% stated they lacked the resources to participate:



Other reasons given for not participating included “we think we don’t have any problems with these items,” the Program was “just introduced to us last year,” we “believe it may provide information to the Government/IRS that we don’t want to share,” “I am somewhat skeptical about having to apply with IRS and having to have them review/prepare report,” and we “just went through audit.”

We asked if the Tribes saw any benefits to participating in a self-compliance check program. Over half saw the benefit of staying in compliance and avoiding penalties key to participation, 16% noted that a self-compliance program would provide a good training tool for employees, and a few saw other benefits such as building a trusting relationship with the IRS and the fact that a self-compliance check would be less intrusive than a compliance check performed by the IRS. One quarter of those responding said they did not know or were not sure about the benefits of participating in such a program:



We also asked the Tribes if they saw any reasons *not* to participate in a self-compliance check program. There was a wide range of answers, with the primary one being the fear of recourse from the IRS and limited Tribal resources following a close second:

input as an integral part of the program development. We believe that the absence of agendas for these meetings that identify matters that *ITG* wishes to discuss with the Tribes makes it far less likely that there will be meaningful consultation and collaboration. Without an agenda, the appropriate Tribal representatives would not know that it might be appropriate to attend the meeting, would not hear what *ITG* is contemplating, and would not have the opportunity to provide their views about what the program should entail.

We believe that *ITG* should give strong consideration to establishing and circulating agendas for the consultation listening meetings. The agendas should preserve the open-endedness of the first part of each meeting, which should continue to be devoted to listening to the Tribes' concerns. With more concrete information about the matters that *ITG* wishes to discuss in the second part of each meeting, we believe that the opportunity for meaningful, two-way consultation and collaboration between the IRS and the Tribes will be significantly enhanced

Revise ITG's Form Letter Used to Initiate a Compliance Check

In our view, the current form letter sent by *ITG* to Tribal Governments (see Exhibit D) is not as clear as it could be in explaining to the Tribe that a compliance check is being requested. The first two paragraphs of the letter contain confusing statements suggesting that *ITG* merely wishes to have a wide-ranging "discussion" with the Tribe regarding a variety of federal tax administration issues. The letter waits until the fourth paragraph to use the phrase "Compliance Check," and waits until the second page to discuss the Voluntary Self-Compliance Program. We recommend that the letter be revised to more clearly explain that *ITG* is requesting a compliance check and that the Tribe may perform the compliance check itself if it wishes to do so. Our suggested revision of the letter is attached as Exhibit E.

Provide Focused Outreach and Education Regarding the Program

To date, the IRS has provided only limited information to Tribal Governments regarding the Program. In many cases, *ITG*'s initial marketing campaign of putting information on the website and mentioning the Program at various events did not reach the Tribal representatives responsible for deciding whether to participate in the Program.

We recommend that *ITG* undertake more focused outreach and education regarding the Program. *ITG* should develop a presentation regarding the Program that it could present at specially convened regional workshops or in-house training sessions devoted to the Program. The presentation should include a full explanation of the IRS's compliance check and examination processes, along with a candid discussion of the reasons that Tribal Governments may or may not wish to participate in the Program. The presentation should walk participants through each page of the Form 13797 and any related Toolkits that are developed, so that the participants will have a concrete understanding of what the Program entails. The presentation also should advise the participants that the Form 13797 and Toolkits can be used internally, without registering with *ITG*.

If regional workshops are scheduled, *ITG* should inform the Tribes about the workshops using the same communication protocols that are used in informing the Tribes about *ITG*'s

consultation listening meetings: by sending individual letters to each Tribal leader in the region, having the ITG Specialists call their contacts at each Tribe, and publicizing the workshop in a special edition of ITG News and in a headline posted on the ITG website. ITG should schedule regional workshops at times and places that will be convenient for Tribal staff to attend, such as immediately before or after other regional meetings that such staff are likely to attend.

Recommendation 2: Enhance Promotion of Internal Use of Form 13797

ITG should enhance its promotion of the use of the Form 13797 as an internal tool for Tribes who wish to assess their federal tax compliance without involving the IRS. This promotion should take place everywhere that ITG promotes the Program: on ITG's website, in its other promotional materials regarding the Program, and in its statements in the field regarding the Program.

Recommendation 3: Compartmentalize the Program by Tax Issues

The Program is currently structured so that participating Tribes check and report on the entire range of their federal tax compliance. As noted above, however, a number of the survey respondents cited a lack of resources in explaining why they had not participated in the Program. ITG staff, too, noted that the four Tribes that have registered for the Program to date have taken considerably longer to complete the self-compliance checks than ITG expected. We believe that more Tribal Governments will choose to participate in the Program if it is compartmentalized into several smaller subparts, each of which could be conducted as a stand-alone self-compliance check in appropriate circumstances. For example, a stand-alone self-compliance check might be appropriate with respect to each of the following: (1) Forms W-2, W-3, W-4, and 941 reporting, (2) Forms W-9, 945, and 1099 reporting, (3) worker classification, (4) distributions to Tribal members, and (5) gaming or other industry-specific issues.

Recommendation 4: Create Compliance Check Toolkits

ITG should create a series of "Compliance Check Toolkits" for use with the Form 13797, to better facilitate the Tribes' participation in the Program or its internal use. One Toolkit should be created for use with each subpart, and the Toolkits should be posted on the webpage devoted to the Program.⁴ As recommended above, we believe that the Program should be compartmentalized into several smaller subparts.

Recommendation 5: Eliminate Open-Ended Questions from Form 13797

The Form 13797 is generally clear and straightforward in guiding the Tribal representative through the steps that must be performed to complete the compliance check. Nevertheless, we have two suggestions for improving the content of the Form.

⁴ We would be happy to assist ITG in developing the Toolkits as part of our ACT project and report next year.

First, we believe that open-ended questions should be eliminated. In our view, these questions fuel the perception that a central objective for the IRS in establishing the Program is to conduct a “fishing expedition” to assist the IRS in identifying returns for examination. We suggest that the portion of the Form entitled “Review of Forms” on page 3 be eliminated or redrafted with more specificity for this reason. We also believe that the question regarding “General Welfare Programs” on page 5 is too open-ended in its current form:

Is the Entity involved in the development and/or implementation of any programs that are designed to promote the general welfare of tribal members?

Virtually all Tribal laws and programs are established to promote the general welfare of the Tribe and its members. We suggest that the question be rephrased as follows (additions indicated by underscoring):

Is the Entity involved in the development and/or implementation of any programs providing cash or in-kind benefits to or for individual tribal members that are designed to promote the general welfare of tribal members?

Second, for many of the questions on the Form for which boxes are provided to check “Yes” or “No,” a third box should be provided to check “N/A” for “Not Applicable.”

Recommendation 6: Rename the Program

The Program name – “Tribal Evaluation of Filing and Accuracy Compliance” – is cumbersome and difficult to remember, as is the “TEFAC” acronym used by the IRS. We suggest that the name of the Program be changed to “Tribal Compliance Check,” shortened to the acronym “TCC,” which more clearly reflects the purpose of the Program, will be easier for Tribal Governments to remember, and should be used in all future materials. The toolkits that we suggest be created could be called “Tribal Compliance Check Toolkits,” shortened to “TCC Toolkits.”

Recommendation 7: Be Patient

Finally, we recommend that the IRS be patient as it waits for more Tribal Governments to participate in the Program. All of TE/GE’s other voluntary compliance programs took time to catch on with TE/GE’s customer groups. For example, only three customers chose to participate in the Employee Plans Office’s voluntary self-compliance program in the first two years of that program. Since then, thousands of customers have participated in that program. Over time, especially if the above recommendations are followed, more Tribes will participate in the Voluntary Self-Compliance Program or use the Form 13797 internally, resulting in enhanced federal tax compliance by the Tribes.

EXHIBIT A

**Lenor A. Scheffler, Sandra J. Starnes, and Mary J. Streitz
Indian Tribal Government Representatives
Advisory Committee on Tax Exempt and Government Entities
Internal Revenue Service, Department of Treasury**

January 12, 2007

Dear Tribal Representative:

We are members of the IRS Advisory Committee on Tax Exempt and Government Entities, also known as the "ACT." We are writing to ask you to complete the enclosed survey to assist us in our information gathering for a public report that we are preparing for the IRS and the public from the ACT.

We do not work for the IRS. Rather, we were appointed to the ACT to represent the interests and concerns of tribal governments and tribal entities in matters of federal tax administration. Other members of the ACT represent federal, state, and local governments, tax-exempt entities, and employee plans. We serve on the ACT in a volunteer capacity. In our professional lives, two of us are lawyers in private practice who represent tribal governments and tribal entities. The other is a certified public accountant who is employed by a tribal government.

One of our responsibilities as members of the ACT is to provide feedback from tribal governments and tribal entities to the IRS regarding tax administration matters affecting tribes and tribal governments. This year, we have decided to prepare a report regarding the voluntary compliance check program for tribes and tribal entities that the IRS launched in 2006.

As part of our information gathering for this report, we are seeking your valuable input regarding the voluntary compliance check program by completing the enclosed survey or having an appropriate person or persons at your tribe complete the survey. You need not sign the survey if you prefer not to do so. However, if you are willing to be contacted for further discussion of the issues in the survey, please provide your name and contact information.

We will not share any specific answers that you provide to us with the IRS or include any specific answers in the report, only compilations of data gathered from all of the surveys. If you choose to provide your name so that we can contact you further, we will not share your name or your tribe with the IRS.

We would really appreciate your taking the time to respond to the survey and returning it to us in the enclosed stamped envelope, or to one of us by email or fax, on or before February 9, 2007. Our contact information is provided below and at the end of the survey.

We will be happy to share our findings with you. Also, our report will be completed and available to the public on June 13, 2007. If you have any questions about the survey, the report, or the ACT, please call us.

Sincerely,

Lenor A. Scheffler
Minneapolis, Minnesota
Tel: (612) 349-5687
Fax: (612) 339-5897
Email: lscheffler@bestlaw.com

Sandra J. Starnes
Kingston, Washington
Tel: (360) 297-9667
Fax: (360) 297-9666
Email: sandra@pgst.nsn.us

Mary J. Streitz
Minneapolis, Minnesota
Tel: (612) 340-7813
Fax: (612) 340-8827
Email: streitz.mary@dorsey.com

**SURVEY FOR TRIBES AND TRIBAL ENTITIES
REGARDING IRS SELF-COMPLIANCE CHECK PROGRAM**

1. Have you heard about the IRS's voluntary compliance program that allows Tribal governments and Tribal entities to perform their own self-compliance check?
 - a. If yes, where did you hear about it?
2. Do you know the name of the self-compliance check program?
3. Do you know where you can go to find information about the self-compliance check program?
 - a. If yes, where?
4. Have you considered participating in the self-compliance check program?
 - a. If yes, have you?
 - b. If no, why not?
5. Would you use the IRS's self-compliance check list (referred to by the IRS as a "template") to see how you are doing if you didn't have to turn it into the IRS?
 - a. Have you?
 - b. Why or why not?
6. What benefits do you see for a Tribe to participate in a self-compliance check program?
7. What reasons do you see for a Tribe not to participate in a self-compliance check program?
8. What benefits do you see for the IRS to offer a self-compliance check program?
9. Have you looked at the IRS's self-compliance check template? If so, do you have any comments or suggestions regarding the template in any of the following areas?:
 - a. Organization
 - b. Ease of use

- c. Appropriateness of terminology
 - d. Adequacy of explanations and instructions
 - e. Are there any areas of inquiry that should be expanded?
 - f. Are there any areas of inquiry that should be reduced or eliminated?
 - g. Other
10. Have you ever heard the acronym “TEFAC?” If so, do you know what it means?
11. What IRS tax forms are you required to file?
12. Approximately how many employees do you have?
13. What type of Tribal revenue raising activities do you have? (Check all that apply)
- a. Gaming
 - b. Retail
 - c. Wholesale
 - d. Natural resources
 - e. Telecommunications
 - f. Housing
 - g. Other
14. What type of Tribal entities do you have for these activities? (Check all that apply)
- a. Business corporation
 - b. Nonprofit corporation
 - c. Partnership
 - d. LLC
 - e. Authority
 - f. Tribe operates activity directly
 - g. Other
15. Who prepares your tax returns?
- a. Self
 - b. Outside firm
16. Do you use the IRS’s web site and if so how often?
17. Do you have any feedback you would like to offer regarding the IRS’s website?

18. Do you have issues with the IRS that you would like the ACT committee to look into in the upcoming year?

If you need additional space for any of your answers, please feel free to attach additional pages.

Return Survey to one of the IRS's ACT Committee Members in the enclosed postage paid envelope:

Lenor A. Scheffler, Lawyer

Minneapolis, Minnesota

Tel: (612) 349-5687

Fax: (612) 339-5897

Email: lscheffler@bestlaw.com

Sandra J. Starnes, CPA

Kingston, Washington

Tel: (360) 297-9667

Fax: (360) 297-9666

Email: sandra@pgst.nsn.us

Mary J. Streit, Lawyer

Minneapolis, Minnesota

Tel: (612) 340-7813

Fax: (612) 340-8827

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Advisory Committee on Tax Exempt and Government Entities
Internal Revenue Service, Department of Treasury

January 12, 2007

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We will be happy to share our findings with you. Also, our report will be completed and available to the public on June 13, 2007. If you have any questions about the survey, the report, or the ACT, please call us.

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**SURVEY FOR TRIBAL ADVISORS
REGARDING IRS SELF-COMPLIANCE CHECK PROGRAM**

1. Have you heard about the IRS's voluntary compliance program that allows Tribal governments and Tribal entities to perform their own self-compliance check?
 - a. If yes, where did you hear about it?
2. Would you advise a client Tribal government or Tribal entity to participate in the self-compliance check program?
 - a. If yes, have you?
 - b. If no, why not?
3. Do you know where you can go to find information about the self-compliance check program?
 - a. If yes, where?
4. What benefits do you see for a Tribe to participate in a self-compliance check program?
5. What reasons do you see for a Tribe not to participate in a self-compliance check program?
6. What benefits do you see for the IRS to offer a self-compliance check program?
7. Have you looked at the IRS's self-compliance check list (referred to by the IRS as a "template")? If so, do you have any comments or suggestions regarding the template in any of the following areas?:
 - a. Organization
 - b. Ease of use
 - c. Appropriateness of terminology
 - d. Adequacy of explanations and instructions
 - e. Are there any areas of inquiry that should be expanded?

- f. Are there any areas of inquiry that should be reduced or eliminated?

- g. Other

- 8. What activities do the Tribes that you advise conduct? (Check all that apply)
 - a. Gaming
 - b. Retail
 - c. Wholesale
 - d. Natural resources
 - e. Telecommunications
 - f. Housing
 - g. Other

- 9. What types of Tribal entities do the Tribes that you advise use to conduct their activities? (Check all that apply)
 - a. Business corporation
 - b. Nonprofit corporation
 - c. Partnership
 - d. LLC
 - e. Authority
 - f. Tribe operates activity directly
 - g. Other

- 10. Do the Tribes that you advise typically prepare their own tax returns?

- 11. Do you use the IRS's web site and if so how often?

- 12. Do you have any feedback you would like to offer regarding the IRS's website?

- 13. Do you have issues with the IRS involving Tribes and Tribal entities that you would like the ACT committee to look into in the upcoming year?

If you need additional space for any of your answers, please feel free to attach additional pages.

Return Survey to one of the IRS's ACT Committee Members in the enclosed postage paid envelope:

Lenor A. Scheffler, Lawyer
 Minneapolis, Minnesota
 Tel: (612) 349-5687
 Fax: (612) 339-5897
 Email: lscheffler@bestlaw.com

Sandra J. Starnes, CPA
 Kingston, Washington
 Tel: (360) 297-9667
 Fax: (360) 297-9666
 Email: sandra@pgst.nsn.us

Mary J. Streit, Lawyer
 Minneapolis, Minnesota
 Tel: (612) 340-7813
 Fax: (612) 340-8827
 Email: streitz.mary@dorsey.com

EXHIBIT B

Form **13797**
(November 2006)

Department of the Treasury — Internal Revenue Service

OMB No. 1545-2026

Compliance Check Report

This page to be completed by the IRS ITG Specialist.

Use this form to fully document the activity and findings from your Compliance Check. This template is designed to report on data for one entity within the tribe (each Employer Identification Number (EIN) is considered to be one Entity for this purpose). If you decide to expand to additional tribal entities, pages 2-7 should be completed for each entity and attached to the final report. Only one summary sheet should be completed.

If you have any questions regarding a federal tax administration issue during the course of your Compliance Check, or any questions regarding the completion of this form, please check our [web resources](#), or contact:

Once the Compliance Check is completed, this document should be saved and returned on a 3½" diskette or CD-Rom to:

In order to assist you in completing the Compliance Check, our records currently indicate the following information in regard to this entity:

EIN: _____

Entity Name: _____

Address: _____

Required to file the following federal tax returns:

- Form 940 Employer's Annual Federal Unemployment (FUTA) Tax Return
- Form 941 Employer's Quarterly Federal Tax Return
- Form 943 Employer's Annual Return – Agricultural Employees
- Form 945 Annual Return of Withheld Federal Income Tax
- Form 990 Return of Exempt Organization
- Form 1065 Partnership Tax Return
- Form 1120 Corporation Income Tax Return
- Form 720 Quarterly Federal Excise Tax Return
- Form 730 Monthly Tax on Wagering
- Form 11-C Occupational Tax and Registration Return for Wagering
- Form 1042 Ann. Withholding Return for U.S. Source Income of Foreign Persons
- Form 2290 Highway Use Tax Return
- Form 1041 Fiduciary Tax Return
- Other _____

Tribal Entity Reviewed

Employer Identification Number (EIN)

Name of Entity

Address

City

State

Zip

Activity of Entity

Year Entity Started

Performs Services for the Tribe in the Area of

Which of the following tax issues are applicable to the entity:

YES	NO	<u>Tax Issues Present</u>
<input type="checkbox"/>	<input type="checkbox"/>	<u>Employment Tax</u> (Withholding and FICA)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Information Reporting</u> (Forms 1099)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Tip Income</u> (do employees of the entity receive tip income)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Title 31</u> (Bank Secrecy Act compliance)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Natural Resources</u> (Fishing and Land based income exclusions)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Excise Tax</u> (Wagering)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Excise Tax</u> (Other)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Employee Plans</u> (pension and 401k plans) (are employees of the entity covered by an employee retirement or income deferral plan)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Exempt Organizations</u> (is the entity structured as a not-for-profit organization under Section 501 of the Internal Revenue Code)
<input type="checkbox"/>	<input type="checkbox"/>	<u>Tax Exempt Bonds</u> (does the entity have any outstanding obligations for tax exempt bonds issued)

Is the Entity presently required to file:

YES	NO	<u>Form</u>	<u>Form Description</u>
<input type="checkbox"/>	<input type="checkbox"/>	Form 940	Employer's Annual Federal Unemployment (FUTA) Tax Return
<input type="checkbox"/>	<input type="checkbox"/>	Form 941	Employer's Quarterly Federal Tax Return
<input type="checkbox"/>	<input type="checkbox"/>	Form 943	Employer's Annual Return – Agricultural Employees
<input type="checkbox"/>	<input type="checkbox"/>	Form 945	Annual Return of Withheld Federal Income Tax
<input type="checkbox"/>	<input type="checkbox"/>	Form 990	Return of Exempt Organization
<input type="checkbox"/>	<input type="checkbox"/>	Form 1065	Partnership Tax Return
<input type="checkbox"/>	<input type="checkbox"/>	Form 1120	Corporation Income Tax Return
<input type="checkbox"/>	<input type="checkbox"/>	Form 720	Quarterly Federal Excise Tax Return
<input type="checkbox"/>	<input type="checkbox"/>	Form 730	Monthly Tax on Wagering
<input type="checkbox"/>	<input type="checkbox"/>	Form 11-C	Occupational Tax and Registration Return for Wagering
<input type="checkbox"/>	<input type="checkbox"/>	Form 1042	Annual Withholding Return for U.S. Source Income of Foreign Persons
<input type="checkbox"/>	<input type="checkbox"/>	Form 2290	Highway Use Tax Return
<input type="checkbox"/>	<input type="checkbox"/>	Form 1041	Fiduciary Tax Return
<input type="checkbox"/>	<input type="checkbox"/>	Form W-2	Wage and Tax Statement
<input type="checkbox"/>	<input type="checkbox"/>	Form W-2G	Certain Gambling Winnings
<input type="checkbox"/>	<input type="checkbox"/>	Form 8027	Employer's Annual Return of Tip Income and Allocated Tips
<input type="checkbox"/>	<input type="checkbox"/>	Form 1098-T	Tuition Statement
<input type="checkbox"/>	<input type="checkbox"/>	Form 1099-MISC	Statement for Recipients of Miscellaneous Income
<input type="checkbox"/>	<input type="checkbox"/>	Form 1099-R	Distributions from Retirement, Insurance, or Profit Sharing Plans
<input type="checkbox"/>	<input type="checkbox"/>	Form 8300	Cash Transactions Over \$10,000 Received in a Trade or Business
<input type="checkbox"/>	<input type="checkbox"/>	FinCEN Form 102	Suspicious Activity Report by Casinos and Card Clubs
<input type="checkbox"/>	<input type="checkbox"/>	FinCEN Form 103	Currency Transaction Report by Casinos

Review of Forms

Comment from your reviews of copies of the most recently filed tax forms. Include comments on whether the returns were accurately prepared; whether there were any returns processing problems, whether there was a balance due, whether there were any penalties imposed, etc.

If problems were encountered, how could they have been mitigated?

Forms W-4

- Does the entity have employees? Yes No
- Are Forms W-4 on file for every employee? Yes No
- Are all forms W-4 secured prior to initial payment? Yes No
- If No, what percentage was received after initial payment? _____
- Are all forms W-4 properly completed? Yes No
- If No, what percentage was incomplete? _____
- Are new forms W-4 secured each year on all individuals claiming to be exempt from income tax withholding? No Yes
- List any other comments from inspection of Forms W-4.

Forms W-9

- Does the entity make payments to vendors or independent contractors? Yes No
- Are Forms W-9 on file for every vendor or independent contractor? Yes No
- Are all forms W-9 secured prior to initial payment? Yes No
- If No, what percentage was received after initial payment? _____
- Are all forms W-9 properly completed? Yes No
- If No, what percentage was incomplete? _____
- List any other comments from inspection of Forms W-9.

Forms 1099

Are Forms 1099 filed for payments to all vendors and independent contractors for payments in excess of \$600 per year? Yes No

Is federal income tax withheld when required, due to invalid or missing Forms W-9? Yes No

Employment Taxes

Do Forms W-3, W-2 and 941 reconcile for the most recent calendar year? Yes No

If No, comment on the discrepancy and any actions needed or taken to resolve it.

Were there Federal Tax Deposit penalties assessed that could have been avoided? Yes No

Does the entity provide any fringe benefits (i.e., medical insurance, life insurance, tribal/employer-provided vehicle, tribal/employer-provided housing, etc.) Yes No

If Yes, list the type and whether they are deemed taxable in whole or part by the Entity.

Were taxable fringe benefits included on Forms W-2 for the applicable employee? Yes No

Does the entity pay Tribal Council members for their services on the Council (i.e. salary, meetings fees, stipends, etc.)? Yes No

Are the payments reported on Form W-2 or Form 1099? Yes No

If reported on Form W-2, are there withholding for FICA, Medicare, and Federal Income Tax? Yes No

Is the entity aware of Revenue Ruling 59-354? Yes No

Are internal controls present to ensure that a Form 1099 is not issued to an employee for an item that should be reported on Form W-2 (i.e. bonuses, excess reimbursement of expenses, personal use of a tribal asset, etc.)? Yes No

Is the level of tax filings consistent with the activity of the entity (i.e. Do the wages paid and withholding remittances appear accurate based on the size of the entity and the number of employees)? Yes No

If No, comment on the discrepancy and any actions taken to resolve it.

Does the Entity utilize a payroll service or Employee Leasing entity to file any required employment tax forms? Yes No

If Yes, list the name, address and EIN of the **service provider** as well as the specific forms filed on behalf of the entity.

EIN	Name			
Address	City	State	Zip	

Forms filed by payroll service on behalf of THIS entity

Is the entity required to file Form 940 (Employer's Annual Federal Unemployment (FUTA) Tax Return? Yes No

If Yes, does the entity participate in the State Unemployment Tax Act (SUTA) program? Yes No

If yes, are you aware of the relief from Federal Unemployment Tax that is available if you are in compliance with SUTA? Yes No

Comment on tax compliance in the following areas, including if the area is "not applicable" since the Entity has no involvement with the listed issue.

1. General Welfare Programs

Is the Entity involved in the development and/or implementation of any programs that are designed to promote the general welfare of tribal members? Yes No

If Yes, describe the nature of the programs and how the potential tax consequence of such program was determined.

2. Employee Leasing

Is the Entity involved in leasing employees **TO** or **FROM** another entity? Yes No

Lease TO another entity Lease FROM another entity

Is the other entity controlled by the tribe or another tribe? Yes No

Have all federal tax filings and payments been properly made? Yes No

List any other comments on employee leasing.

3. Excise Taxes

Comment on the excise taxes that are applicable to the Entity as reflected on Forms 720, 730, 2290, and 11-C (include a comment on whether the essential government services exclusion was appropriately defined and applied to any communication or fuel taxes)

4. Non-Gaming Distributions to Members

Are there any distributions of non-gaming revenue made by the entity to any individuals (i.e. royalty income, business profits, land claim proceeds, etc.)? Yes No

If Yes, are Forms 1099 issued? Yes No

If No (Forms 1099 are NOT issued) comment on the reason.

List any other comments on Non-Gaming Distributions.

5. ***Housing Assistance for Law Enforcement Personnel Living in High Crime Tribal Areas***

Does the Entity provide any tax-free housing for law enforcement officials to reside in areas deemed to be a "high crime zone" by the Tribe?

Yes No

If Yes, has the tribal governing body duly designated the zone and payments?

Yes No

List any other comments on law enforcement housing.

6. ***Tip Income***

Does the Entity have employees who receive tip income?

Yes No

If Yes, is there a voluntary Tip Agreement in place (Tip Rate Determination Agreement or a Gaming Industry Tip Compliance Agreement)?

Yes No

What is the percentage of tipped employees who are participating in such an agreement? _____

If there are non-participating employees, do all of them report their tip income to the entity as required each month?

Yes No

Are all employee tips properly reported on line 6c of Form 941?

Yes No

Comment on whether the tip income being reported by employees appears accurate.

7. ***Bank Secrecy Act (BSA) Issues***

Is the Entity subject to Title 31 (gross gaming revenues of \$1 million or more per year, or the entity provides services such as check cashing, wire transfers, etc.)?

Yes No

Does the entity have a designated BSA Compliance Officer?

Yes No

Is that position solely dedicated to that task?

Yes No

Does the entity have formal written BSA compliance program?

Yes No

Is ongoing Bank Secrecy Act training held for all employees who interact with customers on the gaming floor, or work in security?

Yes No

Comment on the level of filings of FinCEN Forms 102 and 103, specifically whether the number being filed is changing in proportion to any changes in the size of the gaming operation.

8. ***Per Capita Distributions of Gaming Revenues to Members***

Does the Tribe distribute any gaming revenues directly to tribal members?

Yes No

Does the Tribe have a Revenue Allocation Plan (RAP)?

Yes No

If Yes, is the tribe in compliance with it's RAP?

Yes No

Is Form 1099 issued to each recipient?

Yes No

Is proper withholding made from the distributions?

Yes No

List any other comments on Per Capita Gaming Distributions

9. Use of Trusts or Other Programs to Defer Distributions, or the Tax Consequence of Distributions

Are any programs utilized by the tribe or tribal members to defer the tax consequence of a distribution, or to defer the actual distribution to a later date (i.e. through the use of a trust or other legal structure)? Yes No

Are they operated by the tribe? Yes No

Are they under contract or facilitated by a third party? Yes No

Were the guidelines in Revenue Procedure 2003-14 used? Yes No

If not, was a Private Letter Ruling secured on the deferral program? Yes No

List any other comments on use of Trusts.

10. Aggregation Agreement on Gaming

Does the Entity have an agreement with the IRS to aggregate slot machine wins for a patron in a gaming day? Yes No

If Yes, is the entity in compliance with that agreement? Yes No

List any other comments on aggregation agreements.

11. Acceptance Agent Agreement on ITINs for Gaming Patrons

Does the Entity have an agreement with the IRS to secure Tax Identification Numbers for gaming patrons from foreign countries who lack a social security number? Yes No

If Yes, is the entity in compliance with that agreement? Yes No

List any other comments on ITIN agreements.

Actions / Corrections / Improvements

List any actions that the Tribe has taken on its own, or plans to implement, to effect improvements in compliance as a result of conducting this Compliance Check.

List any actions where the IRS office of Indian Tribal Governments could assist the Tribe in effecting improvements to compliance (i.e. Outreach/Education, improved access to information, need for a Private Letter Ruling, implementation of a Tip Agreement, etc.) **Note:** Specific identified compliance concerns that may result in additional tax or penalties can be listed at the conclusion of this form if you are seeking IRS assistance and potential penalty relief.

SUMMARY OF COMPLIANCE CHECK

Name of Tribe			
Address of Tribe	City	State	Zip
Date Compliance Check Completed			
Tribal Entity Contact Name		Tribal Entity Contact Title	
Tribal Entity Contact Telephone Number		Tribal Entity Contact E-Mail Address	

The following information summarizes the results of the Compliance Check that was conducted
(complete all applicable sections)

EMPLOYER IDENTIFICATION NUMBER (EIN) CHANGES REQUIRED

(List the affected EINs, check the column for the change(s) required
and list an explanation for each change in the last column).

EIN	New EIN	Change of Address	Filing Requirement Change	Other	Explanation of Change
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

REQUIRED CORRECTIVE ACTIONS UNCOVERED BY COMPLIANCE CHECK

Based on the results of this Compliance Check, we request assistance in effecting the following corrective actions with the understanding that penalties will be waived wherever permissible.

Privacy Act Statement and Paperwork Reduction Act Notice

This notice is given under the Privacy Act of 1974 and the Paperwork Reduction Act of 1995. The Privacy Act and Paperwork Reduction Act requires that the Internal Revenue Service inform businesses and other entities the following when asking for information.

The information on this form will carry out the Internal Revenue laws of the United States. We will comply with Internal Revenue Code (IRC) section 6109 and the regulations hereunder, which generally require the inclusion of an Employer Identification Number (EIN) on certain returns, statements, or other documents filed with the Internal Revenue Service. Information on this form may be used to determine which Federal tax returns are required to file and to provide related forms and publications. This Form will be disclosed to the Social Security Administration for their use in determining compliance with applicable laws. An EIN will not be issued unless you provide all of the requested information, which applies to your entity.

Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by IRC section 6103.



Enhancing Federal Tax Compliance

A Compliance Check is a review to determine whether a tribal entity is adhering to record keeping and information reporting requirements. It is neither an investigation under section 7605(a) of the Internal Revenue Code, nor an audit under section 530 of the Revenue Act of 1978. A Compliance Check does not directly relate to determining a tax liability for any past tax period, and does not involve the examination of books and records by the IRS. The Compliance Check is a tool to help tribal officials and employees increase voluntary compliance, and minimize the risk of error.

Tribal entities can now qualify to perform their own Compliance Check under a program known as TEFAC (Tribal Evaluation of Filing and Accuracy Compliance). Tribes interested in participating in TEFAC can submit a **Request to Conduct Tribal Evaluation of Filing and Accuracy Compliance**.

In order to assist with this process, the following reference items address many of the common federal tax administration issues for tribal entities. These can be reviewed to ascertain filing requirements for various forms, as well as the federal taxation and Bank Secrecy Act laws that impact tribal entities.

[Request to Conduct Tribal Evaluation of Filing and Accuracy Compliance](#)

On-line request form to be completed and submitted by tribes requesting to participate in the TEFAC program.

[Form 13797 - Compliance Check Report](#)

A template of what will be included in the compliance check.

[Top Ten Problems Found Through Compliance Checks](#)

A list of the common compliance problems identified through Compliance Checks

Taxpayer Rights and Official Notices

[Publication 1](#)

[Publication 3114](#)

[Notice 609](#)

Employment Taxes

Forms and Instructions

Form 940 ([Form](#)) ([Instructions](#))

Form 941 ([Form](#)) ([Instructions](#))

Form 943 ([Form](#)) ([Instructions](#))

Miscellaneous Information

[Employment Tax FAQs](#)

[Federal Tax Deposit Instructions](#)

[Publication 15, Employer's Tax Guide](#)

[Publication 15-A, Employer's Supplemental Tax Guide](#)

Employment Tax Related Forms

Forms and Instructions

Form W-2 ([Form](#)) ([Instructions](#))

Form W-3 ([Form](#)) ([Instructions](#))

Form W-4 ([Form](#))

Form W-9 ([Form](#)) ([Instructions](#))

Miscellaneous Information

[Revenue Ruling 59-354](#)

[Taxable Fringe Benefits](#)

Miscellaneous Information

[Publication 15-B, Fringe Benefits](#)

[Accountable Plans and W-2s](#)

[Reimbursing Business Travel Expenses](#)

[Per Capita Distributions](#)

Miscellaneous Information

[Per Capita FAQs](#)

[Publication 15-A, Employer's Supplemental Tax Guide](#)

[Information Reporting](#)

Forms and Instructions

[Form W-2G \(Form \) \(Instructions \)](#)

[Form 1098-Mortgage Interest Statement \(Form \) \(Instructions \)](#)

[Form 1098-T \(Form \) \(Instructions \)](#)

[Form 1099-MISC \(Form \) \(Instructions \)](#)

Miscellaneous Information

[Information Reporting FAQs](#)

[Tip Income](#)

Forms and Instructions

[Form 8027 \(Form \) \(Instructions \)](#)

Miscellaneous Information

[Tip FAQs](#)

[Non-Title 31 FAQs](#)

[TRDA/GITCA Comparison Chart](#)

[Title 31](#)

Forms and Instructions

[Form 8300 \(Form \)](#)

[FinCEN 102 \(Form \) \(Instructions \)](#)

[FinCEN 103 \(Form \)](#)

[FinCEN 103N \(Form \)](#)

[FinCEN 104 \(Form \)](#)

Miscellaneous Information

[BSA FAQs](#)

[Title 31 Anti-Money Laundering page](#)

[Excise Tax – Wagering](#)

Forms and Instructions

[Form 11-C \(Form \)](#)

[Form 730 \(Form \)](#)

Miscellaneous Information

[Excise Tax Guide](#)

[Excise Tax FAQs](#)

[Excise Tax – Other](#)

Forms and Instructions

[Form 720 \(Form \) \(Instructions \)](#)

Miscellaneous Information

[Excise Tax Guide](#)

[Excise Tax FAQs](#)

[Employee Plans](#)

Forms and Instructions

[Form 1099-R \(Form \) \(Instructions \)](#)

[Exempt Organizations](#)

Forms and Instructions

Form 990 ([Form](#)) ([instructions](#))

Tax Exempt Bonds

Miscellaneous Information

[Tax Exempt Bonds FAQs](#)

Natural Resources

Miscellaneous Information

[IRC 7873](#)

[Revenue Ruling 56-342](#)

[Fishing Rights FAQs](#)

[Natural Resources page](#)

Highway Use Tax

Forms and Instructions

Form 2290 ([Form](#)) ([Instructions](#))

Income Tax Returns

Forms and Instructions

Form 1065 ([Form](#)) ([Instructions](#))

Form 1120 ([Form](#)) ([Instructions](#))

Miscellaneous Withholding Returns

Forms and Instructions

Form 945 ([Form](#)) ([Instructions](#))

Form 1042 ([Form](#))

Form 1042-S ([Form](#)) ([Instructions](#))

For questions on Compliance Checks, please [e-mail](#) us. Be sure to include your name, your phone number and your email address so that we can respond to your question.

Request to Conduct Tribal Evaluation of Filing and Accuracy Compliance

Requests must be submitted for each EIN on which you wish to conduct a self evaluation. To qualify, the entity must be current in the filing of all federal tax returns, and current in the payment of all federal taxes. If the IRS determines that you do not qualify under these provisions, we will inform you of the reason and provide a 30 day time period to remedy the apparent delinquency.

Complete this form online. The completed form will automatically be sent as an attachment via e-mail when you select the Submit Form button. The Reset Form button will clear all entries made on the form.

+++++

Entity Name:

Entity EIN (include dash):

Name of Tribe:

+++++

Name of Person Submitting This Request:

Title of Person Submitting This Request:

Telephone Number of Person Submitting This Request:

E-mail Address of Person Submitting This Request:

+++++

Comments:

Submit Form

Reset Form

Common Compliance Problems Identified through Compliance Checks

1. FUTA – tribes still making tax deposits and/or filing Forms 940 when they are not required to pay FUTA because they participate in State unemployment.
2. Noncompliance with Revenue Ruling 59-354 - Tribal council members' pay being handled incorrectly and reported on a Form 1099 instead of a Form W-2, or being reported on a Form W-2 with FICA, Medicare and income tax withheld
3. Form 1099 problems
 - the forms were not prepared at all,
 - the forms were prepared incorrectly (amounts in the wrong box, etc.).
 - the forms were prepared but not submitted to IRS,
 - the incorrect copy was submitted to IRS,
 - not aware of the exception to filing on payments to corporations,
 - not aware of requirement to file 1099 for medical and legal expenses, even if the recipient is incorporated
4. Employment tax return filing/deposit problems
 - tax returns filed but no tax deposits were made,
 - deposits were made but no return was filed
 - deposits were made to incorrect period,
 - deposits were made using the wrong timetable (e.g. monthly deposits when should be semiweekly),
 - unaware of the "next day" deposit rule
 - Form 941 was filed with no Schedule B attached
5. Forms W-9 and W-4 are not being used, or are not being updated when necessary
6. Unaware of requirement to backup withhold if no TIN provided prior to payment
7. Payments to tribal members (committee members, gaming and non-gaming per capita) not reported on information returns, reported on the wrong information return, required withholding not done, or withholding done incorrectly
8. Amounts on Forms W-2, W-3, 1096 and 941 don't reconcile
9. Incorrect filing requirements for the entity, or there are other tribal entities that were not identified to the IRS as belonging to the tribe
10. Unaware of magnetic media filing requirement, and unaware of FIRE system (Filing Information Returns Electronically)

EXHIBIT D

INTERNAL REVENUE SERVICE Office of Indian Tribal Governments



TAX EXEMPT AND
GOVERNMENT ENTITIES DIVISION

Employer ID Number:
Telephone Number:
Refer Reply to:

Re:

Dear

The office of Indian Tribal Governments is committed to working with Indian Tribes to address federal tax issues that impact them. To assist in attaining this objective, we would like to meet with you or your designated representative to discuss the various federal tax administration issues affecting the entity referred to above.

In order to accurately determine how we can best assist your Entity, I hope that we can discuss the various current tax issues, future changes that are planned that will have federal tax ramifications, previous contacts between the Tribe and the Internal Revenue Service, and any current federal tax concerns that may exist. This information will assist us in working with you to develop remedies to any existing problems, as well as to mitigate any potential future problems by identifying prospective needs.

As part of our meeting, I would like to review and reconcile the most recent copies of the following forms: 941, 940, 945, W-2, W-3, W-4, W-9, 1099, and 1096.

This Compliance Check is voluntary and is not an examination or inspection under Internal Revenue Code Sections 7602 or 7605(b), or an audit for purposes of Section 530 of the Revenue Act of 1978. If we decide to perform an examination, we would issue a separate letter to notify you.

In lieu of the office of Indian Tribal Governments conducting this Compliance Check, we have a Self Compliance Check Program that encourages interested tribal entities to conduct their own internal review using a template we provide, and with assistance available from our staff. Any tribal Entity that is current in the filing of all tax returns and full payment of all federal taxes can qualify. If you qualify and are interested in this opportunity, which includes a limited program for penalty-free correction of any errors found through the review, please contact me.

I hope that we can meet within the next 30 days, and I ask that your designated representative contact me so that we can schedule a mutually convenient time. I may be contacted at the telephone number listed above.

Sincerely,

Indian Tribal Governments Specialist
Employee ID #

EXHIBIT E

INTERNAL REVENUE SERVICE Office of Indian Tribal Governments

Employer ID Number:
Telephone Number:
Refer Reply to:

RE:

The office of Indian Tribal Governments is committed to working with Indian Tribes to address federal tax issues that impact them. To assist in attaining this objective, we would like to meet with you or your designated representative to perform a Compliance Check.

This Compliance Check is voluntary and is not an examination or inspection under Internal Revenue Code Sections 7602 or 7605(b), or an audit for purposes of Section 530 of the Revenue Act of 1978. If we decide to perform an examination, we would issue a separate letter to notify you.

As part of our meeting, I would like to review and reconcile the most recent copies of the following forms: 941, 940, 945, W-2, W-3, W-4, W-9, 1099 and 1096.

In lieu of the office of Indian Tribal Governments conducting this Compliance Check, we have a Self Compliance Check Program that encourages interested tribal entities to conduct their own internal review using a template which can be found on the IRS website www.irs.gov/tribes. We encourage all tribal entities to take this opportunity to exercise their sovereignty by conducting their own Compliance Checks.

IRS staff will be available to assist you upon your request. Any tribal Entity that is current in the filing of all tax returns and full payment of all federal taxes can qualify. If you qualify and are interested in this opportunity, which includes a limited program for penalty-free correction of any errors found through the review, please contact me.

If you choose to have the IRS conduct the Compliance Check, I hope that we can meet within the next 30 days, and I ask that your designated representative contact me so that we can schedule a mutually convenient time. I may be contacted at the telephone number listed above.

Sincerely,

Indian Tribal Governments Specialist
Employee I.D. #

Proposal for an Exempt Organizations Voluntary Compliance Program

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

**PROPOSAL FOR AN EXEMPT ORGANIZATIONS
VOLUNTARY COMPLIANCE PROGRAM**

**Betsy Buchalter Adler, Project Leader
Sean Delany, Project Leader
Bonnie Brier
Julie Floch
Suzanne Ross McDowell
Ana Thompson**

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Proposal for an Exempt Organizations Voluntary Compliance Program
EO⁶ Examinations office, but it may be a person without any subject-matter nexus or other connection to the problem. Here are some examples of non-compliance issues described to us by lawyers and accountants practicing in this area:

- After its founder died, a small family foundation failed to file Form 990 PF, pay the Section 4940 excise tax, or meet the minimum distribution requirements under Section 4942. These problems were discovered when the founder's brother asked counsel to review the foundation's records.
- A voluntary employee benefits association described in Section 501(c)(9) inadvertently failed to file Form 990-T or pay unrelated business income taxes for a number of years. This omission was only discovered when newly engaged counsel was asked to review the Form 990s that the organization had already filed.
- An organization with an all-volunteer board had gross receipts above the \$25,000 Form 990 filing threshold for a number of years, but had not filed Form 990 because the organization's officers did not understand the filing requirements and had received incorrect advice about the obligation to file. New directors who were aware of the filing requirements joined the board, and wanted to bring the organization into filing compliance. However, the board was reluctant to file due to the organization's past delinquencies.

The absence of a formal mechanism to voluntarily resolve compliance failures has led to the evolution of a dual-class system for exempt organizations: the represented and the unrepresented. Larger organizations with counsel familiar with the tax laws, or accountants accustomed to negotiating the intricacies of IRS regulation, are able to resolve their problems relatively quickly, often in the organization's favor, whether or not the result in one instance is consistent with the result in other instances with similar fact patterns. Those without access to qualified professional assistance often flounder. They may contact IRS personnel who are unable to help or, worse, they may be paralyzed into continued inaction by their uncertainty as to what course to take. Even those who do have access to qualified assistance may obtain relief from the IRS on terms and conditions that vary from those accorded to other, similarly situated organizations. The Exempt Organizations Closing Unit, the only mechanism within the IRS for the voluntary resolution of compliance problems with centralized record-keeping, is seldom used by practitioners to address nonfiling or other issues.

By contrast, several other areas of the Tax Exempt and Government Entities Division ("TE/GE") have long operated formal voluntary compliance programs covering a broad

⁶ References to "EO" refer to the Exempt Organizations Division of the Tax Exempt and Governmental Entities ("TE/GE") Division of the Service.

Proposal for an Exempt Organizations Voluntary Compliance Program noncompliance is extensive, noting that in approximately 24% of the cases examined in one study of the problem, the person responsible for maintaining the organization's books and records was unaware of the obligation to file an annual information return.¹¹

With the enactment of new Section 6033(j), as part of the Pension Protection Act, those organizations will face automatic revocation of exempt status for failure to file information returns for three consecutive years beginning after 2006. Organizations that have lost their exemption due to nonfiling must apply for reinstatement, a process that entails significant cost not only for the organization itself but for the Service.¹² Our proposed voluntary compliance program (VCP), therefore, begins with a transitional segment designed specifically to offer delinquent exempt organizations an opportunity to avoid the automatic revocation looming in the near future. Based on lessons learned from this transitional segment, our proposed VCP would then become an ongoing program with eligibility criteria designed to address other issues of non-compliance.

Bringing non-filing organizations into the system will facilitate IRS regulation and public scrutiny of exempt organizations that have previously operated “under the radar.” It will prevent the automatic revocation of tax-exempt status and the attendant waste of resources (by both the IRS and the revoked organizations) that will otherwise be expended on efforts to reinstate exempt status. A widely publicized VCP with clear entry standards and consistently applied consequences will enable even volunteer-run organizations to bring themselves into compliance without professional aid. By first addressing nonfiling problems, the IRS can pilot a voluntary compliance program that can be expanded to include additional areas of non-compliance, following evaluation and appropriate modifications. A voluntary compliance program that invites participation from a diverse group of exempt organizations and covers a wide range of compliance issues will enable the IRS to allocate enforcement resources more efficiently (particularly if an extension of the statute of limitations, for issues other than non-filing as such, is a condition of participation) and to understand better the compliance challenges that face exempt organizations.

In our view, it is important to remember why Form 990 and its variations are known as “information returns”: their primary purpose is not the collection of taxes or penalties but the collection of financial data and other particulars to meet enforcement and other objectives. The Service requires Form 990 and its variations because, as a matter of law enforcement and of tax policy as well, both the Service and the public want exempt organizations to provide that information. If an exempt organization has been

¹¹ Exempt Organizations Nonfiler Study Report of Findings, December 1994.

¹² This new burden is likely to fall on the EO determinations group just as (if IRS predictions are correct) they will have finally cleared their accumulated backlog of tax exemption applications.

Proposal for an Exempt Organizations Voluntary Compliance Program plan document.¹⁵ By the mid 1990s, there were increased demands from the regulated community to expand the program. In response, the IRS promulgated Revenue Procedure 98-22 to create a broader corrections program, the Tax Sheltered Annuity Voluntary Compliance Program. This program became a formal part of the Employee Plans Compliance Resolution System (“EPCRS”) upon the reorganization of the IRS in 2000. Revenue Procedure 2006-16 clarified the types of factors to be considered for self-correction, gave examples of types of failures, and provided remedies.

Since 1998, EPCRS has grown into a comprehensive system of correction programs, which currently include the Self-Correction Program (“SCP”), the Voluntary Correction Program (“VCP”), and the Audit Closing Agreement Program (“Audit CAP”). SCP is available to certain plan sponsors that have established compliance practices and procedures, and want to correct insignificant operational failures. There is no fee or sanction for participation in this program. VCP is available to plan sponsors that wish (before audit) to obtain TE/GE approval for correction of certain qualified plans. There is a limited fee for participation, and there are also special procedures for anonymous and group submissions. Under Audit CAP, the plan sponsor may correct a failure that has been identified on audit and pay a sanction. This sanction will be based on the nature, extent and severity of the failure. Annual revenue procedures clarify the latest programs and offer links to available guidance on the IRS website.

Revenue Procedure 2006-27, which runs to 116 pages, lists the general principles that govern these correction programs and provides detailed information for participation in the program, including model forms. EPCRS was established to encourage sponsors to adopt principles for proper plan operation and to make voluntary and timely corrections. Under the EPCRS, voluntary correction is available to address “plan document failures” (e.g., a plan provision, on its face, does not satisfy code requirements), “demographic failures” (e.g., a plan’s design or operation fails to satisfy the nondiscrimination requirements), and “employer eligibility failures” (e.g., a plan is not eligible under Section 403(b) because its sponsor is not a Section 501(c)(3) organization), as well as operational failures resulting from sponsor noncompliance with a plan’s stated terms. The program excludes from eligibility conduct constituting egregious failure, diversion or misuse of plan assets, and abusive tax avoidance transactions.

Eight general principles guide EPCRS. First, sponsors and other administrators should be encouraged to establish administrative practices and procedures that ensure compliance. Second, sponsors and other administrators should satisfy plan document requirements. Third, sponsors and other administrators should make voluntary and timely correction of plan failures so as to protect participating employees from harm to

¹⁵ Revenue Procedure 92-89, 1992; Revenue Procedure 93-36, 1993; Revenue Procedure 94-62, 1994; see *Self-Correction Under EPCRS: Counseling Clients in an Evolving Area*, David T. Cowart, American Bar Association-Section of Taxation, 2004 Midyear Meeting.

Proposal for an Exempt Organizations Voluntary Compliance Program to a limited subset of exempt organizations, suggesting a disconnect between what the regulated sector could correct through a VCP and what the Service has thus far offered. Moreover, the diverse nature and enormous size of the exempt organizations community, in contrast to other divisions within TE/GE, makes promoting such a program a challenge. Therefore, the success of any VCP should not be assessed by initial participation rates, since it may be some years before its benefits are widely accepted.

Current EO Division Practice. Although the EO Unit does not have a formal, ongoing voluntary compliance program, guidelines and procedures for EO Closing Agreements in section 4.75.25.1 of the Internal Revenue Manual (“IRM”) apply to voluntary taxpayer-initiated (walk-in) requests. These procedures provide that other IRS offices will forward requests for closing agreements to the appropriate Area Office for consideration, unless the Director, EO has identified the issue for referral to the Manager, EO Technical, or the circumstances otherwise suggest that this group should consider the request.

The IRM contains advisory guidelines that are intended to help reach uniform results in areas not expressly covered by regulations and court decisions.²² EO personnel are advised to use closing agreements only to resolve matters that cannot be resolved through normal compliance processing procedures and to encourage future voluntary compliance. Further, the guidelines provide that a closing agreement is not appropriate when a taxpayer has engaged in flagrant or continuous acts compelling revocation or imposition of tax, unless the Service can reasonably assure future compliance. Significantly, the guidelines state not only that the Service will strive to bring a taxpayer subject to a closing agreement into full retroactive compliance, but that the Service also generally expects payment of 100% of the tax liabilities, interest, and penalties for all open tax years.

Practitioners report, however, that in many cases, especially those involving failure to file returns, the Service requires compliance only for three prior years. Additionally, the Service waives late filing penalties in close to 60% of the cases that involve first-time offenders.²³ This is consistent with a statement in the guidelines that the Service may consider more favorably a taxpayer voluntarily approaching the Service to resolve outstanding issues and agreeing to future voluntary compliance.

²² For example, they state that closing agreements are not intended to circumvent the private foundation provisions of Chapter 42 of the Code; the excise taxes required under Sections 4911, 4912, 4955, 4958 excise taxes; or the abatement of first and second tier taxes in certain cases, as provided in Subchapter E of Chapter 42.

²³ Nina Olson, Taxpayer Advocate, in remarks to the Exempt Organizations Committee of the Tax Section of the American Bar Association in January 2007, reproduced in 56 *Exempt Organization Tax Review* 21, 48 (2007).

An exempt organization fearing revocation or taxation may voluntarily contact the Area Office to resolve outstanding issues by way of a closing agreement. However, the Service is not required to enter into a closing agreement. The organization must provide the Service with sufficient facts and documentation (and the Service may make sufficient examination or inquiry) to warrant acceptance of the agreement. EO personnel may discuss a closing agreement with an anonymous taxpayer; however, discussions may not proceed beyond the draft closing agreement stage without identification of the taxpayer.

An exempt organization that asks to enter into a closing agreement must (a) explain why a closing agreement is appropriate; (b) describe the advantage(s) to the taxpayer and indicate that the government will sustain no disadvantage(s) because of a closing agreement; (c) provide a detailed description of the method proposed for correcting the non-compliant activities; (d) describe each step of the correction method in narrative form, including specific information to support the suggested correction method; (e) explain how the taxpayer will achieve future compliance; and (f) describe proposed methodology to calculate any tax, interest and penalty. The Service is not required to negotiate a closing agreement during these discussions.²⁴

By contrast, if an organization files a late return, the authority to waive late filing penalties resides in Ogden, Utah where all Forms 990 and 990-EZ are filed. Section 6652(c)(4) provides that the Service can waive a penalty for late filing of information returns if there is reasonable cause. IRS staff in Utah reported that they are generally flexible in finding there is reasonable cause if there is no prior history of late filing but they generally do not find there is reasonable cause for failure to file if an organization has previously failed to file.²⁵

Currently, the IRS cannot maintain reliable data on the extent of nonfiling due to the exemption for organizations that fall below the filing threshold. Moreover, because unrepresented exempt organizations (or organizations represented by advisors who do not know they may safely contact the Service) may not call the Service, we do not know whether the informal voluntary compliance efforts that we describe here represent a large or small sample of the universe of organizations that are out of compliance and wish to correct their problems.

Past EO Voluntary Compliance Efforts. In the last 15 years, EO has offered three narrowly drawn and time-limited voluntary compliance programs. For various reasons,

²⁴ I.R.M. 4.75.25.13.

²⁵ In 2005, according to the Taxpayer Advocate, the Service abated approximately 56% of the delinquent filing penalties that it assessed, amounting to some 59% of the dollars involved. Nina Olson, Taxpayer Advocate, in remarks to the Exempt Organizations Committee of the Tax Section of the American Bar Association in January 2007, reproduced in 56 *Exempt Organization Tax Review* 21, 48 (2007).

none of them produced results commensurate with the effort that went into designing them.

Alien Withholding. The most detailed program began in early 2001, when EO issued Revenue Procedure 2001-20, 2001-1 CB 738, with detailed procedures to enable colleges and universities to request relief for failure to properly withhold income and employment taxes from payments to alien individuals. The program was effective from February 26, 2001 to February 28, 2002. We understand that approximately twelve organizations took advantage of this program. The participation may have been limited because of timing: by the time the Service issued Rev. Proc. 2001-20, most organizations that had withholding problems had already corrected them.

Nonetheless, the design of the program is instructive. Under this program, organizations that requested consideration agreed to (1) identify those areas in which they were not in compliance with tax, withholding, and reporting obligations on payments to alien individuals; (2) compute and pay any tax and interest due; and (3) institute procedures and policies which would assure compliance in the future with the organization's tax, withholding, and reporting obligations. In return, they received assurance that their proposed procedures and policies relating to tax, withholding, and reporting obligations applicable to alien individuals were acceptable to the Service, and the Service "generally" would not impose penalties for identified underpayments or deficiencies, if the liability was due to reasonable cause as defined in the Revenue Procedure.

The program was available to private colleges and universities and state colleges and universities and their charitable affiliates which were not under audit on the date of the Revenue Procedure or prior to coming forward under the program. The Revenue Procedure included a list of the specific defects covered by the program. They included failure to withhold or pay the correct amount of social security and Medicare excise taxes imposed on employers and employees with respect to wages paid to alien individuals (IRC §§ 3101, 3111, 3402); failure to withhold or pay the correct amount of income taxes on scholarships, fellowships and grants, compensation for independent personal services, and royalties or other types of taxable income paid to nonresident alien individuals (IRC §§1441-1464); and failure to report the correct amount of any or all of the taxes listed above (IRC §§1441-1464 and 6011).

Participants in the program were required to submit a letter to TE/GE with detailed information about the current administrative procedures that the organization used to determine tax, withholding, and reporting obligations regarding payments to alien individuals. They were required to describe the defects in their procedures for payments to alien individuals, how and why the defects occurred, the years affected by such defects, the number of alien individuals affected, and how the number was determined. In addition, they were required to calculate the total amount of taxes they failed to withhold, pay and/or report for tax periods open for assessment or collection.

Finally, participating organizations were required to provide a detailed description of how they intended to correct the defects, both for existing errors and for ongoing compliance. However, an organization's participation in the program did not preclude the Service from commencing an employment tax audit or from asserting that individuals treated as independent contractors were employees.²⁶

Net Revenue Stream Voluntary Compliance Program. Past voluntary compliance programs in EO were not limited to filing deficiencies. In 1992, the Service announced a voluntary compliance program that addressed the fundamental Section 501(c)(3) issue of private inurement. This program, described in Announcement 92-70, 1992-19 IRB 89, focused on hospitals that had entered into transactions with their medical staff that allowed the staff to share in the net revenues of the hospitals. According to the Announcement, a number of hospitals described in section 501(c)(3) formed joint ventures with members of their medical staff and sold to the joint venture the gross or net revenue stream derived from the operation of an existing hospital department or service for a defined period of time.

A hospital entering into such a transaction jeopardized its tax exempt status under section 501(c)(3) for at least three reasons. First, the transaction caused the hospital's net earnings to inure to the benefit of private individuals (the physician investors). Second, the private benefit stemming from such a transaction could not be considered incidental to the public benefits received. Third, such a transaction, since it involved sale of a revenue stream from a hospital activity to referring physician-investors, may violate federal law.²⁷

Under the program, hospitals that had entered into partnerships or joint ventures with staff or related physicians were permitted to terminate the arrangement without loss of their exempt status by requesting to enter a closing agreement with the IRS before September 1, 1992. After that date, the transactions would be treated by the IRS as subject to the usual procedures governing tax consequences, including revocation of exempt status.

We understand that approximately ten organizations participated in the program. The limited participation rate in this VCP, too, may also have been a result of the time required to design and implement it.

²⁶ Participating organizations were also required to provide copies of workpapers or schedules that clearly explained the organization's calculation of its correct tax liability regarding payments to alien individuals; copies of the original Forms 941, 945, 1042, if any, as filed that relate to these calculations; and copies of Forms 8233, 1001, W-BEN, W-9, or sufficient information to support tax treaty claims.

²⁷ See G.C.M. 39862 (Nov. 21, 1991).

applicable, for any period during the three most recent tax years for which such returns were otherwise due.²⁹

- **Payment:** The organization must pay all taxes due with the return or notice, with applicable interest. For example, if the organization files a 990-T to report income from an unrelated business activity, it must pay all tax due on that income along with all interest due the Service on the unpaid tax. Similarly, if the organization had employees but failed to timely file Form W-2 and remit applicable payroll taxes, it must remit those taxes together with applicable interest.
- **Penalties:** No penalties would be assessed for filing delinquencies, although no relief would be provided for any other issues, including any problems reflected in the delinquent returns filed to participate in the program. For this limited time, the IRS would not assess the late filing penalties that it would otherwise be entitled to assess for failure to timely file the returns covered by this VCP.³⁰ We make this recommendation because we believe that the Service and the public derive a greater benefit from access to the information reported on these returns and notices and (importantly) from bringing these non-filers back into long-term compliance, going forward, than they would gain from assessing late filing penalties.
- **User fee:** A sliding scale would apply, with no fee for participating organizations with assets and revenues under \$1 million in each of the three years for which delinquent returns are filed. We make this recommendation because we believe it is in the best interests of the Service and the public to avoid disincentives for small organizations to participate in this transitional VCP.
- **Time frame:** We strongly recommend commencing the transitional phase of this program as soon as possible, with an end date of December 31, 2010. The Pension Protection Act provides that automatic revocation will be imposed for a failure to file three consecutive returns for any reporting period beginning after 2006. Therefore, automatic revocations for organizations now "outside the system" will begin on January 1, 2010 and be completed on December 31, 2010 (although automatic revocations will continue thereafter for exempt organizations that subsequently fail to file for three consecutive years). This means it is essential to begin *now* to implement this transitional VCP.

²⁹ Unlike our recommendation for an ongoing program, there appears to be no need for anonymity in the initial contact with the IRS. Since participating organizations would not be required to show "reasonable cause" for their noncompliance, those preliminary discussions should be unnecessary. This program does not cover nonfilers of Form 990N, the "e-postcard" filing, because no financial penalties are imposed for nonfiling; the penalty is revocation of exempt status after three consecutive years of non-filing.

³⁰ IRM Section 20.1.1.3.2.2, Administrative Waiver (8/20/1998).

With regard to nonfilers of information returns, we believe the default should be an “open door policy” with certain limited exceptions. Specifically, we recommend making the EO VCP available to an exempt organization so long as:

- the organization’s failure to file the return(s) was due to reasonable cause;³¹
- the late return(s) do not show that the exempt organization: is subject to the excise tax under Sections 4941, 4942, 4943, 4944 or 4945 for self-dealing, failure to distribute income, excess business holdings, investments that jeopardize charitable purposes and taxable expenditures; is subject to the excise tax under Section 4912 for excess lobbying expenditures that result in loss of exemption under Section 501(c)(3); is subject to the excise tax under Section 4955 for participation or intervention in a political campaign on behalf of or in opposition to a candidate for public office; was involved in an “excess benefit transaction” that could result in the imposition of the excise tax under Section 4958 on a disqualified person or organization manager; is subject to the excise tax under Section 4965 related to prohibited tax shelter transactions; is subject to the excise tax under Sections 4966 or 4967 related to certain prohibited activities by donor advised funds; is subject to the excise tax under Section 170(f)(10) for premiums paid on certain personal benefit contracts; is subject to the termination tax under Section 507(c); or is subject to revocation pursuant to Section 6033(j) for three consecutive years of failure to file; or
- the exempt organization is not under examination by the IRS, in Appeals or in court with respect to any issue within the jurisdiction of the IRS.

With regard to W-2 and 1099 nonfilers, we believe that organizations should be eligible if their W-2/1099 issues are not subject to other extant programs within the IRS, such as the Classification Settlement Program. Potential participants should be subject to qualifications similar to those that we have recommended in connection with Forms 990, 990-T, and 990-PF.

Including W-2/1099 nonfiling in the ongoing EO VCP meets two hallmarks of other VCPs in TE/GE: the issues directly affect the interests of third parties (here, employees and independent contractors); and organizations are more highly motivated to correct promptly their failures in this area (here, to preclude or rectify tax filing problems for their employees and contractors).

³¹ We believe that the eligibility standard that Rev. Proc. 2006-27 outlines for the EPCRS program – no abusive tax avoidance transactions, no egregious failures, no diversion or misuse of plan assets – would be preferable as a matter of policy, since it would permit more organizations to use the VCP to return to compliance. We recognize that Congress’ adoption of a reasonable cause standard in new IRC 6033(j) with regard to the consequences of repeated failures to file exempt organization returns may limit the Service’s flexibility in this area. Nonetheless, we urge the Service to construe “reasonable cause” liberally in order to encourage participation in this VCP.

We understand that while the Small Business/Self-Employed Division of the IRS is responsible for employment tax policy, TE/GE is responsible for administering the employment taxation of tax-exempt entities and governmental employers. Our preliminary analysis and discussions suggest that a pilot program in EO that allows exempt organizations to resolve issues related to failure to file, or failure to file complete and accurate, Forms W-2 and 1099 does not implicate tax policy and, if successful, could serve as a model for other areas within the IRS.

Procedure. We offer specific procedural recommendations, based on what we have learned from other voluntary compliance programs within the TE/GE Division and from our inquiries in preparing this report.

Establishment of an EO VCP Office. As with other ongoing VCPs in TE/GE, we think it is critical to have a dedicated EO VCP office. This will assure the consistent and even-handed operation of the program. It also will allow for securing the experience important to the evolution toward a comprehensive EO VCP. To maximize the likelihood the program will be successful, we believe the head of the EO VCP should be a person with significant experience in the EO Division. This person should receive substantial training from, and have continuing access to, attorneys in the Rulings & Agreements group and in the office of the Associate Chief Counsel for TE/GE. Similarly, the Tax Law Specialists administering the EO VCP under the direction of the head of the VCP Office should have solid experience in the EO area. Assuring a sufficiently high level of personnel in the EO VCP office and their continuing access to internal expertise is crucial, not only in the formative stages of the program, but also as it evolves to handle more challenging issues. This also sends a signal, both internally and externally, that the VCP has institutional support.

Confidential Contacts. As is common with other ongoing VCPs in TE/GE, we think it is important for exempt organizations and their legal/accounting representatives to be able to contact the EO VCP office on a confidential basis to discuss the possibility of the organization's participation in the EO VCP. Our survey and conversations with leading EO practitioners indicate that there may be substantial hesitancy to use a VCP, at least in its formative stages, if preliminary confidential contacts are not permitted. This is particularly true for those practitioners who currently are able to access representatives of the IRS on an initially confidential basis. Such confidential contacts could include a proffer by the organization or its representative of specific facts and a conclusion by the EO VCP Office of the likely outcome before the organization formally submits a request to participate in the EO VCP.³²

³² Our proposed transitional VCP did not recommend confidential contacts because that program does not require a showing of reasonable cause for failure to file. Here, confidentiality enables organizations to "test the waters" regarding the Service's likely view of whether the failure in question was in fact due to reasonable cause. Of course, informal discussions are not binding either on the organization or on the

Conditions for Participation in the EO VCP. To participate in the EO VCP, the exempt organization must:

- a. file any delinquent Forms 990/990-EZ/990-PF and Form 990-T for the prior three years, and correct any forms W2 or 1099 for which relief is sought;
- b. simultaneously file any ancillary returns due, such as Form 4720 for payment of the Section 4911 tax on excess lobbying expenditures by public charities that have elected to be subject to Section 501(h), Form 1120-POL in the case of an exempt organization treated as having political organization taxable income under Section 527(f)(1), or Form 926 in the case of transfers of property to a foreign corporation;
- c. include payment for any taxes shown as due on those returns (e.g., Section 4940 tax on investment income, unrelated trade or business taxes); and
- d. agree to maintain books and records going forward sufficient to allow it to continue to file its forms on a current basis.

Request to Participate in the VCP. Similarly with other VCPs in TE/GE, the EO Division should develop a Notice of Election and Statement to be filed by the exempt organization in which it elects to participate in the VCP. The document should include:

- a. name, address, telephone number, fax number, and employer identification number;
- b. contact person (at organization or an authorized representative, and in the latter case Form 2848, Power of Attorney must be submitted with the Statement), with name, address, telephone number and fax number;
- c. the unfiled return(s) with all taxes shown as due;
- d. how it was discovered that the return(s) should have been filed but was(were) not and why that constitutes reasonable cause;
- e. representations under penalties of perjury that the exempt organization is not under examination by the IRS, in Appeals or in court with respect to any issue relating to the jurisdiction of the IRS, the delinquent return(s) filed with the Statement is(are) complete and accurate and the exempt organization agrees to maintain books and records going forward sufficient to allow it to continue to file its form(s) on a current basis;

Service; relief would be available only after the organization formally applies for participation in the VCP, as described above, and then only if the facts submitted to the Service justify relief.

- f. in the case of delinquent Forms 990-T and 990-PF, the exempt organization would agree to waive all defenses to the assessment and collection of penalties for failure to file estimated taxes;
- g. in the case of late tax payments, the exempt organization would agree to waive all defenses to the assessment and collection of statutory interest;
- h. the Statement would make clear that if the delinquent return(s) is(are) not complete and accurate, the exempt organization may be subject to IRS audits and penalties that could cover more than the three years potentially at issue; and
- i. where appropriate, the Statement would include a waiver of the statute of limitations by the exempt organization.

Benefits to the EO. Exempt organizations participating in the EO VCP will not be subject to revocation of exemption based solely on the failure to file or other noncompliance specifically intended to be addressed in the program.³³ Exempt organizations filing delinquent returns will not be subject to penalties for late filing, except that penalties may apply where the EO is unable to show that its failure to file was not egregious, and the organization will still be liable for failure to file and pay estimated taxes in applicable cases involving Forms 990-T and 990-PF. (All late tax payments will be subject to assessment of statutory interest.)

Closing Agreement. We believe that exempt organizations participating in the EO VCP should be permitted to request a closing agreement or other document confirming the outcome and that the proposed initial phases of this initiative lend themselves to a simple form of documentation.

User Fees. We are not opposed to the imposition of reasonable user fees based on the size of the organization.³⁴ On the other hand, the history of other VCP programs in TE/GE suggests that exempt organizations often are hesitant to participate in new VCPs. The desirability of not further discouraging participation in the EO VCP's formative years suggests limiting those user fees, at least in the beginning period of the program. Accordingly, we recommend not imposing any user fee in the initial phases of the EO VCP initiative on an exempt organization whose Total Revenue (Part I, line 12 of

³³ By contrast, the remedy of revocation of exempt status would continue to be available for all other issues, including violations of law that are revealed in filings or submissions made by exempt organizations in the course of participation in the VCP. Serious compliance problems for which the IRS determines that it must preserve the possible penalty of revocation may not be appropriate, by their nature, for inclusion in a VCP. However, that remedy cannot be excluded for issues outside the scope of the program that are revealed in the course of participating in the VCP.

³⁴ Our approach to user fees for participation in the proposed ongoing VCP is intentionally different from our proposed transitional VCP.

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the Form 990 and Form 990-PF) and Net Assets (Part IV, line 74 of the Form 990 and Part III, line 31 of the Form 990-PF) are equal to or less than \$1 million at the end of the year as to which the delinquent return relates. The Service is best placed to determine appropriate user fees for organizations that exceed these levels; however, we recommend a sliding scale that encourages participation by smaller organizations.

Publicizing Availability of the EO VCP. The IRS should assure that exempt organizations and their representatives are made aware of the EO VCP initiative once it is implemented. We strongly recommend a multi-prong outreach approach, starting with the publication of a Revenue Procedure and continuing with an announcement on the TE/GE web pages for the varieties of exempt organizations, a prominently featured article in the email sent to those on the IRS EO listserv, announcements in speeches by IRS representatives, inclusion in IRS publications, inclusion of prominent reference on the instructions for the Forms 990, 990-EZ, 990-PF and 990-T, and in any notices that are otherwise sent to exempt organizations.

However, promotion of this program through the official channels described above will likely not be sufficient to induce participation by a meaningful number of non-filing exempt organizations. The organizations for which the non-filing aspect of the program is intended, especially during the transitional phase, are by their nature not in regular communication with the IRS. Those organizations, many of them small with volunteer staffing, must be reached by other means. We strongly recommend that special efforts be taken to attract media attention for this program beyond the professional outlets, using the deadlines created for the expiration of the transitional phase to create exposure for this problem and the IRS' solution to it.

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APPENDIX 1: Persons Interviewed for This Report

The ACT spoke, on a confidential basis, with a number of lawyers and accountants familiar with formal and informal voluntary compliance procedures for exempt organizations. We appreciate the comments of our ACT colleagues, who made their voluntary compliance expertise available to us as well. In addition, we are grateful to the Service for making the following employees available to us for interviews, and to each of the IRS employees (listed in alphabetical order) for their generosity with time and information.

Robert Choi, Director, EO Rulings and Agreements

David Fish, Acting Manager, Technical Guidance and Quality Assurance, EO Rulings and Agreements

Marvin Friedlander, Manager / Technical, EO Rulings and Agreements

Clifford Gannett, Director, Tax-Exempt Bonds

Joseph H. Grant, Director, Employee Plans

Vicki Hansen, Area Manager, EO Compliance Area (EO Examinations)

Joyce Kahn, Manager, Voluntary Compliance, EP Rulings & Agreements

Lois Lerner, Director, Exempt Organizations

Catherine E. Livingston, Assistant Chief Counsel, TE/GE

Peter Lorenzetti, Area Manager Northeast, EO Examinations

Stephen Macchio, Manager, Processing Center Programs, TE/GE Customer Account Services, and various members of his staff

Rod McArthur, Program Manager, Employment Tax Policy (SBSE)

Steven T. Miller, Commissioner, TE/GE

Theresa Pattara, Project Manager, PPA & Form 990 Redesign (EO)

Marsha Ramirez, Director, EO Examinations

Lisa Schultz, Senior EO Mandatory Reviewer (EO Examinations)

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Roberta Zarin, Director of Education and Outreach, (EO)

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APPENDIX 3: Comparison of TE-GE Voluntary Compliance Programs

	Central Office	Confidential Contacts	Revenue Procedure or Other Guidance	User Fees	Standard for Relief	Publicize Program	Closing Agreements
EP EPCRS	Yes (VCP applications submitted centrally, but coordinators located in Seattle, Dallas, Chicago, and Brooklyn)	Yes	Rev. Proc. 2006-27	Sliding scale, based on number of plan participants	Not available to correct "operational failures that are egregious," "diversion or misuse of plan assets," or "abusive tax avoidance transactions"	Yes, to practitioners and employers	Yes, with correction of any plan defects
TEB VCAP	Yes, TEB Compliance and Program Management	Yes, but examination may begin if name of bond issue not disclosed	Notice 2001-60; IRM 7.2.3; Rev. Proc. 97-15	No (but payment of a "closing agreement amount" is typically required)	Violations not under examination, under challenge in court, and "not due to willful neglect"	Yes, to practitioners and tax-exempt bond community	Yes, but may be reopened "in the event of fraud, malfeasance, or misrepresentation of a material fact"
ITG TEFAC	Yes (submitted online)	No	Form 13797 (11-2006)	No	Must be current in all filings due	Yes, through IRS web site and ACT communications	Not applicable, filing delinquencies addressed through existing mechanisms
EO Alien Withholding	Yes (Manager EPP, Dallas)	No	Rev. Proc. 2001-20	No	Reasonable cause	Yes, to practitioners at "key district" liaison meetings	"Acknowledgment letter" indicating "substantial compliance" – "will not be used as the basis to initiate an examination"
EO Net Revenue Stream	Yes (EO Technical)	No	Announcement 92-70	No	No, but transaction must be rescinded	Yes	Available (but none requested)
EO 527 Nonfiling	Yes	No	Notice 2002-34	No	No tax, penalty, or interest "solely because" the organization failed to file	Yes, to practitioners and through press release	No
Proposed: Transitional EO (PPA nonfiling)	Yes	No	Yes	Fees for Organizations with > \$1M	Not available if under examination or in court	Yes, as widely as possible	Yes, simplified
Proposed: Ongoing EO (nonfiling; withholding)	Yes	Yes	Yes	Fees for Organizations with > \$1M	Not available unless reasonable cause shown, or if under examination, or in court	Yes, as widely as possible	Yes

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

**AFTER THE BONDS ARE ISSUED:
THEN WHAT?**

**Joan M. DiMarco
Robert E. Donovan
Maxwell D. Solet**

Project Leaders

June 13, 2007

This ACT project resulted from the recognition that many governmental issuers of tax-exempt bonds and private, nongovernmental conduit borrowers were not adequately prepared to monitor ongoing compliance with federal law with respect to such bonds. There was particular concern for newly-elected or appointed officials who might have little prior experience with tax-exempt debt.

This project complements the 2005 ACT report, which included recommendations as to record retention. That report has prompted a growing discussion about appropriate record retention procedures in the tax-exempt bond area.

After consultation with senior personnel in the Tax Exempt and Government Entities Division, the ACT decided that it would prepare a paper on post-issuance compliance in a format appropriate for inclusion in the "Information for the Tax Exempt Bond Community" section of the IRS website. The goal was to provide a product at a level of generality suitable for elected or appointed officials, identifying areas requiring compliance procedures without attempting to ask and answer all possible questions. That product is attached as an exhibit hereto.

Initial discussions were held in late Fall 2006, with representatives of the Tax-Exempt Finance Committee of the Tax Section of the American Bar Association (ABA), the Debt Finance Committee of the Government Finance Officers Association (GFOA), and the National Association of Bond Lawyers (NABL) to confirm that the proposed project seemed a useful one. The ACT learned that NABL and GFOA were engaged in preparation of a detailed post-issuance compliance "checklist," aimed principally at bond counsel, and discussed with those groups the development of a project which, because of its different target audience and greater level of generality, would avoid being duplicative of their efforts. ACT members spoke again with these three groups in early Spring 2007, to share a draft of the paper presented here. The final version reflects their helpful comments.

This report is being delivered at a time of increased focus in IRS tax-exempt bond audits on post-issuance compliance rather than exclusively on matters which support the initial opinion of bond counsel, delivered at closing, that interest on the bonds is excludable from the gross income of the bondholders. These audits appear to support the perception that there is a wide range of practice among issuers and conduit borrowers in terms of their use of systematic procedures for monitoring post-issuance tax compliance.

The ACT believes that voluntary implementation of better procedures for monitoring compliance will substantially improve overall compliance, well beyond what can be achieved through the audit process. At the same time, it should greatly improve the efficiency of tax exempt bond audits. The ACT urges the IRS to encourage improved compliance procedures on a forward-looking basis without drawing negative inferences with respect to prior procedures in the inherently backward-looking context of the audit process. Issuers, and conduit borrowers, vary substantially with respect to their size, their resources, and the number and complexity of their bond transactions. There can

After the Bonds Are Issued: Then What?

be no one-size-fits-all set of procedures. However, each issuer or borrower should identify and establish appropriate procedures to ensure that its bonds remain in compliance with this complex body of federal tax law.

Exhibit

AFTER THE BONDS ARE ISSUED: THEN WHAT?

The closing date of a tax-exempt bond issue usually is the culmination of weeks or months of negotiation and planning. That process includes extensive fact-gathering and analysis by bond counsel to ensure that the bonds will be in compliance with federal tax law requirements. At closing, bond counsel delivers an opinion that interest on the bonds is properly excluded from the gross income of the bondholders. That opinion is based upon a reasonable expectation that tax law requirements will be complied with throughout the time the bonds remain outstanding. Frequently bond documents include covenants by issuers and conduit borrowers as to post-issuance tax law compliance.

This section is intended to assist treasurers, comptrollers, chief financial officers, and other responsible officials of state or local government issuers of tax-exempt bonds, or of private, nongovernmental conduit borrowers which are allowed to borrow at tax-exempt rates from such governmental issuers, in developing policies, procedures and systems which will ensure that the bonds remain tax-exempt.

Because most tax-exempt bonds will remain outstanding for many years, it is important to have procedures which can be understood and implemented over time even as the responsible officials may change. The particular procedures which are appropriate may vary substantially, depending upon the size and complexity of the issuer/borrower, the complexity of the financing, the number of bond issues to be monitored, and the type of bond issue involved, e.g., governmental general obligations, qualified 501(c)(3) bonds, multifamily housing bonds. Most important is to assign responsibility for post-issuance tax law compliance and to be sure that sufficient information is routinely identified and maintained to allow those who later inherit that responsibility to successfully continue the job. It is appropriate to ask bond counsel at the time of closing to assist in the development of a procedural framework for post-issuance tax compliance.

Whenever possible, monitoring of tax law compliance should be integrated with existing accounting systems so that those who directly manage bond-financed assets will be prompted to identify relevant facts at the time any changes are contemplated and to communicate such plans to the appropriate finance officials. For example, bond-financed property could be specially coded on an existing plant ledger in order to require advance review of contemplated sales, leases, or other contractual arrangements involving bond-financed property.

Because of the long term of many tax-exempt bonds, and the need to verify tax-law compliance throughout the term, special care should be given to record retention policies. Record retention requirements may differ from and be more stringent than those required under state law or other governing rules. See [Tax Exempt Bond FAQs regarding Record Retention Requirements](#) [link] and the discussion of record retention in the [2005 Report of the Advisory Committee on Tax Exempt and Government Entities](#)

[link]. In Notice 2006-63, the IRS solicited comments as to appropriate record retention standards, including recordkeeping limitation programs, and is currently considering industry comments.

The goal of the types of procedures described here is to identify on a timely basis the facts relevant to the continued tax-exemption of outstanding bonds. The analysis of those facts and the crafting of solutions to potential problems may require on-going consultation with bond counsel. Issuers and borrowers should recognize that such consultation may go beyond the scope of bond counsel's initial engagement.

Post-bond issuance tax compliance may include the following:

- Procedure
 - Identify who will be responsible for post-issuance tax compliance and steps to be taken to transfer that responsibility and accumulated information in the future.
 - Where different persons are responsible for different aspects, for example investment of bond proceeds and expenditure of bond proceeds on projects, coordinate record-keeping and review.
 - Determine frequency for review of various items and plan of implementation.
- Issuance
 - Obtain and store “closing bible” of crucial documents prepared by bond counsel.
 - Confirm filing of Form 8038, Form 8038-G or Form 8038-GC with IRS, usually overseen by bond counsel at or soon after closing.
 - Establish plan for keeping relevant books and records as to investment and expenditure of bond proceeds.
- Arbitrage
 - Choose accounting method with respect to bond proceeds and interest earnings, investment, and expenditures.
 - Obtain computation of “yield” of bonds and establish procedure to track investment returns.
 - Establish procedure for allocation of bond proceeds and interest earnings to expenditures, including reimbursement of pre-issuance expenditures.

Post-issuance tax compliance is an integral part of an issuer or borrower's debt management process. In some organizations, compliance may be adequately supported by ad hoc procedures or by the efforts of a single individual. However, consideration should be given to whether ongoing timely, reliable institutional compliance should be supported by practices integrated within the core policies and procedures of the institution. Such practices may assist newly elected or appointed officials in quickly identifying and understanding existing policies and remedies and who is responsible for their implementation in order to avoid a disruption of necessary activities.

Post-issuance tax compliance begins with the debt issuance process itself and provides for a continuing focus on investments of bond proceeds and use of bond-financed property. It will require identifying existing policies, the responsible people, the applicable procedures, and the affected population. The facts will differ for every issuer or borrower. The questions may differ as well. The need for effective policies, procedures, and systems to ensure compliance will not.

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

**IMPROVING COMPLIANCE FOR ADOPTERS
OF PRE-APPROVED PLANS**

**Charles M. Lax, Project Leader
Susan Diehl
Dodi Walker Gross
Charles F. Plenge
Daniel J. Schwartz
Michael S. Sirkin**

June 13, 2007

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contribution plans cover all who they must cover and that the rights and assets of participants remain protected?

. . .

Are participants including retirees getting the service they should from plan administrators? Also, as we see more and more adoption of mass marketed plans, how do we best police follow up compliance in such plans?

. . .

The EPCU is staffed with Senior EP Agents, Analysts, Statisticians and Economists. Since June 2005, when the EPCU stood up, it has performed more than 1,500 compliance checks. In the long term, the unit is going to conduct correspondence examinations and support our efforts to attack abusive tax schemes.

. . .

I have also asked them to work on a compliance project to see how mass marketed plans are doing post-adoption. The EPCU will allow us the flexibility to design and execute compliance projects to accommodate a shift of mission. I promise that things will get even more interesting.

. . .

Additionally, prior ACT Reports have commented on the M&P plan program and made suggestions for improvement. For example, in the June 21, 2002 First ACT Report entitled "Employee Plans Small Business Access and Compliance Project," ACT members recommended that the IRS obtain lists of PAPs for use in a focused audit program, as well as require Sponsoring Organizations to provide Adopting Employers with operational manuals. Furthermore, in the June 9, 2006 Fifth ACT Report entitled "Document Compliance Program for 403(b) Arrangements," ACT members noted "Current members of the ACT continue to express their concerns over many plan document preparation and plan operation/administration failures that appear to accompany the marketing and use of pre-approved plans by some vendors and practitioners in this market."

Employers. For this reason, once a standardized M&P plan receives an opinion letter from the IRS, there is no need for an individual employer to request a determination letter. The IRS' opinion letter is all that is needed to provide that Adopting Employer assurance that the form of their plan is acceptable.

A standardized M&P plan must meet the following requirements:⁶

- The plan's eligibility and participation requirements must generally be extended to all employees except those who: (i) do not meet the age and service requirements, (ii) are nonresident aliens with no US source income, or (iii) are members of a collective bargaining unit.
- The plan's eligibility requirements may not be more favorable for highly compensated employees than other employees.
- Total compensation (e.g., exclusion of bonuses and/or overtime is not permitted) must be used in allocating contributions in a defined contribution plan or calculating benefits in a defined benefit plan. However, integration of the plan with Social Security is permitted.
- Only participants who terminate employment during the year and have less than 500 hours of service during the year may be excluded from an allocation or an accrual for such plan year.
- Unless the plan is a target benefit plan or a 401k/m plan, contributions or accruals must meet the design-based safe harbors of Code Section 401(a)(4).
- Crediting past service for participants must meet the safe harbor contained in Reg. Section 1.401(a)(4)-5(a)(3).

A non-standardized plan is an M&P plan which does not meet the standardized plan requirements. As such, a non-standardized plan may have many more options and choices available to the Adopting Employer. However, because of this, not only does the plan receive an M&P opinion letter from the IRS, but the Adopting Employer in many instances also must submit the plan along with the choices selected in the Adoption Agreement to the IRS for an individual determination letter.⁷

⁶ Rev. Proc. 2005-16, 2005-10 I.R.B. 674 at §4.10

⁷ Under certain circumstances, an adopter of a non-standardized plan may get reliance from the Sponsoring Organization's opinion letter if the requirements of §19.02(2), (3), and (4) of Rev. Proc. 2005-16 are met.

available to Corporate M&P Plans. From that point forward, the IRS issued separate revenue procedures for Corporate M&P Plans and those M&P plans that included self-employed individuals. By 1972, the only distinguishing characteristic between a master plan and a prototype plan was that a master plan specified the funding organization in the sponsor's application, whereas a prototype plan did not, and instead the Adopting Employer's application specified the funding organization.²³

After the Code was amended by the Employee Retirement Income Security Act of 1974 ("ERISA"), the IRS ceased reviewing requests for the issuance of opinion letters for M&P plans and determination letters for the adoption of such plans by employers until guidelines could be developed in accordance with the new requirements.²⁴ The guidelines for defined contribution Corporate M&P Plans²⁵ and M&P plans for self-employed individuals²⁶ were issued in 1975. They were somewhat limited and prohibited the issuance of opinion and determination letters with respect to certain types of money purchase pension plans or those with certain provisions.²⁷ The IRS further required for the first time that employers requesting determination letters for M&P plans notify interested parties of the filing.²⁸ Later that year, the IRS expanded the program by issuing guidelines that allowed for the issuance of an opinion letter or determination letter for Corporate M&P Plans that were either of a defined contribution or defined benefit nature.²⁹

Beginning in March of 1976, the IRS developed a procedure for law firms to obtain approval for a defined contribution plan form which the law firm contemplated using in its submission of determination letters for multiple Adopting Employers. These were referred to as "pattern plans."³⁰ Pattern plans could not include target benefit, stock bonus, bond purchase, or employee stock ownership plans, or plans adopted by partnerships,³¹ and a law firm was limited to two district-approved plans for each type of

²³ Rev. Proc. 72-8 §3.02, 1972-1 C.B. 716

²⁴ Rev. Proc. 74-40, 1974-2 C.B. 4941

²⁵ Rev. Proc. 75-47, 1975-2 C.B. 581

²⁶ Rev. Proc. 75-51, 1975-2 C.B. 590

²⁷ *Supra* notes 10-11

²⁸ *Id.*

²⁹ Rev. Proc. 75-52, 1975-2 C.B. 592

³⁰ Rev. Proc. 76-15, 1976-1 C.B. 553

³¹ *Id.* at §3.01

defined contribution plan allowed under Rev. Proc. 76-15.³² Additionally, the IRS required that the law firm requesting a notification letter as to the acceptability of the pattern plan submit the request simultaneously with an Adopting Employer's request for a determination letter.³³

In 1977, the IRS created "field prototype plans;" a defined contribution or defined benefit plan that did not include self-employed individuals, submitted by a firm³⁴ that had at least 10 Adopting Employers in each region for which a notification of acceptability was sought.³⁵ Unlike pattern plans, field prototype plans did not have to be submitted simultaneously with an Adopting Employer's request for a determination letter,³⁶ and there was not a limit on the number of field prototype plans a firm could have for each type of plan.³⁷ Types of allowable plans for the field prototype plan program included unit benefit, fixed benefit, flat benefit, profit-sharing, stock bonus, money purchase, bond purchase, and employee stock ownership plans.³⁸ Requests for notification letters and determination letters for field prototype plans were required to be submitted to District Offices.³⁹

Following the issuance of final ERISA regulations, the IRS issued a "simplified procedure for requesting opinion, notification and determination letters" in connection with M&P, pattern, and field prototype plans.⁴⁰ While Rev. Proc. 79-28 did nothing more than refer the sponsors of such plans to the previously issued applicable Revenue Procedure, it was the first instance in which all types of PAPs had been addressed collectively in the same Revenue Procedure; a foreshadowing of what was to come. Again, in the spirit of simplification, the IRS issued Rev. Proc. 80-29 to address both corporate M&P plans as well as "H.R.-10" plans, M&P plans that included self-employed individuals.⁴¹ While the two types of M&P plans were addressed in a single Revenue Procedure, there were still distinctions between H.R.-10 M&P plans and Corporate M&P

³² *Id.* at §4.01

³³ *Id.* at §5.01

³⁴ A firm is an entity "other than a trade or professional association, bank, insurance company, or regulated investment company." *Id.* at §3.01

³⁵ Rev. Proc. 77-23, 1977-2 C.B. 530

³⁶ *Id.* at §5.01

³⁷ *Id.* at §4.01

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Rev. Proc. 79-28, 1979 C.B. 569

⁴¹ 1980-1 C.B. 681

Plans. One of the distinctions was that an employer who adopted the H.R.-10 M&P plan received automatic reliance on the plan (i.e., assurance that any disqualification of the plan would not be retroactive), whereas an employer who adopted a Corporate M&P Plan had to obtain a favorable determination letter to receive reliance on the M&P plan.⁴² Subsequently, the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)⁴³ largely eliminated the distinctions between Corporate M&P Plans and H.R.-10 M&P plans.⁴⁴ As a result, the IRS issued Rev. Proc. 84-23 and removed the distinction between the two types of M&P plans, referring to them collectively as “M&P plans.”⁴⁵ Under Rev. Proc. 84-23, an employer was entitled to rely on a favorable opinion letter issued for a standardized form of M&P plan the employer had adopted, without having to obtain a determination letter.⁴⁶ Where an employer adopted an M&P form of plan other than a standardized form, a determination letter was still required, as the IRS needed to address the particular facts and circumstances of the Adopting Employer.⁴⁷

Rev. Proc. 84-23 also marked the introduction of the Mass Submitter Program.⁴⁸ Under this program, an entity faced reduced procedural requirements and expeditious processing; if it could establish that at least ten Sponsoring Organizations would sponsor the identical M&P plan. Sponsoring Organizations only included banks, insured credit unions, insurance companies, regulated investment companies, certain investment advisors, and certain principal underwriters.⁴⁹ The Mass Submitter Program was intended as an experimental program to reduce the IRS’s paperwork burden in addressing the required plan amendments to comply with TEFRA’s qualification changes.⁵⁰

Following the changes to qualification requirements imposed by the Tax Reform Act of 1986,⁵¹ which had a specific provision requiring the IRS to accept applications for

⁴² Rev. Proc. 84-23, 1984-1 C.B. 457

⁴³ Pub. L. 97-248, 1982-2 C.B. 462

⁴⁴ Rev. Proc. 84-23 §3.01

⁴⁵ *Id.* at §4.01-02

⁴⁶ *Id.* at §3.01

⁴⁷ *Id.*

⁴⁸ *Id.* at §17

⁴⁹ *Id.* at §17.01-03

⁵⁰ *Id.* at §3.06

⁵¹ Pub. L. No. 99-514, 100 Stat. 2085 (1986)

opinion letters for M&P plans that included cash or deferred arrangements (CODAs),⁵² the IRS issued model amendments for Sponsoring Organizations to use to conform their plans to the new law.⁵³ Rev. Proc. 87-18 set forth the procedure for submitting the amendments to M&P plans and included priority handling for Mass Submitters.⁵⁴

In the late 1980's, the IRS instituted a fee schedule for opinion and determination letters⁵⁵ as required by the Revenue Act of 1987.⁵⁶ Pursuant to public comment regarding the excessive nature of the user fee program for Mass Submitter plan adoptions and VS plans,⁵⁷ the IRS reduced the fees for those two programs.⁵⁸ The fee for a word-for-word adoption of a Mass Submitter's plan was reduced from \$100 to \$50, with a \$15,000 cap on the aggregate amount a Mass Submitter paid within a calendar year.⁵⁹ Furthermore, under the revised schedule, a VS plan was no longer subject to the fees for individually designed plans, but instead was assessed a fee of \$1,000 for the lead plan and \$100 for each subsequent adoption of the VS plan.⁶⁰ In 1989, the Mass Submitter program became a permanent program for expedited review of plans that complied with the procedures set forth in Rev. Proc. 89-9.⁶¹

Also, in 1989, the IRS created a program for "regional prototype plans," which lessened the requirements otherwise applicable to uniform plans and allowed practitioners to sponsor M&P plans, in addition to institutional sponsors.⁶² Regional prototype plans were not required to use the top-heavy vesting requirements contained in Section 416 of the Code in all cases, and adopters of regional prototype plans were

⁵² *Id.* at §1142. Previously, the IRS would not issue opinion letters with respect to plans containing CODAs as described in Section 401(k) of the Code. See Rev. Proc. 84-23 §8.033, 1984-1 C.B. 457.

⁵³ Notice 87-33, 1987-1 C.B. 380 (containing model amendments for M&P plans to comply with the qualification requirements under the Tax Reform Act of 1986); Notice 87-34, 1987-1 C.B. 390 (containing a model amendment for sponsors of M&P plans to include a CODA).

⁵⁴ 1987-1 C.B. 709. Mass Submitters were those entities that had previously applied for and received favorable opinion letters on a profit-sharing plan for ten or more qualified sponsoring organizations. *Id.* at §5.01

⁵⁵ Rev. Proc. 88-8, 1998-1 C.B. 628

⁵⁶ Pub. L. 100-203 § 10511

⁵⁷ Rev. Proc. 89-4 §6.02, 1989-1 C.B. 767 (defining a volume submitter plan as "a pension, profit-sharing or stock bonus plan the form of which meets certain criteria established by an individual key district which is submitted pursuant to procedures established by the key district for filing determination letter applications under the district's volume submitter program"). Rev. Proc. 90-17 §6.02(b), 1990-1 C.B. 479 defines a volume submitter specimen plan as a volume submitter plan "that is submitted to the key district office by a practitioner who certifies that no fewer than 30 employers within any two regions of the Service are expected to adopt a plan that is substantially identical to the specimen plan following the district office's approval of the specimen plan."

⁵⁸ *Id.* at §§2.02-03

⁵⁹ *Id.* at §2.02

⁶⁰ *Id.* at §2.03

⁶¹ 1989-1 C.B. 780

⁶² Rev. Proc. 89-13, 1989-1 C.B. 801

plan, regardless of how many employers were expected to adopt the plan.⁷¹ Yearly notices to the IRS and each Adopting Employer, previously required of Sponsoring Organizations,⁷² were eliminated and replaced with a simplified requirement that all M&P plan Sponsoring Organizations maintain a list of Adopting Employers and that Sponsoring Organizations supply the list to the IRS upon request.⁷³ The Unified Program also made uniform the Mass Submitter program by creating a single definition of a mass submitter as any person who could establish that at least 30 unaffiliated adopting sponsors would adopt the basic plan document, while allowing those mass submitters who obtained an opinion letter as a mass submitter of M&P plans under Rev. Proc. 89-9⁷⁴ to generally qualify as a mass submitter under the Unified Program.⁷⁵ Finally, as was previously the case for standardized M&P plans, under the Unified Program, opinion letters issued for all standardized plans, including regional prototype plans, could be relied upon by an Adopting Employer except in certain situations.⁷⁶

Despite the unification of procedures that was occurring during that period, the VS program remained separate. The VS program emerged in the 1980s and was first addressed by the IRS in Rev. Proc. 89-4.⁷⁷ A VS plan was a “pension, profit-sharing or stock bonus plan, the form of which met certain criteria established by an individual key district and which was submitted pursuant to procedures established by the key district for filing determination letter applications under the district’s VS program.”⁷⁸ Pursuant to the program, a practitioner could submit a “lead” or “specimen” plan only if he could certify at the time of the submission that in the future he would submit no fewer than 30 determination letter requests on behalf on employers who have adopted a plan substantially identical to the lead plan.⁷⁹ Unlike M&P plans, VS plans allowed the Sponsoring Organization to delete any plan provisions from the lead plan that did not

⁷¹ Rev. Proc. 2000-20 at §3.06

⁷² Rev. Proc. 89-13 at §14.05

⁷³ Rev. Proc. 2000-20 at §3.07

⁷⁴ “[A]ny person that received a favorable TRA ‘86 opinion letter for a plan as a mass submitter under Rev. Proc. 89-9 will continue to be treated as a mass submitter if it submits applications on behalf of at least 10 sponsors (regardless of affiliation) each of which is sponsoring, on a word-for-word identical basis, the same basis plan document and one or more of the adoption agreements associated with that plan document.” Rev. Proc. 2000-20 at §4.10

⁷⁵ Rev. Proc. 2000-20 at §3.08

⁷⁶ *Id.* at § 6

⁷⁷ 1989-1 C.B. 767

⁷⁸ *Id.*

⁷⁹ *Id.* at §6.02

The last inquiry made by the ACT was simply a request for recommendations to improve compliance for Adopting Employers of PAPs. The following represents a summary of the most frequent responses (starting with the most frequently identified recommendation and listing them in descending order):

The IRS Audit Agent Group

- Adopting Employers should have a better understanding of how their plan operates.
- Sponsoring Organizations should have increased responsibilities to ensure that documents are updated timely and the plan administration handled appropriately.
- The IRS should increase its education and outreach efforts.
- Adopting Employers should be encouraged to seek out and retain competent assistance in the administration of their plan.
- A summary of pertinent plan provisions and/or a summary of the responsibilities to be provided by the Adopting Employer, service providers, and other professionals should be completed and maintained as a part of the plan document.

The Practitioner Group

- Plan documents should be simplified to the extent possible. This includes simplifying Adoption Agreements and requiring Adoption Agreements and plan documents to be written in “plain English.”
- Adopting Employers should be encouraged to seek out and retain competent assistance in the administration of their plan.
- Adopting Employers should have a better understanding of how their plan operates.
- Sponsoring Organizations should have increased responsibilities to ensure that documents are updated timely and the plan administration handled appropriately.
- The amendment process should be simplified by reducing the number of required amendments.

information requests sent by the Sponsoring Organizations, or (ii) where the Sponsoring Organization has a reasonable belief that there may have been document or operational failures by an Adopting Employer. Accordingly, the ACT recommends that the IRS issue further guidance to Sponsoring Organizations with respect to the following:

- What responsibility, if any, does a Sponsoring Organization have to determine whether an Adopting Employer has timely amended a PAP when necessary?
- What responsibilities or actions, if any, are required of the Sponsoring Organization where it reasonably believes that due to operational errors, the plan may no longer be qualified or where an Adopting Employer fails to timely amend a PAP (beyond notification of the availability of EPCRS)?
- What constitutes a “reasonable and diligent effort” to apprise Adopting Employers of required amendments and what information should be maintained by the Sponsoring Organization to demonstrate its compliance with this requirement?
- What actions may be required for a Sponsoring Organization to withdraw the availability of the use of its PAP for an Adopting Employer (presumably after notifying the Adopting Employer of a plan failure which remains uncured)?

Exhibit A

SUMMARY OF BENEFITSLINK SURVEY (33 RESPONSES)

	Failures					Totals	Less Likely	Just as Likely	More likely
	1	2	3	4	5				
1	412(j) Plans exceeding 415					1		1	
2	Participation under 401(a)(26)					1		1	
3	ADP/ACP tests					20		14	6
4	Exclusions of part-time employees					2		2	
5	Independent contractors					2	1	1	
6	Seasonal employees/farming					1		1	
7	Eligibility failures					16		10	6
8	RMD failure					2	2		2
9	Definition of compensation					8	2 1 2	4	4
10	Controlled group failure					1			1
11	Non-amenders					18	3 1 1	7	8
12	Matching/compensation/true-ups					3	3	2	1
13	Excesses not timely distributed					2	1 1	1	1
14	Top-heavy minimum					6	1 1 1	3	2
15	Spousal consent					2	1 1	1	1
16	Participant loans					4	2 1 1	2	2
17	Checking the wrong box					7	2 1 2 1 1		7
	Failures					Totals	Less Likely	Just as Likely	More likely

Advisory Committee on Tax Exempt and Government Entities
June 13, 2007

Exhibit B

SUMMARY OF BENEFITSLINK SURVEY (110 RESPONSES)

	Failures		1	2	3	4	5	Totals	Less Likely	Just as Likely	More likely
1	412(i) Plans exceeding 415									1	
2	Participation under 401(a)(26)									1	
3	ADP/ACP tests	2	0	2				4		2	2
4	Exclusions of part-time employees	2	1	1				4		3	1
5	Independent contractors										
6	Seasonal employees/farming										
7	Eligibility failures	23	13	7				43	3	26	9
8	RMD failure			4				4		2	
9	Definition of compensation	13	8	5				26	2	10	8
10	Controlled group failure	4	1	4				9		1	8
11	Non-amenders	7	9	3				19	3	5	10
12	Matching/compensation/true-ups	2	2	3				7		4	2
13	Excesses not timely distributed.										
14	Top-heavy minimum		2					2		2	
15	Spousal consent										
16	Participant loans		5	4				9		3	3
17	Checking the wrong box										

