Determination Letters

Options for Change

Views of the American Society of Pension Actuaries

response to the
Internal Revenue Service White Paper

The Future of the Employee Plans Determination Letter Program Some Possible Options **(August 8, 2001)**

4245 North Fairfax Drive
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Introduction and Summary

In August 2001, the Internal Revenue Service issued a 36-page white paper ("White Paper") describing options for changing its current approach to issuance of determination letters on the qualification status of retirement plans and requesting comments from the private sector.[1]

This paper is the response by the American Society of Pension Actuaries (ASPA) to the White Paper. In the following sections, ASPA states its views on the options described in the White Paper, and offers certain modifications and counterproposals that might usefully be explored. Our references to options correspond to those in the White Paper.

ASPA is a national organization of approximately 5,000 members who provide actuarial, consulting, administrative, legal and other professional services for qualified plans and §403(b) arrangements. ASPA's members and their clients are committed to compliance with the legal requirements affecting these plans and arrangements.

ASPA's views were developed by its Work Group on Options for Change in the Determination Letter Program. This paper is the result of considerable deliberation involving the entire work group. It represents ASPA's position. This introduction summarizes each section of the paper. It also identifies the principal authors, partly to facilitate communication in the event a reader wishes to further discuss ASPA's position.

Members of the work group would be pleased to meet, individually or as a group, with representatives of the Service to discuss ASPA's views. Work group members can also be reached through the ASPA national office at (703) 516-9300.

American Society of Pension Actuaries
Work Group on Options for Change in the Determination Letter Program

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[1] Internal Revenue Service, *The Future of the Employee Plans Determination Letter Program Some Possible Options*, Washington, DC, August 8, 2001.

Summary of Comments

Section 1 states ASPA's position on elimination of determination letters. Elimination might apply to all plans (Option B) or just to individually designed plans (Option C). ASPA opposes elimination of determination letters in any situation where the sponsor does not have reliance without such a letter. Section 1 also discusses the notion of self-certification (Option E). ASPA opposes this approach. Self-certification would probably mean a step backward in the Service's attempts to achieve a higher level of compliance.

The principal authors of Section 1 are Bruce L. Ashton, Esq., APM, and Nicholas J. White, Esq., APM.

Section 2 describes ASPA's proposal to partially "privatize" the determination letter program (Option D). Under this approach, individuals in the private sector would be authorized to issue determination letters acting, in effect, as agents of the Service. Privatization has great merit. However, it would require establishment of a major system to enroll and monitor those individuals authorized to issue letters. It would also require a substantial educational effort to overcome the bias existing in a large segment of the private sector against privatization. For these reasons, privatization may be an idea whose time has not yet arrived. Nevertheless, if the Service wished, ASPA would be happy to suggest the details of an enrollment system and steps to overcome the current private sector bias.

The principal author of Section 2 is Edward E. Burrows, MSPA.

Section 3 discusses the idea of a registration system (Option F). ASPA believes this idea has merit and could lead to an enhanced level of compliance. However, it is not a substitute for the existing determination letter program. A registration procedure would need to be added to machinery that already exists. Its main advantage is that it would identify, for each plan, the individual or organization responsible for maintaining compliance. In most cases, these individuals or organizations would be third party service providers. Hence, the Service would find it easier to identify those service providers whose clients appear to experience consistently higher than average levels of difficulty in achieving compliance. This early identification could lead to a more focused and efficient approach to examinations. We provide a partial illustration showing the type of registration statement ASPA envisions.

The principal advantage of a registration requirement would be the help it would give the Service in improving the efficiency of its examination program. In ASPA's view, the registration requirement would improve voluntary compliance. Service providers would realize that if they fail to do their job correctly, they are likely to be found out. However, a far more significant contribution to improved voluntary compliance would involve a rule that the registration statement must be prepared by an accredited practitioner. This requirement would necessitate the same development effort as privatization. That is, it would necessitate establishment of a system to enroll and monitor the individuals authorized to complete registration statements.

ASPA has long advocated a system under which plans would be required to obtain periodic certification by an accredited compliance specialist. If it were deemed desirable to pursue such a requirement, ASPA would be happy to suggest a detailed approach.

The principal author of Section 3 is Charles J. Klose, FSPA, CPC.

Section 4 describes ASPA's proposal to stagger remedial amendment deadlines (Option G). ASPA strongly endorses this approach. However, in exploring it, ASPA concluded that developing consistent rules for the many different situations requiring rules is more of a challenge than might have been anticipated. Section 4 outlines, in some detail, our proposals for an approach to implementing this approach. ASPA has attempted to treat each of the various situations that will need to be addressed.

The principal author of Section 4 is Robert M. Richter, Esq., APM.

Section 5 states ASPA's position on the question of immediate amendments to reflect changes made by either Congress or the regulators (Option H). No amendment other than a very general good faith amendment should be required before the end of a plan's remedial amendment period in which the change is effective. Where a change is mandatory and the plan sponsor has no options, even the good faith amendment requirement should be waived. Finally, ASPA suggests waiver of the good faith amendment requirement for any change in which an overwhelming majority of sponsors can be expected to make the same election. This would require an identification, for any change, of the "majority election." This identification would be accompanied by a ruling that any sponsor who fails to adopt a good faith amendment will be deemed to have made this majority election.

The principal author of Section 5 is Robert M. Richter, Esq., APM.

Section 6 states ASPA's position on the desirability of requiring that all sponsors equip themselves with plan operation manuals. Some sponsors find operation manuals to be valuable tools that enhance plan administration. Other sponsors who do not now use manuals would probably benefit by using them. However, in still other cases, manuals would fail to improve operations for one simple reason: they would not be read. Experienced practitioners find it relatively easy to identify cases in this last group. In such cases, money spent on preparation of a manual is money wasted. Manuals should be encouraged, but their use should be entirely voluntary.

The principal author of Section 6 is John P. Parks, MSPA.

Section 7 discusses other tools proposed in the Service's paper. ASPA attempts to identify those tools that would be useful and those that would in ASPA's view be counterproductive.

The principal authors of Section 7 are Bruce L. Ashton, Esq., APM, and Nicholas J. White, Esq., APM.

Additional Considerations

ASPA applauds the efforts of the Service to improve the efficiency of its determination letter program. ASPA believes and hopes that these efforts will produce significant improvements.

As the revised direction of the program becomes clearer, steps should be considered to bring 403(b) plans and governmental 457 plans under the program.

ASPA advocates asking Congress to consider extending reliance concepts to labor law requirements that parallel those in the tax code. These would include, most importantly, the requirements of ERISA and ADEA.

ASPA also advocates asking Congress for tax and labor law legislation that will accommodate the proposals described in Section 5. These are the proposals that would permit deferring certain plan amendments reflecting statutory and regulatory changes. An inherent component of these proposals is that all applicable tax and labor laws would be applied as though the deferred amendments had been made on the effective date of the change. The relevant applications would include issues such as the anti-cutback rules, funding standards, and deduction limits.

Section 1

Eliminating or Replacing the EP Determination Letter Program (Options B, C, and E)

Arguments Against Options B and C: Elimination Of The EP Determination Letter Program Providing Model Plans For Employers Who Want Reliance

Introduction

The EP determination letter program provides a valuable benefit to plan sponsors, plan participants, and plan service providers. The Service should retain the program.

The qualified plan world is complex. If a plan sponsor or service provider makes a mistake in a plan document, it can result in plan disqualification, along with serious tax liabilities and penalties. One of the primary causes of plan qualification failures and other administrative problems is the failure to follow the plan's written terms. This failure places a high premium on plan document accuracy and clarity, which are the roadmaps for complying with the qualified plan rules. The best, and perhaps the only, way to ensure that the roadmap is accurate is for the Service (or someone deputized by the Service) to confirm plan accuracy and clarity through the determination letter program.

Model plans, on the other hand, are not a viable substitute for the determination letter program, and their use may have a negative effect on plan design. Furthermore, model documents cannot possibly address all the options plan sponsors may desire. The Service acknowledged in its White Paper that model plans would discourage innovation and flexibility in plans. The lack of options, in turn, will prevent many plan sponsors from meeting the special needs of their workforce.

Specific Arguments In Favor of Retaining the EP Determination Letter Program

Reliance & Confidence: Determination letters give plan sponsors, plan participants, and plan service providers reliance that their plans meet the document requirements of the qualified plan rules. This, in turn, is the first step in complying with these rules operationally. In addition, the determination letter review process provides an excellent opportunity to discover and resolve—to the Service's satisfaction—any ambiguities that may exist in the plan's language. As a result, receiving a determination letter provides parties with a high level of confidence in their plan document. This confidence serves to

facilitate proper plan administration, which, in turn, ensures that plan participants receive the benefits to which they are entitled.

Retroactive Protection When the Service Issues Additional Guidance or "Clarification": It is not unusual for the Service to issue additional guidance or "clarification" long after a particular provision of the qualified plan rules becomes effective. The additional information may require a plan sponsor to amend its plan to bring it into compliance. In such a case, a favorable determination letter is the only means by which the plan can be protected against the potential for retroactive disqualification.

Innovation & Flexibility in Plan Design: The determination letter program promotes innovation in plan design because it allows plan sponsors and their professional advisors to submit plan design issues to the Service and obtain a ruling on issues without the risk of plan disqualification. The determination letter program paves the way for both innovation and flexibility in plan design, which can sustain and create interest in retirement programs, generally, and improve benefits for plan participants.

Facilitation of Plan Transfers in the Context of Corporate Mergers & Acquisitions: The determination letter program facilitates plan transfers in the context of corporate mergers and acquisitions because buyers are much more likely to accept transfers of plan assets from plans that have a current favorable determination letter ruling. A determination letter gives the buyer an additional level of assurance that its plan will not be "infected" (and, thus, subject to disqualification) by transferring in assets from the seller. In some cases, a favorable determination letter ruling can provide sufficient confidence such that a seller may be willing to either continue a plan that might otherwise be terminated, or extend the plan's coverage to its employees. On the other hand, if the Service were to discontinue the determination letter program, it would make buyers more reluctant to accept plan transfers. By preserving plans, the Service also helps preserve retirement benefits.

Increased Portability: The argument that a determination letter ruling increases portability is similar to the facilitation the determination letter program provides for plan asset transfers in the context of a merger or acquisition. That is, transferee plans are far more likely to accept transfers and rollovers from plans with a current determination letter ruling. The absence of a determination letter program would have the opposite effect. In addition, sustaining the current determination letter program is an important part of supporting the portability changes enacted under EGTRRA.

The Absence of a Determination Letter Program Could Result in Widespread Non-Compliance: If the Service were to discontinue the determination letter program, it could lead to widespread non-compliance because the Service's ability to review plans would likely be limited to those relatively few instances in which plans are examined or submitted under voluntary remedial programs. Without a determination letter program, a high percentage of plans would likely go unchecked by the Service for many years and, potentially, the entire time the plans are in existence. Given the complexity of the qualified plan rules, perhaps many of these plans (and potentially all of the plans prepared a single service provider) will have incurred qualification failures, which could

otherwise have been identified and corrected as a result of the determination letter process.

However, without a determination letter program—and given the fact that only a small percentage of plans would likely be examined—there would be a relatively small risk to the individual plan sponsor in ignoring the qualified plan rules, thereby leading to significant non-compliance.

The Absence of a Determination Letter Program Could Discourage Plan Formation: If the Service were to discontinue the determination letter program, the inability to obtain reliance on the form of a plan document may pose too great a risk for many employers and thus effectively discourage plan formation.

Specific Arguments Against The Development of Model Plans

Model Plans Will Not Sufficiently Address ERISA Concerns: Often, employers want flexibility on how they address ERISA (*i.e.,* Title I) concerns in their plan documents. For example, an employer may want to use particular language to describe their ERISA plan administrator's discretion to determine eligibility for benefits to dictate the standard of review in the event such determination is later addressed by a court.[2] An employer may also want to discuss in its plan document the applicability and function of ERISA §404(c) and the operation of its participant loan program. Model plans would not provide for flexibility in addressing these and other important ERISA concerns.[3] They are not a viable substitute for plans drafted by practitioners.

Model Plans Will Not Sufficiently Address Trust and Administration Issues: Often, the institutions that serve as trustees for qualified plans require particular language to be included in the trust document. It is highly unlikely the Service—or any organization—could develop a model trust document that would meet the particular needs of even a majority of these trustees. Furthermore, as a practical matter, the institutional trustees would likely also be unwilling to review the Service's model trust language to determine whether it addresses all of their particular concerns. Rather, the trustee would probably require the employer to use its trust document or forego its services. This requirement would appear to be an unreasonable restraint on a plan sponsor's ability to choose a particular service provider and/or trustee. Similarly, these same concerns apply to plan document administrative issues.

For the foregoing reasons, including those described in the "Introduction" section above, model plans do not adequately address the needs of plan sponsors and are not a viable alternative to the determination letter program.

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[2] See *Firestone Tire & Rubber Co. v Bruch*, 489 US 101 (1989).

[3] ASPA acknowledges that Title I issues are not now covered by a determination letter.

Arguments Against Option E:
Replacing the Determination Letter Program
With a Self-Certification System

Summary: The current determination letter program facilitates compliance with the qualified plan rules and provides valuable benefits to plan sponsors, plan participants and plan service providers. Replacing the determination letter program with a self-certification system would result in widespread non-compliance, which could not be adequately addressed by the Service through its examination function. The proposed self-certification system should be rejected.

Arguments: As discussed in our arguments against elimination of the determination letter program, qualified plan rules are highly complex and, therefore, require significant technical expertise to understand and implement on both a plan document and operational level. A significant number of plan sponsors will be unlikely to undertake the education necessary to enable them to legitimately certify that their plans meet the requirements of the qualified plan rules. Even if a plan sponsor were to acquire a working knowledge and understanding of the qualified plan rules, given the demands on plan sponsors, it is unreasonable to assume the sponsor would invest the time and energy necessary to properly analyze a plan's documentation and operation so as to be in a position to make a competent certification concerning compliance.

Plan sponsors will be disinclined to retain the services of qualified plan professionals to provide an opinion concerning the plan's level of compliance, upon which the plan sponsor could rely in making the certification. Relatively few sponsors would enter into such an arrangement and, therefore, it is unrealistic to expect that a significant number of plan sponsors could make a certification on this basis.

In a high number of cases, self-certification would probably be made on the basis of insufficient knowledge, experience and/or data. This would conceivably lead to widespread non-compliance, and perhaps reckless disregard for the qualified plan rules. It is unlikely the Service would have adequate resources necessary to address such non-compliance through its examination function, which would thereby place valuable retirement benefits at an unacceptable level of risk.

ASPA strongly supports third-party verification of plan documents, as currently in place under the determination letter program, and opposes a self-certification system.

Section 2
Partially Privatizing the Determination Letter Program (Option D)

The ASPA Proposal

The proposal takes its lead from Option D recited in the White Paper. It involves partial privatization of the determination letter program.

The determination letter program would continue with one important change: Determinations would be made, and determination letters issued, by Enrolled Qualification Reviewers (EQRs).

At least initially, this approach would apply only to determination letters issued to plan sponsors. Involved sponsors would include those using master, prototype, and volume submitter documents as well as those using individually designed documents. As under the current arrangement, it would be necessary to have separate letters directed to the institutions and other service providers sponsoring master, prototype, and volume submitter documents. These letters would indicate that document wording is acceptable. These letters pre-approving the documents would continue to be issued by employees of the Service.

An EQR would be a private sector practitioner who has demonstrated the willingness, experience, and knowledge necessary to perform the function of reviewing plans to determine their qualification status. The status of an EQR would be analogous in many respects to the status of an Enrolled Actuary.[4]

A practitioner could be enrolled as a document reviewer ("EQR for Documentation"), an operations reviewer ("EQR for Operations"), or both.

An EQR for Documentation would be authorized to review plan and plan related documents and determine whether these documents on their face evidence a qualified plan.

An EQR for Operations would be authorized to review demographics and determine whether non-discrimination requirements are satisfied relative to coverage, benefit amounts, and benefits rights and features. This review would include determining whether discrimination tests for the year under review have been satisfied. More

[4] We have not discussed in detail the qualification, testing and continuing education requirements for EQRs, but would be pleased to provide the Service with our suggestions if desired.

importantly, it would include determining whether testing methodology is acceptable. Plan sponsors would have the same measure of reliance under the new procedure as under the existing one. Reliance is important to plan sponsors. It protects a plan sponsor who receives a favorable determination letter and follows the plan's terms in operation. In general, subject to four key conditions, the plan will not be retroactively disqualified if the Service later determines that the plan is not qualified.[5]

Technical Support

The Service would maintain a technical support facility to assist any EQR who encounters a question for which there is no apparent authoritative precedent. In order for the approach to work, the Service's assistance to the EQR would need to be prompt.

It would be a policy of the Service that technical support would involve one of the following:

- Advice that the proposed course of action is acceptable,
- Advice that it is unacceptable, or
- Advice that guidance has not been formulated on the issue, and pending guidance, the law should be interpreted in a reasonable manner.

Any one of these three forms of advice would constitute technical support.

EQRs would be encouraged not to rule favorably, without obtaining technical support, on a question for which there is no authoritative precedent. However, for the program to be effective, it would be critically necessary for the third form of advice, that guidance has not been formulated, to constitute technical support.

Consider the situation where an EQR has ruled favorably and a Service examiner later determines that there should not have been a favorable ruling. The burden would be on the EQR to show either that an authoritative precedent did exist or that technical support had been obtained. A failure to show one or the other would not necessitate retroactive correction of the plan document, though prospective amendments would, of course, be required. In other words, the plan sponsor would still have reliance on the EQR's ruling. However, the EQR would be subject to disciplinary action by the Service. On the other hand, the EQR who obtained and followed technical support would be immune from discipline.

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[5] The four key conditions are that 1) the determination letter request did not misrepresent or omit material facts, 2) the facts later developed do not differ materially from the facts on which the letter was based, 3) there has been no change in applicable law or regulation, and 4) the sponsor acted in good faith in relying on the letter.

The technical support procedure would operate in a manner similar to operation of the Technical Advice Memorandum procedure now in place, except that expedited processing would be added.

Just as with private letter rulings, technical support obtained by one EQR could not be used as a precedent by any other EQR. However, the Service would maintain and make available to all EQRs a list of issues respecting which any EQR has been told that guidance has not been formulated. Until an issue had been removed from this list, the EQR would be free to approve any reasonable, good faith approach involving the issue. Reliance on this list would not, by itself, subject the EQR to discipline.

Conflict of Interest

It would be permissible for practitioners to rule on acceptability of plans for which they supply design or testing support. In this respect, the approach would be similar to the approach with enrolled actuaries.

In the case of an enrolled actuary, the practitioner does the work and then prepares a Schedule B showing whether funding standards have been satisfied. Similarly, with an EQR for Documentation, it would be acceptable for the practitioner to prepare the documents and then make a determination on whether the documents satisfy qualification requirements as to form. And similarly, with an EQR for Operations, it would be acceptable for the practitioner to perform non-discrimination tests and then make a determination on whether the non-discrimination requirements are satisfied.

Adverse "self dealing" consequences would be avoided by a vigorous discipline process. The privilege of retaining the EQR designation would be viewed as a valuable asset. Practitioners would be very reluctant to risk disenrollment. This is discussed later in the section captioned "Financial Incentive to the EQR."

The ability to let the EQR certify on acceptability of a plan he or she designed or tested is a critical aspect of the proposal. Without this ability, the program would impose prohibitive costs on the sponsor seeking a determination. Without this ability, the program would be unworkable.

For example, an EQR who prepared a plan document is in a position to determine whether it complies. The EQR-practitioner would not need to make further examination. Requiring that a separate practitioner review the document would substantially increase the cost of review and make the program infeasible.

Advantages of the Proposal

The proposal would eliminate the peaks and valleys that the Service currently experiences in its workforce needs. The time-consuming portion of the determination letter program would be shifted almost entirely to the private sector.

By limiting the roster of EQRs to experienced, knowledgeable practitioners, the approach would improve quality of the review. Salary constraints have made it difficult for the

Service to retain trained personnel, and the Service is continually fighting to train new reviewers.

The proposal would eliminate a technique that has become alarmingly prevalent. Under this technique, a practitioner encountering a questionable provision or method will propose tentatively adopting it and requesting a determination letter. Too often, the favorable letter is forthcoming where it should not have been issued.

Under ASPA's proposal, the practitioner encountering a questionable provision or method would be required to either opine on acceptability of the feature or seek technical support from the Service. ASPA believes that volume requirements on the technical support facility would be kept to a level low enough to permit exclusive use of experienced, knowledgeable Service personnel.

The proposal would improve consistency among plans. Under the current arrangement, the combination of extreme complexity of the rules and differing experience levels of the reviewers has led to inconsistency. Some reviewers routinely approve features and testing methods that other reviewers just as routinely reject. EQRs, being more experienced, would be more familiar with the complex rules and the reasoning underlying these rules. This increased familiarity would improve consistency.

The description of Option D in the White Paper suggests that a possible drawback of privatization would be greater inconsistency. On the contrary, an *advantage* of privatization would probably be greater *consistency*.

Financial Incentive to the EQR

Every practitioner firm would have a powerful incentive to employ (or establish close contractual relationships with) at least one EQR. The firm without such a facility would need to recommend that its clients obtain determination letters from separate entities. This would mean the firm's clients would face the high cost of obtaining review and approval from this separate entity. The resultant competitive disadvantage would make it infeasible to practice without close access to EQR services.

This, in turn, would give the experienced practitioner who is able to meet qualification standards a powerful incentive to obtain and retain EQR status. This incentive would bring major advantages to the system. The competence of EQRs in general would be held to a very high level. EQRs would place a high value on their designations and would be reluctant to take any action that might place those designations in jeopardy. The resultant automatic policing would be an effective tool in assuring that EQRs comply with the rules.

EQR Liability

One of the most frequently voiced private sector objections to privatization involves the liability exposure of the EQR. The most important factor making this a non-issue is the element of reliance already recited.

Without reliance, there would be legitimate concerns over the consequences of an incorrect decision by an EQR. Suppose, for example, an EQR made an honest mistake in determining that a plan is qualified when it is not. Without reliance, disqualification might be retroactive. The consequence might be an expensive lawsuit brought by the sponsor against the EQR.

The element of reliance essentially eliminates this exposure.

It is true that even with reliance, an IRS examiner might determine that a change must be made *prospectively*. Arguably, any such determination could lead to a suit by the sponsor against the practitioner. The sponsor might take the position that if the need for any such change had been anticipated, the sponsor would never have adopted the program.

However, to the extent the risk (however minimal) does exist, it is no greater than the risk an advisor faces now, when a determination letter is issued by the Service and an examiner later rules that there must be prospective changes.

Indeed, the technical support facility already discussed should *reduce* this risk. The EQR would be able to submit any questionable provision or testing method to the technical support facility. Upon a ruling that the questionable element is acceptable, the EQR would be relieved of liability.

Cost to the Sponsor

Another frequently voiced objection to privatization is that the program would cause increased costs to the sponsor. This could cause a slowdown in the adoption of new plans. It could cause stagnation under which existing plans are not kept current with changing needs. It could also cause an undesirable trend away from obtaining determination letters.

This objection disappears if the practitioner who supplied design and testing support for a plan is permitted to make determinations regarding the same plan. As discussed in the section on conflicts of interest, the ability to let the EQR certify on acceptability of a program he or she designed is a very important aspect of the proposal. So long as this advantage is retained, the sponsor cost would be *less*, not *more*, than under the current arrangement. The program would eliminate:

- User fees,
- The cost of preparing a request for determination, and
- The cost of interacting with a Service reviewer.

Additional Details

If the Service saw merit in pursuing the concept of privatization, ASPA would be pleased to suggest details for establishment of the machinery necessary to develop and maintain a list of Enrolled Qualification Reviewers. The process would include:

- Adding applicants to the list after determining that they have satisfied qualification requirements,
- Retaining practitioners on the list after determining that they have satisfied ongoing continuing education requirements, and
- Removing practitioners from the list (temporarily or permanently) when and if they have demonstrated unfitness to serve.

Section 3

Registration System
(Option F)

Introduction

There appears to be a current need to increase qualified plan compliance. Unfortunately, the Service has been hampered by a workforce reduction that has limited its ability to perform field audits of qualified plans. This limitation is exacerbated by IRS resources that have been moved from performing audits to the current determination letter program, with its inherent workload peaks and valleys.

The registration system contemplated in Option F addresses the idea of a determination letter substitute and the problem of ongoing plan compliance. As such, Option F seems to involve more than finding a substitute for the current determination letter program. From all indications, Option F appears to be focusing, to a greater degree, on a desire for an increase in plan compliance with the Code and an increase in compliance-related guidance more recently issued by the Service. These two different, but important, perspectives should be separated and considered independently.

It should be pointed out that the other options outlined in the White Paper do not combine the determination letter substitute with attempts to improve ongoing, year-by-year compliance. We believe that the concept of a registration statement, in the form of a Certified Compliance Checklist ("Checklist") has value. A Checklist could be an effective and worthwhile compliance tool. An enhanced compliance and registration statement, in the form of a Checklist that would be signed by both the plan sponsor and by the third party recordkeeper/compliance administrator, would be a good first step to increasing compliance.

The ASPA Proposal

Under ASPA's proposal, the present determination letter program would not be affected by a new Checklist requirement; it is separate from the proposed Checklist.

A Checklist would be drafted by the IRS and would be filed annually as a separate Schedule with the Form 5500. The Checklist would have to be signed by both the plan sponsor and, if applicable, by the third party recordkeeper/compliance administrator.

ASPA is eager to work with the Service to design and create a Checklist. In Exhibit A, ASPA has included a preliminary draft, for discussion purposes, of a Checklist that could be used for defined contribution plans. ASPA hopes that Exhibit A can serve as an initial prototype in the development and evolution of such a Checklist. As the concept evolves,

the Checklist could be expanded to encompass both defined contribution and defined benefit plans.

Advantages of the Proposal

The Certified Compliance Checklist would better insure compliance with the various qualification provisions of the Code.

Many employers, based on their understanding of the law, conclude that the qualified retirement plan area is beyond their capabilities and retain a third party recordkeeper/compliance administrator to handle the compliance administration of their plan. A Checklist will advise the IRS of the third party providing such services. In addition, by signing the Checklist, the third party is putting its name, professional reputation and possible exposure to liability or disciplinary action on the line as it pertains to the relevant compliance issues.

On the other hand, other employers, again based on their understanding of the law, conclude that they can handle the administration of their qualified plan in-house. In smaller companies, this function may be handled by the bookkeeper. In larger companies, a benefits department and/or a human resource department usually handles this function.

A Checklist will advise the Service of those plan sponsors who are not using the services of a third party recordkeeper/compliance administrator. It is likely that a requirement, such as the one proposed, would encourage plan sponsors to revisit the decision not to use a third party. In situations where the plan sponsor realizes that it does not have the necessary expertise, a third party recordkeeper/compliance administrator will be retained.

Most non-compliance situations are caused by ignorance of the law, and not by an intentional disregard of the law. If ASPA's Checklist requirement were to be adopted, it would most likely result in an increased use of the Service's self-correction programs. The Checklist would likely help the Service (and plan sponsors) discover operational, document and demographic failures and more likely spur employers to self-correct.

Creating an additional Schedule, in the form of a Checklist, to be filed as part of the existing Form 5500 series, would be most effective. Since the Form 5500 series is already in existence, the addition of another Schedule should not require any legislative changes. Further, from the perspective of the Service, the Checklist could enhance the effectiveness in plans selected for examination.

Disadvantages of the Proposal

The Certified Compliance Checklist could increase the burden and cost of maintaining a qualified plan, especially for those plan sponsors who currently are not using the services of a third party recordkeeper/compliance administrator.

There would most likely be pushback to the proposal from those small employers who are not currently using the services of a third party recordkeeper/compliance

administrator. In addition, there would most likely be pushback to the proposal from large financial institutions that have previously voiced their displeasure at such a concept.

Summary

The authors of the White Paper have consistently encouraged employee benefit professionals to "think outside the box" when commenting on the contents of the paper. The Certified Compliance Checklist certainly is a concept that is outside the current box, yet it provides a workable, affordable, and effective tool to close the gap between plan compliance and noncompliance.

Section 4

Staggered
Remedial Amendment Periods
(Option G)

ASPA believes that staggered remedial amendments periods would level the peaks and valleys that currently occur in the determination letter program. All of the pros and cons listed in the White Paper of a staggered remedial amendment period (RAP) (see pp 27-28) are accurate. In reviewing the staggered RAP approach, we concluded that it presents a number of practical challenges. The following are suggestions on how a staggered approach could be structured to address these challenges:

1. Begin the staggered RAP process as part of the Service's EGTRRA regulatory updates.

2. Existing rules regarding automatic reliance on M&P and volume submitter plans would be retained (*i.e.,* IRS Announcement 2001-77 would apply).

3. The RAP would be synonymous with the reliance period under Code §401(b).

4. The existing rules would apply to both the establishment and termination of plans. Thus, the remedial amendment for a new plan would end based on the rules set forth in Code §401(b) regulations (*i.e.,* the RAP would end on the tax return due date for the fiscal year ending with or within the initial plan year). Terminating plans would need to be updated for all applicable laws as of the termination date.

5. For ensuing legislative changes, there would be staggered RAPs. The RAP would cover legislative changes as well as other changes that are integrally related to the legislative changes.

    a. *The Cycle*. A 5-year cycle has been suggested and seems acceptable. One suggestion is that the cycle be based on the last digit of the plan sponsor's taxpayer identification number. For example, if the digit ends on 0 or 5, then the RAP would be 2005, 2010, 2015, etc.

    b. *Calendar Year Basis*. For simplicity, the cycle should be based on the calendar year (*i.e.,* the RAP ends on 12/31 of the 5th year of the cycle).

    c. *Stated in Plan*. We suggest that a plan's RAP cycle be stated in the plan documents. The RAP could only be changed in certain limited situations.

    d. *Two-Year Rule*. There are a number of situations (most of which are addressed below) where a special "two-year rule" could be utilized. The

two-year rule would provide that a plan's RAP need not be earlier than 2 years from the prior RAP.

For example, suppose an employer's cycle (based on its taxpayer ID) ends in 2008, but the employer establishes a new plan in 2006. The plan's initial RAP would end during 2007 (based on the general RAP that applies to the establishment of the plan). Because the general cycle would end less than 2 years after the first RAP, the two-year rule would apply. The employer could (but it is not required to) base its 5-year cycle from the year in which the initial RAP expired (*i.e.,* RAPs would end in 2012, 2017, etc.). Requiring that the cycle be stated in the plan's terms would eliminate confusion in subsequent years.

e. *Multiple Employer Plans*.

1. *Establishment of multiple employer plans*. The initial RAP would be based on the existing Code §401(b) rules. Subsequent RAPs would be based on the earliest year that would apply to any participating employers. However, the two-year rule could be utilized.

2. *An employer merges an existing plan into an existing multiple employer plan*. No special rules are needed. The RAP is based on the existing multiple employer plan.

3. *Spin-off from a multiple employer plan*. The plan being spun off would have a RAP based on the multiple employer plan.

4. *Existing multiple employer plans*. The RAP would be based on the earliest year that would apply to any of the participating employers.

f. *Multi-Employer Plans*. The same rules as above would apply. The RAP would be based on the plan's sponsor (*i.e.,* the union) tax ID number. If there is no single sponsor, the RAP would be based on the same rules that apply to multiple employer plans.

g. *Plans of Controlled Groups or Affiliated Service Groups*. The same rules as above would apply.

h. *Business Entity Changes*. No special rules are needed. Once the RAP cycle has been established and stated in a plan, it generally would not be changed. Thus, a change in the sponsoring entity (which would be defined by a change in the taxpayer identification number of a sponsor) would not alter the RAP that had already been established.

i. *Spin-offs*. No special rules are needed. The RAP cycle set forth in the plan would apply to each separate plan being spun off.

j. *Merger of Plans Not Initially Sponsored by Same Employer*. The RAP cycle would be the earliest RAP of the plans being merged, but the two-year rule would also be applied.

6. *Amendments to Existing Plans*. An employer would be permitted to submit amendments for approval during the RAP cycle. If the amendment were being submitted with Form 6406, then the RAP cycle would not change. If an entire plan is being submitted for a determination letter, then the employer can select a new 5-year cycle as long as the next RAP does not end more than 5 years after the end of the calendar year in which the submission is made.

7. *Master and Prototype (M&P) and Volume Submitter Plans (including mass submitters*). M&P and volume submitter plans would need to be updated each year.

   Employers with a cycle ending in a particular year could update using the approved M&P or volume submitter document that was last approved prior to the calendar year in which the employer's cycle ends. For example, if an employer's cycle ends in 2006, the employer could use the latest version of the prototype that was approved prior to 2006 (*e.g.,* 2005 if the last version was approved in 2005). The reason for this rule is because of the time lag involved with the submission, approval, and dissemination of the approved prototype.

Section 5

Immediate Plan Amendments for Legislative or Regulatory Changes (Option G-1)

1. "Immediate" amendments (*i.e.,* amendments during a RAP cycle) should only be required to memorialize elections that are available to employers. Furthermore, even in those situations where an election is available, amendments should not be needed in situations where it is clear that the majority of plan sponsors would want to make the election (*e.g.,* ASPA presumes that the majority of employers would want to implement the higher EGTRRA Code §415 limits). A plan amendment should only be needed for those employers that do not want to take advantage of the higher limits.

   To the extent a change in the law or regulations does not require any elections, then the cost of amending plans outweighs the benefits because in many cases the amendment's language will not be detailed enough to provide meaningful guidance to an employer. While the amendment will serve as notice that the law has changed, other avenues should be explored to accomplish the need for an amendment. Going through the exercise of formally amending a plan just to notify employers is cumbersome and expensive.

2. The Service should issue sample "good faith" language whenever an amendment is necessary.

3. The issuance of the sample "good faith" language would start the period for determining when an employer needs to amend its plan. Employers would be required to amend their plans by the end of the twelfth calendar month following the month in which the Service releases "good faith" language.

4. Regarding Code §411(d)(6), a plan should be treated as having made an immediate amendment in situations where:

   a. Pursuant to 1 above, an immediate amendment requirement was waived because the sponsor either had no options or because there were options, but a majority of sponsors were expected to make the same election; or

   b. Pursuant to 3 above, an amendment was required, but the plan sponsor had a 12-month period to adopt the amendment. This would help ensure that when an employer actually makes the true amendment within the applicable remedial amendment period, there has not been an impermissible elimination of a Code §411(d)(6) protected benefit.

Section 6

Plan Operating Manual

Qualified retirement plans are complex arrangements governed by a number of laws, that come with an infinite variety of benefits, features, types and styles. Out of necessity the responsibility for plan administration must default to the plan adopter. Plan adopters therefore quite often relegate to an individual, or perhaps a group of individuals, the responsibility for dealing with a complex subject for which they have little or no experience or expertise (this is especially true for smaller employers).

The White Paper suggests that a plan operating manual (POM) might address such problems as well as the perceived problem of widespread noncompliance and failure to follow plan terms among certain categories of plan adopters.

In general, having a POM would be an ideal goal for all qualified retirement plans and would be of significant help to most adopters. It is important to note, however, that such a goal would come at a price and may not be the logical alternative for each and every plan.

If a POM were to be developed for a plan, its components might include the following:

- The original agreement or agreements between the plan adopter and the various providers including the administrator, consultant, record keeper, etc.,
- A function definition chart outlining the roles each party would play,
- Implementation procedures,
- Compliance instructions,
- Operational procedures,
- Administrative forms,
- Various plan documents including: the plan, trust agreement, adoption agreement, and summary plan description, and
- A Glossary of terms.

Below are various advantages and disadvantages of using and creating a POM.

Advantages

Requiring use of a POM could have the following advantages:

- A POM could serve as an educational tool to be used in workshops and meetings between the plan adopter and the retirement plan consultant.

- It would consolidate all important plan related information into a single reference document.
- It would foster consistent application of plan provisions
- It would act as a reminder of the various duties for each of the multiple parties involved.
- Properly prepared, a POM would list all the multiple due dates related to plan administration and the various governmental filing requirements and hence act, for example, as a timeline to assist in the avoidance of missed deadlines and penalty fees.
- A POM would add another layer of review to help ensure the accuracy of plan documents.
- A POM could potentially lower long-range administrative costs as adopter personnel become more effective in plan administration.

Disadvantages

Even though formats and standards would be developed over time, the cost of a well-prepared POM would be significant. Given that the cost of a POM is essentially unrelated to plan size, it would have greater impact on the smaller plan adopter.

Each time the plan is amended, or applicable laws change, the POM would require a comprehensive review for likely changes and updates.

A POM might not be utilized even if it is prepared for a particular plan.

When a single employer has multiple plans, there would need to be appropriate cross-references and coordination between the POMs. This may pose a challenge where providers are not the same for each plan adopted.

The broad spectrum of information, as outlined above, that a POM would be required to cover gives rise to two questions: where does the responsibility to develop a POM fall and how the POM might be prepared. The responsibility must naturally fall upon the adopter. In turn, the adopter would, in all probability, assign that responsibility to its team of experts. This team might be a composite of document drafters and the various administrative parties or possibly a single entity assigned that specific duty that has expertise in the breadth of issues that must be incorporated into an effective POM.

Summary

Some sponsors find administration manuals to be valuable tools that enhance plan administration. Sponsors who do not use manuals would probably benefit by using them. However, in still other cases, manuals would fail to improve operations simply because they would not be effectively utilized. In such cases, money spent on preparation of a manual would be money wasted. Manuals should be encouraged, but their use should be entirely voluntary.

If desired by the Service, ASPA would be pleased to provide a sample Plan Operating Manual.

Section 7

Other Tools for the Determination Letter, M&P, and Volume Submitter Program

Establish a Presumption that M&P and Volume Submitter Plans are Preferred. Work Towards Making the Individually Designed Plan the Exception, not the Rule.

As a practical matter, M&P and volume submitter plans are currently preferred by virtue of the high level of reliance the Service's recent guidance has accorded such plans. In addition, large financial institutions, many of which provide their clients with approved prototype documents, currently dominate the retirement plan industry. For these reasons, the individually designed plan is already "the exception, not the rule." Therefore, ASPA believes it is unnecessary to take additional steps that provide preferential treatment to M&P and volume submitter plans (such as the Service's suggestion of requiring practitioners to certify that they do not have 30 clients adopting substantially the same plan).

The Service needs to strike a reasonable balance between its interest in reducing the number of favorable determination letter applications and the interest of plan sponsors to provide for the particular retirement plan needs of their workforces through individually designed plans. If these interests are not properly balanced, plan sponsors may be forced to use M&P or volume submitter documents that do not meet their needs, which could discourage retirement plan formation.

Finally, ASPA supports the Service's suggestion to encourage applicants to be represented by employee benefit professionals when applying for favorable determination letter rulings. Not only will such representation facilitate the interaction during the review process, it will prompt problems to be self-identified and corrected prior to the time the favorable ruling application is filed and, thus, will serve to facilitate overall compliance with the qualified plan rules.

Combine the M&P and the Volume Submitter Programs.

There is no compelling reason to maintain separate programs. In fact, there would be certain advantages to a combined program. At the same time, ASPA is not certain this will have a significant impact on the Service's ability to achieve greater consistency in documents.

In terms of the advantages of a combined program, whatever "umbrella program" the Service adopts, it should retain the flexibility of the volume submitter structure (*i.e.,* the ability to make minor changes to the document and still submit for a determination letter ruling on the basis of a minimum filing fee), with the addition of a provision which

would permit plans to be amended at the document sponsor level, as currently permitted under the M&P program.

Permitting amendments at the document sponsor level would, in almost all cases, obviate the need for individual plan sponsors to adopt amendments in order to keep their plans in compliance with the qualified plan rules. Structuring the combined program in this manner would preserve the best features of the volume submitter and M&P programs. At the same time, it would provide plan sponsors with an option for avoiding the time and expense associated with amending their plans for law changes, which would also reduce the burden on the Service when ruling on those amendments.

It is absolutely essential for any version of an umbrella program to provide the flexibility currently available under the volume submitter program. A lack of flexibility would impair the practitioner community's ability to create documents that meet the varied needs of plan sponsors.

Require All M&P Plans to be Standardized Plans.

ASPA supports the adoption of a combined program that contemplates the flexibility discussed in Item No. 2, above. Therefore, ASPA does not support the suggestion to require all M&P plans to be standardized plans. It would impair the ability of plan sponsors to use relatively low-cost documents to adequately provide for the particular retirement needs of their workforces.

Consider Proposing a Tax Credit for Plan Sponsors, in Appropriate Circumstances, to Help Defray the Cost of Obtaining a Certification.

ASPA supports this suggestion.

Develop Model Plans; Continue to Develop Model Plan Provisions.

Please see our comments in Section 1. ASPA opposes this suggestion.

Publicize and *Encourage Adoption of Code §408(p) SIMPLE Plans, Which do not Require Determination Letters.*

ASPA would be extremely concerned if the Service encouraged employers to establish any particular plan type. Employers should adopt retirement programs based on what best meets the needs of their particular workforce. If the Service finds a need to publicize retirement plan programs, it should provide information on all plan types, and the particular advantages and disadvantages of each in a given situation.

Furthermore, recent events have highlighted the importance of defined benefit pension plans; therefore, to the extent there is any "promoting" of retirement programs, it should be done in a manner which re-establishes a level playing field between defined contribution and defined benefit pension plans. For this reason, promoting SIMPLE plans could tilt the playing field in favor of defined contribution plans.

Exhibit A

Certified Compliance Checklist for Defined Contribution Plan

For Plan Year Ending _____

Name of Plan Sponsor: _____

Employer Identification Number: _____ Three-Digit Plan Number (PN): _____

Name of Plan: _____

	Yes	No	Unknown
Have the procedures used to determine highly compensated employees been reviewed for consistency with the IRC and the plan document?			
Have the procedures used to track service for eligibility, vesting, and benefit accrual been reviewed for consistency with the IRC and the plan document?			
Does the plan satisfy the coverage requirements of IRC §410(b)?			
Was an IRC §414(s) nondiscriminatory definition of compensation used to compute benefits for IRC §401(a)(4) non-discrimination testing purposes?			
Do all "benefits, rights or features" meet the non-discriminatory current and effective availability requirement?			
Have the procedures used to allocate employer contributions and forfeitures been reviewed for consistency with the IRC and the plan document?			
Have the amounts of contribution allocation been determined to be nondiscriminatory and consistent with the requirements of IRC §401(a)(4)?			
If nondiscrimination testing involves "cross testing," have testing procedures been reviewed for compliance?			
If this plan is a §401(k) plan without ADP and ACP safe harbor provisions, has the plan demonstrated compliance with the ADP and ACP tests of IRC §§401(k) and 401(m)?			
Have the procedures used to determine key employees for top-heavy purposes been reviewed for consistency with the IRC and the plan document?			
Does the plan comply (if applicable) with the minimum contribution and minimum vesting requirements for top-heavy plans under IRC §416?			
If this plan is required to comply with the joint and survivor annuity requirements, have the notice and consent requirements been made where required?			

Provide the complete business mailing address of the location where the supporting details for the responses to this compliance checklist are being stored: _____

_____

Statement By Plan Sponsor And Third Party Recordkeeper/Compliance Administrator (see instructions before signing)

To the best of my knowledge, the information supplied in this Certified Compliance Checklist is complete and accurate.

	Plan Sponsor Representative	Third Party Recordkeeper/Compliance Administrator Representative
Signature:		
Print or Type Name:		
Mailing Address (Including Company Name):		
Telephone Number:		