

under section 469, the determination depends on whether the acquisition of the qualified equity investment in the CDE arises in connection with the conduct of a passive activity." But it does provide that the determination "does not depend on the taxpayer's interest or extent of participation in the CDE's trade or business."

Alan S. Lederman, a shareholder with Gunster, Yoakley & Stewart in Ft. Lauderdale, Fla., noted that the fear that the IRS would subject the NMTC to the passive activity rules deterred individual investors from buying partnership and membership interests in CDEs. Thus, CDEs often found that their investor base excluded individuals and was limited to widely held C corporations, particularly large commercial banks, because they are exempt from the passive activity rules.

Lederman said individual investors' fears that the IRS would apply the passive activity rules may have been reinforced by Rev. Rul. 2003-20. That ruling did not address the passive activity rules but described the membership of a CDE LLC as all widely held C corporations. (For Rev. Rul. 2003-20, 2003-1 C.B. 465, see *Doc 2003-2178* or *2003 TNT 16-5*.)

Lederman said the new guidance appears to adopt the view "that CDE limited partnership interests or LLC interests should generally not be subject to the passive loss rules." Lederman pointed out that marketing considerations still disfavor selling NMTC interests to individuals, as distinguished from widely held C corporations, even after Rev. Rul. 2010-16.

**If Congress really wanted to spur investment in the area, it would pass legislation to permit taxpayers to claim the NMTC against the alternative minimum tax, said Lederman.**

Lederman said that Rev. Rul. 2010-16 still leaves the door open for the IRS to disqualify the NMTC as nonpassive regarding the purchase of a CDE interest by an individual. Because an individual's distributive share of the CDE's tax losses could still be deemed passive, widely held C corporations remain more attractive investors in CDEs. He said that if Congress really wanted to spur investment in the area, it would pass legislation to permit taxpayers to claim the NMTC against the alternative minimum tax and to authorize NMTCs for 2010. ■

## Advisory Panel Recommends Retirement Plan Changes

By Sam Young — [syoung@tax.org](mailto:syoung@tax.org)

The IRS should eliminate a widely disliked requirement that qualified retirement plan sponsors amend their plans between cycles of the staggered remedial amendment program, according to an advisory panel.

Members of the IRS Advisory Committee on Tax-Exempt and Government Entities (ACT) made the recommendation in a report presented at an ACT open meeting. ACT's Subcommittee on Employee Plans proposed two options for replacing the interim amendments and numerous other changes to the determination letters program.

### 'Interim Amendments Must Die'

Marcia Wagner of the Wagner Law Group, the subcommittee's project leader, said the subcommittee spoke with groups across the employee plans spectrum to prepare its report. "We spoke to third-party administrators, actuaries, administrators, vendors, attorneys; we had public conferences [and] private conferences; we went to the IRS in Cincinnati to see how the determination letters process works in the trenches," Wagner said. (For the ACT report, see *Doc 2010-12763* or *2010 TNT 111-51*.)

**'The overwhelming majority — in fact I would say unanimity, which is very hard to find for this stakeholder class — was that interim amendments must die,' Wagner said.**

The subcommittee polled IRS employee plans specialists, who reported that the interim amendment process is confusing even for them. When private-sector practitioners were contacted by the subcommittee, "the overwhelming majority — in fact I would say unanimity, which is very hard to find for this stakeholder class — was that interim amendments must die," Wagner said.

The subcommittee proposed that interim amendments be required only for "core" amendments or only for changes to benefits protected by section 411(d)(6). A core amendment would be "anything that would materially affect a benefit right or feature within the meaning of section 404(a)(4)," Wagner explained. "It would be anything that would commit or require participant action. It would be anything that would prospectively reduce a section 411(d)(6)-protected benefit. To give the IRS the

flexibility you need and we need you to have, it would be anything you determine is a core amendment."

Noncore amendments would have to be adopted by the end of the remedial amendment period under section 401(b). According to Wagner, those would be "only ministerial or technical in nature," and notice to participants and incorporation into the plan only by reference should be sufficient to keep a plan qualified. Plan sponsors would be subject to a best-efforts compliance standard for noncore amendments.

The six subcommittee members reviewed all the interim amendments required for cycle D filers to the staggered remedial amendment program and unanimously agreed on which were core and which were noncore amendments, Wagner said. Those conclusions are included in Appendix H to the subcommittee's report along with the subcommittee's rationales. Most of the amendments were judged to be noncore, she added.

The section 411(d)(6) proposal would affect "only the core of what is a pension plan," Wagner said, with other amendments not required until the end of the remedial amendment period. "This is what the private practitioner community thought it was getting with the staggered remedial amendment program," she said.

Andrew Zuckerman, director of rulings and agreements for the Tax-Exempt and Government Entities Division's Employee Plans (EP) group, re-

sponded that the IRS could adopt either suggested change but that that may create some other problems. He disagreed with Wagner that determining which amendments are core would be simple but agreed that even so, the revised system could reduce the burden on plan sponsors.

IRS Commissioner Douglas Shulman, who attended part of the ACT meeting, said the subcommittee's report highlights tensions over how to protect employees while also reducing administrative burden as much as possible.

### Other Recommendations

The determination letter program should cover amendments to retirement plans that are added after the IRS releases its cumulative list of required amendments and before the plan's cycle year closes. Requiring plan sponsors to submit a list of interim amendments and report where they were included in the plan — what the committee calls a self-identification sheet — would make that simple to do, Wagner argued.

The subcommittee suggested other improvements to the determination letter program as well, such as routing more cases filed by the same practitioners to the same EP agents, requiring applications to list the locations of all plan qualification elements, and reducing user fees for applications submitted before July 1.

Zuckerman was doubtful that taxpayers could be persuaded to file earlier. "So far our begging hasn't

## RELIEF FOR RETIREMENT PLANS IN FEDERAL DISASTER ZONES IS IMMINENT, IRS OFFICIAL SAYS

The IRS will publish guidance offering an extension for preapproved defined contribution retirement plan sponsors in federal disaster zones to file applications for determination letters, according to Joyce Kahn, manager (employee plans, voluntary compliance) in the IRS Tax-Exempt and Government Entities Division (TE/GE).

Speaking at the Cincinnati Bar Association's Employee Benefits Conference in Cincinnati, Kahn said the disaster relief notice will extend the time to file applications for determination letters from April 30 to July 30 and extend the remedial amendment period for those plans. She added that she expected the notice to be issued before her presentation and that "it should be dropped any day now." (For prior coverage, see *Tax Notes*, May 17, 2010, p. 738, *Doc 2010-10750*, or *2010 TNT 93-2*.)

Another project is a notice on the definition of readily tradable securities for the purposes of employee stock ownership plans and related code provisions. "That should be out fairly soon," Kahn said.

Final regs for the suspension or reduction of nonelective safe-harbor contributions for employers

that incur a substantial business hardship under sections 401(k)(12) and 401(m)(11) "are also very close," Kahn said. (For the proposed regs (REG-115699-09), see *Doc 2009-11197* or *2009 TNT 93-4*.)

Guidance for combined defined contribution and defined benefit plans under section 414(x) is under way, according to Kahn, although she added that "there are a few tricky issues." She was doubtful that combined plans would get much use but backed away from suggesting that the project should not be a priority.

Officials are also hoping to revise the revenue procedure that governs the staggered remedial amendment program. According to Milo Atlas, senior employee plans specialist in TE/GE, the revision process has been held up by concerns over how to address interim amendments. (For the current revenue procedure, Rev. Proc. 2007-44, 2007-28 IRB 54, see *Doc 2007-14055* or *2007 TNT 115-13*.) ■

— Sam Young

worked too well, but we'll continue to look for ways to deal with that issue," he said.

The subcommittee also recommended a revised annual retirement plan notice that would reference the required changes and effective dates for each interim amendment, changes to the Employee Plans Compliance Resolution System, and changes to section 403(b) plans and retirement plans of governmental employers.

According to Zuckerman, some of the subcommittee's suggested improvements are already being implemented, and others are under consideration. For governmental plans, the IRS is discussing coordinated filings and considering clarified or simplified filing deadlines, and it has established a cadre of agents to handle governmental plans. Combining the voluntary compliance process with the determination letters process is also being discussed as a way to expedite the handling of governmental cases, he added.

**Combining the voluntary compliance process with the determination letters process is also being discussed as a way to expedite the handling of governmental cases, Zuckerman said.**

Regarding to the subcommittee's recommendation for increased use of online filing, Zuckerman said that his office is studying the issue but that it has to follow "overall IRS procedures dealing with security." In the interest of protecting taxpayer information, the Service has standards that may be difficult for EP to meet, he said.

Zuckerman said that "all of these recommendations will get serious consideration" but that not all of them are likely to be implemented.

Wagner thanked the IRS for its assistance with the subcommittee's work. "The access we got was unparalleled," she said. ■

## Officials Consider Proposal for Online Charity Compensation Guide

By Fred Stokeld — [fstokeld@tax.org](mailto:fstokeld@tax.org) and  
Sam Young — [syoung@tax.org](mailto:syoung@tax.org)

IRS officials have expressed interest in a proposal to set up a tool on the agency's website to help charities set executive compensation but said it will need to be studied before it can be implemented.

The proposal was presented last week at IRS headquarters in Washington at the public meeting of the Advisory Committee on Tax-Exempt and Government Entities (ACT). In addition to the charities proposal, there were recommendations about tax-exempt bonds, exempt bonds issued by Indian tribal governments, FICA taxes applied to tribal governments, compliance verification and self-correction by public employers, and employee plans. (For related coverage, see p. 1221. For the ACT report, see *Doc 2010-12763* or *2010 TNT 111-51*.)

### Plain Language

The proposal for a plain language, online guide on executive compensation paid by charities was put together by the ACT's Exempt Organizations Subcommittee and presented by Jack Siegel of Charity Governance Consulting LLC. Siegel said the idea behind the project is to help charities "grapple with compensation and avoid running into problems with the IRS."

Siegel presented screen shots of the online guide. After starting with an opening screen, a user would come to a flowchart with boxes covering different categories including tax law, state law, fringe benefits, common pitfalls, intermediate sanctions, and revocation. By clicking on a box, a user could obtain information about a particular topic.

The guide also has interactive questions, including one that asks which forms of compensation need to be considered when determining whether compensation is reasonable, and interactive diagrams on topics such as disqualified persons and possible penalties for excessive compensation. An interactive diagram of the compensation section of Form 990, "Return of Organization Exempt From Income Tax," also is included.

The guide takes a user through the process of using comparability data, getting board approval of compensation packages, and documenting compensation decisions. The guide includes case studies and frequently asked questions.

### IRS Reaction

Lois Lerner, exempt organizations director, IRS Tax-Exempt and Government Entities Division