Tax Exempt & Government Entities

TE/GE

Advisory Committee on

Tax Exempt and Government Entities (ACT)

2017 Report of Recommendations

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2016-2017 Member Biographies

Tino Batt, Fort Hall, Idaho

Tino Batt is an enrolled member and Tribal Treasurer of the Shoshone-Bannock Tribes of Fort Hall, Idaho. Batt is currently on the Fort Hall Business Council, the governing body of the Shoshone-Bannock Tribes of Idaho. In this position, Batt was involved in monitoring the financial management and accounting practices of all tribal entities operating within the tribal government structure. Batt had served on the Board of Directors for the Native American Bancorporation Co. and volunteers with the local AARP Foundation Tax Aide program and Volunteer Income Tax Assistance (VITA) program on the reservation. In addition, Batt serves on various committees under the Department of Health and Human Services with Administration for Children and Families Tribal Advisory Committee. In the past, Batt has represented the Shoshone-Bannock Tribes at the Tribal Interior Budget Council with the Department of Interior and the Department of Health and Human Services Secretary Tribal Advisory Committee as an alternate. Batt holds a B.S. degree in Human Resource/Corporate Training and Development from Idaho State University.

Susan E. Bernstein, New York, New York

Susan Bernstein is special counsel in the New York office of Schulte Roth & Zabel LLP, where she has been advising employers and plan sponsors on ERISA, employee benefits and executive compensation for 23 years. Bernstein has experience working with qualified plans, nonqualified plans, 457 plans and 403(b) plans, as well as health and welfare plans. Bernstein is co-chair of the Employee Benefit and Compensation Committee for the New York State Bar Association and serves on the Executive Compensation and Benefits Committee of the New York City Bar Association. Bernstein has written numerous articles on employee benefit plan issues in addition to being a frequent speaker on employee benefit topics. Bernstein was named one of Employee Benefit Adviser's Most Influential Women in Benefit Advising and was recognized by the New York State Bar Association as an Empire State Counsel Honoree and by WHEDco

with a Pro Bono Leadership Award. Bernstein holds a J.D. from the Benjamin N. Cardozo School of Law, received her B.A. from the University of Pennsylvania and is a member of the New York Bar.

Judith Boyette, San Francisco, California

Judith Boyette is a partner in Hanson Bridgett LLP, a San Francisco law firm, and is the senior partner in the firm's Employee Benefits Group. Prior to joining her law firm, Boyette spent more than 10 years at the University of California as the Associate Vice President of Human Resources and Employee Benefits. Boyette's clients include single employer and multi-employer plans, 403(b) plans, church plans and governmental plans. Boyette received a J.D. from the Hastings College of the Law and is a member of the California Bar.

Natasha Cavanaugh, Seattle, Washington

Natasha Cavanaugh is a tax attorney for the Bill & Melinda Gates Foundation. Prior to joining the Gates Foundation, Cavanaugh served as lead tax attorney at a major public research university where she managed complex tax matters, including the university's medical resident FICA tax refund claim. When in private practice, Cavanaugh represented educational organizations, museums, private foundations and other tax-exempt organizations. Cavanaugh has a J.D., University of Virginia, M.A., Sociology and a B.A., Economics, Stanford University.

Amy Coates Madsen, Baltimore, Maryland

Amy Coates Madsen is the director of the Standards for Excellence Institute, a program of the Maryland Association of Nonprofit Organizations where she has served for more than 20 years. Madsen specializes in nonprofit organization management and governance issues and works with organizations of all sizes and mission areas. Madsen serves as a frequent trainer and writer in the areas of nonprofit best practices, board conduct, openness/transparency, program evaluation, program replication, fundraising ethics and regulation, and nonprofit management. Madsen received her B.A. degree from Virginia Tech, and her M.A. in Policy Studies from Johns Hopkins University.

Dean J. Conder, Denver, Colorado

Dean Conder is the Deputy State Social Security Administrator for the State of Colorado and has more than 16 years of experience working with state and local governments on FICA tax compliance matters and related training. Conder is a member of the National Conference of State Social Security Administrators and serves as its training and succession-planning chairperson. Conder co-authored an article on "Common Errors in State and Local Government FICA and Public Retirement System Compliance," which was published in the Government Finance Review (GFOA) in August 2009. Conder has also served as a state level board member for the state's Section 457 retirement plan. Conder previously served on the IRS Taxpayer Advocacy Panel and is a past president of the National Conference of State Social Security Administrators. Conder holds an M.S. degree from the University of Denver College of Law.

David Danenfelzer, Austin, Texas

David Danenfelzer is a community development professional committed to advancing the fields of nonprofit management, community planning and public finance. His current employer, Texas State Affordable Housing Corporation, is a statewide nonprofit housing finance corporation. Danenfelzer has helped Texas State Affordable to increase investment in affordable housing, redesigned its multifamily bond finance programs and created the first statewide affordable housing land bank. Danenfelzer is an alumnus of the University of Wisconsin at Madison and received his MSCRP at the University of Texas at Austin.

Vandee V. DeVore, Jefferson City, Missouri

Vandee DeVore is the Deputy State Social Security Administrator for the State of Missouri and has more than 27 years of government experience, including experience as an accountant, tax auditor, payroll manager and Assistant Director, Division of Accounting. As the Assistant Director, Division of Accounting, DeVore oversaw and managed statewide payroll and policy, including tax withholding, reporting and reconciliations, Social Security administration and statewide employee benefit budget preparation. As the Deputy State Social Security Administrator, DeVore acts for the state with respect to its responsibilities for maintaining and administering the provisions

of the state's Section 218 agreement/modifications and the proper application of Social Security and Medicare coverage. DeVore is an active member of the Association of Government Accountants, having served in several roles in the local chapter and the national organization. DeVore currently serves as the Immediate Past-President on the Executive Committee of the National Conference of State Social Security Administrators. DeVore is also an adjunct instructor of managerial, governmental and nonprofit accounting at Columbia College in Missouri. DeVore holds a CGFM and has a B.A. in Accounting from William Woods College and an M.B.A. from Columbia College.

Marcelino Gomez, Phoenix, Arizona

Marcelino Gomez previously served as the Assistant Attorney General (Tax and Finance) at the Navajo Nation Department of Justice for 26 years and as an Assistant General Counsel at the Salt River Pima-Maricopa Indian Community. Gomez represented the tribal governments on matters related to federal and state taxes including the risk management, employee benefit and retirement programs. Gomez is now in private practice in Phoenix, Arizona. Gomez received a B.B.A. in Accounting from New Mexico State University and J.D. from the University of Texas School of Law. Gomez is a member of the State Bars of Arizona, New Mexico and Texas, the Navajo Nation Bar Association, the ABA Tax Section and is a USSF Soccer referee and instructor.

William Johnson, Dallas, Texas

Bill Johnson is the Managing Director for First Southwest Asset Management. Johnson is responsible for managing, mentoring and strategic planning for 22 rebate professionals who serve clients nationwide. His client relationship responsibilities include rebate liability planning and implementation of tax law changes for tax-exempt obligation issuers. Johnson is responsible for developing and implementing post issuance rebate compliance policies and procedures for arbitrage clients including not for profit, state and local government, and private activity issuers. Johnson earned his B.B.A. degree in Accounting from Southern Methodist University and an M.S. degree in Taxation from Texas Tech University. Johnson is a member of the AICPA, Texas Society of CPAs and is a licensed CPA in Texas. Johnson is also registered with FINRA as a General

Securities Representative, Series 7; General Securities Principal, Series 24; Municipal Advisor Representative, Series 50 and a Uniform Securities Agent, Series 63.

Cindy M. Lott, New York, New York

Cindy Lott serves as Academic Program Director for Nonprofit Management Programs at Columbia University's School of Professional Studies. Prior to her current position, Lott served as Executive Director and Senior Counsel to the National State Attorneys General Program at Columbia Law School, and within that program was the developer and lead counsel to the Charities Regulation and Oversight Project from 2006-2015. Currently, Lott is also a Senior Fellow at the Center on Nonprofits and Philanthropy at the Urban Institute, working in conjunction with the Institute's Tax Policy and Charities project. Lott develops and moderates a series of national convenings on state and federal regulation of the charitable sector and is engaged in research regarding regulatory capacity and enforcement at the state level. Lott is a graduate of the Yale Law School and clerked for the United States Court of Appeals, First Circuit. Lott is admitted to practice in the District of Columbia, Indiana and Massachusetts.

Floyd Newton III, Atlanta, Georgia

Floyd Newton III is a partner at King & Spalding in Atlanta in the public finance practice. Newton has more than 30 years of broad experience with tax-exempt bonds. Newton is an active member of the ABA Tax Section 103 Committee and the National Association of Bond Lawyers. He was President of NABL in 1998-1999 and served on NABL's Board of Directors from 1994-2000. Newton received a Bachelor's degree, magna cum laude, from Princeton University and a J.D., magna cum laude, from the University of Georgia Law School.

Christopher W. Shankle, Shreveport, Louisiana

Chris Shankle is a senior vice president with Argent Trust Company in Shreveport, Louisiana. Shankle assists his clients with a broad array of employee benefits issues, including retirement plan governance and fiduciary matters, plan design, testing and disclosure matters. Throughout his career, Shankle has been involved in numerous outreach initiatives on employee benefits issues and is a frequent speaker on the

subject. Shankle has led the American Institute of Certified Public Accountants technical resource panel on employee benefit plans monitoring legislative and regulatory activity. Shankle has more than 26 years of experience in the employee benefit industry and is a member of the American Society of Pension Professionals and Actuaries, American Institute of Certified Public Accountants, Society of Louisiana Certified Public Accountants and Mississippi Society of Certified Public Accountants. Shankle received a degree from the University of Mississippi's school of Accounting and is a licensed CPA in Mississippi and Louisiana.

Andrew Watt, Arlington, Virginia

Andrew Watt's core focus all his life has been the social sector. He's served the fundraising community for 25 years, representing our communities in Brussels, Westminster, on the Hill in Washington and Ottawa, as well as around the globe. Watt is a collaborative driver of change; in culture, in understanding, in regulation and assessment of impact. He's worked to develop a greater understanding of what drives the social sector and what it takes to achieve impact in an increasingly volatile and rapidly changing environment. Most recently, Watt served as president & CEO of the Association of Fundraising Professionals from 2011-2016. Today, Andrew is advocating for a fair, just society in which equal opportunity and choice for all are seen as critical elements of our world. Watt serves as a board member of National Philanthropic Trust – UK, is a member of the Public Policy Committee of the Independent Sector and is Chair of the American Friends of Winchester College. Watt is a graduate of the University of Edinburgh.

Matthew I. Whitehorn, Philadelphia, Pennsylvania

Matt Whitehorn is a partner in the Tax Department and chair of the Employee Benefits Group at Dilworth Paxson LLP in Philadelphia, Pennsylvania. Whitehorn has more than 25 years of experience working with qualified and non-qualified plans including 457(b) and (f) plans, and 403(b) plans. Whitehorn co-chairs the Philadelphia Bar Association's Employee Benefits Committee. Whitehorn has a B.A./M.A. in History from The Johns Hopkins University, a J.D. from Villanova University School of Law and an L.L.M. in

Taxation from Temple University School of Law. He is an adjunct faculty member in the Tax L.L.M. program at the Temple University School of Law.

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

This General Report is presented in connection with the 16th annual public meeting of the IRS Advisory Committee on Tax Exempt and Government Entities.

As described in its Charter, the ACT's purpose is to provide an organized public forum for discussion between IRS officials and representatives of the five areas within the jurisdiction of the Tax Exempt and Government Entities Division (TE/GE): Employee Plans (EP), Exempt Organizations (EO), Federal, State and Local Governments (FSLG), Indian Tribal Governments (ITG) and Tax Exempt Bonds (TEB). This year, of the 15 members of the ACT, four represent EP, four represent EO, two represent FSLG, two represent ITG and three represent TEB.

Under the Charter, the ACT reports to the Commissioner, TE/GE, and the ACT members work respectively with the Directors of EP, EO, FSLG, ITG and TEB to identify and research the issues that the ACT will be addressing and reporting on to the IRS Commissioner at the public meeting scheduled for June 7, 2017. In light of the changes to the ACT's structure and focus being implemented, the representatives of the five functional areas within the jurisdiction of TE/GE engaged in cross-area subgroup projects this year and will present:

- **FICA Replacement Plans Subgroup**: Recommendations Regarding FICA Replacement Plan Requirements
- **Future of the ACT Subgroup**: Recommendations Regarding Changes Made to the ACT
- **Online Accounts Subgroup**: Recommendations Regarding Expansion of Online Accounts for Tax Exempt Entities

In the face of the changes in the structure and focus of the ACT and the ongoing significant budget and staffing reduction concerns of the IRS, this year's recommendations address the future of the ACT, the creation and implementation of effective and

efficient online services for taxpayers while prioritizing and balancing resources and the need for additional guidance in the area of FICA replacement plans. The ACT hopes that these recommendations will prove helpful to TE/GE personnel and the communities with which they interact.

Acknowledgements and recognition

ACT members whose initial two-year terms have been extended by one year to serve until June 2018 are:

- Susan Bernstein, Schulte Roth & Zabel LLP (EP)
- Judith Boyette, Hanson Bridgett LLP (EP)
- Natasha Cavanaugh, Bill & Melinda Gates Foundation (EO)
- David Danenfelzer, Texas State Affordable Housing Corporation (EO)
- Marcelino Gomez, Private Practice (ITG)
- William Johnson, First Southwest Asset Management (TEB)
- Cindy Lott, Columbia University's School of Professional Studies (EO)

I hope their service on the ACT next year proves to be rewarding both professionally as well as personally.

ACT members whose terms end in June 2017:

- Tino Batt, Shoshone-Bannock Tribes of Fort Hill, Idaho (ITG)
- Amy Coates Madsen, Standards for Excellence Institute (EO)
- Dean Conder, State of Colorado (FSLG)
- Vandee DeVore, State of Missouri (FSLG)
- Floyd Newton III, King & Spalding (TEB)
- Christopher Shankle, Argent Trust Company (EP)
- Andrew Watt, Consultant (formerly, Association of Fundraising Professionals) (EO)
- Matthew Whitehorn, Dilworth Paxson LLP (EP)

I believe I speak for all members of the ACT in that it has been a pleasure and a privilege to get to know and work with all the departing members.

The ACT thanks Commissioner John Koskinen, TE/GE's leadership, especially Commissioner Sunita Lough for her constant input and interest, all the TE/GE Division Directors, and all the TE/GE staff for the support and assistance you've provided to the ACT throughout the year. Special thanks to Mark O'Donnell, the Designated Federal Officer to the ACT and TE/GE's Communications & Liaison Director and his team, Melaney Partner, Brenda Smith Custer and Nicole Swire for handling the logistics for our meetings, conference calls and technology needs for surveys and other information-gathering activities. Special thanks, as well, to all those who participated in the surveys, focus groups and other information gathering critical to the analysis and recommendations made in the various subgroup reports.

Serving on the ACT and being Chair this year has been an exceptionally interesting experience as I have been able to witness first hand dramatic changes being made with the TE/GE and to the ACT. I have enjoyed working with and learning from all the TE/GE's leadership and the other ACT members with whom I have served during the past three years and hope that all future ACT members find their experience to be meaningful and productive. I would particularly like to take this opportunity to thank subgroup project leaders Vandee DeVore and Susan Bernstein for all their efforts. Furthermore, I want to congratulate and wish good luck to Susan Bernstein who is next year's incoming ACT Chair.

I hope that our input is helpful to the IRS and to the constituent groups that we serve.

Matthew I. Whitehorn
Chair, June 2016 to 2017

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ADVISORY COMMITTEE ON

TAX EXEMPT AND GOVERNMENT ENTITIES

(ACT)

FICA Replacement Plans Subgroup

Recommendations Regarding FICA Replacement Plan Requirements

Vandee DeVore, Project Leader

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June 7, 2017

FICA REPLACEMENT PLANS

I. EXECUTIVE SUMMARY

Effective July 2, 1991, Congress made Social Security mandatory for state and local government employees who were not already voluntarily covered under an agreement entered into under Section 218 of the Social Security Act (Section 218 Agreement) or who were not qualifying participants in a retirement system.

During the 25-year period since mandatory coverage was implemented, retirement plan design has changed dramatically, creating a need for updated guidance. In addition, updated guidance is needed to help reduce confusion in the field with respect to defined contribution plans. Confusion arises, in part, because employees must be covered for each payroll period, potentially creating a constant in and out of coverage situation with each pay period (depending on the plan design), for what is currently defined by the IRS as Federal Insurance Contributions Act (FICA) equivalency. This causes distinct challenges for entities without Section 218 Agreements to assure correct Social Security coverage. It is even more challenging for State Social Security Administrators to explain the complex set of FICA-equivalent coverage circumstances to entities that have little understanding of this area. This can create situations where entities may have been paying Social Security in error, or not paying Social Security when they should have been paying, potentially for years.

Our Subgroup recommendations focus on practical ways to improve carrying out the responsibility granted and delegated to the Commissioner, by further defining the “FICA Replacement Plan” requirements, including updates for more recent plan designs, and strengthening training and support for those dealing with this complex area.

II. INTRODUCTION

Under the Omnibus Reconciliation Act of 1990 (OBRA90), §42 U.S.C. 410 (b)(7)(F), Congress gave the Secretary of the Treasury the responsibility to define the manner in which state and local government entities could meet an exception to participating in Social Security. Treasury Regulations Section 31.3121(b)(7)-2(e)(2)(vi) delegated authority to the Commissioner of the IRS to provide guidance on the minimum

requirements for retirement plans to serve as an exception or replacement for coverage under FICA. Regulations issued in 1991 provided that a defined benefit plan must provide a comparable benefit to that provided under Social Security to meet the requirements as a qualifying replacement for Social Security. Further guidance was issued that year providing safe harbor formulas for defined benefit plans in Revenue Procedure 91-40 (available at www.ssa.gov/slge/revenue_procedure_91-40.htm). Treasury Regulations Section 31.3121(b)(7)-2(e)(2)(iii)(A), issued in 1991, provided detailed specifications for a defined contribution plan alternative using a stated percentage of compensation (7.5 percent) as a minimum amount to be contributed to a defined contribution account.[1] These complex requirements must be met under the terms of the plan for each individual on a day-by-day basis.

Demographic and economic pressures have caused public sector employers to re-examine the use of defined benefit plans as the primary type of retirement plan coverage for government employees even prior to the beginning of the Great Recession in 2008.[2] The incredible budget constraints on government entities as a result of the Great Recession further encouraged exploration of new and different plan designs. In addition, the need to replace baby boomers exiting the workforce made it necessary for government employers to consider plan designs that are more attractive to younger workers who change jobs more often and value portability for their retirement savings. In a number of cases, the governing bodies for public entities desired to include a more minimal defined benefit formula combined with either an actual allocation to a defined contribution plan account or a specified dollar contribution in a pension plan that appeared more like a defined contribution account.

In light of the changes in plan designs now being used or considered by government employers, updated guidance for FICA replacement plans is needed. Much has

[1] The standards that need to be met to exempt employees from mandatory FICA coverage do not relate and are completely separate from requirements that apply in determining whether a plan is tax-qualified under the Internal Revenue Code Section 401(a) rules and parallel provisions of the Employee Retirement Income Security Act of 1974 (ERISA) even though the IRS has responsibility for determining requirements under both areas.

[2] See "The Evolution of Public Pension Plans - Past, Present and Future," National Conference on Public Employee Retirement Systems, March 2008.

changed since 1991. Currently the revenue procedure used for evaluating defined benefit plans, while concise, includes only limited safe harbor alternatives referencing more traditional benefit formulas. The standard for defined contribution plans is based on a 7.5 percent employee and employer combined contribution rate of "compensation." While it is clear that other designs could meet the requirements to be considered a "qualifying plan," the guidance has not been updated to reflect the emerging trend to use hybrid plans, including cash balance plans, and combinations of defined benefit and defined contribution plans.

This ACT Subgroup reviewed the Treasury definition of a FICA replacement plan to determine if the current guidance is sufficient to meet the needs of practitioners. The Subgroup also examined the need for related training and support for FSLG agents in the area of FICA replacement plans and Section 218 coverage.

III. HISTORY

Prior to 1987, state and local government employment taxes (Social Security and Medicare taxes, otherwise known as FICA) were collected by each State Social Security Administrator (See 20 C.F.R 404.1204) and, prior to July 2, 1991, the only way for a state or local government employer to provide Social Security coverage to its employees was through a Section 218 Agreement.[3]

With OBRA90, effective on July 2, 1991, Treasury became responsible for defining the exception to mandatory Social Security coverage under §42 U.S.C. 410 (b)(7)(F). This addition to the law essentially made all state and local government employees not already covered by a 218 Agreement or not covered by a FICA replacement plan (as defined by Treasury in regulations) covered by Social Security.[4] Treasury was prompt to

[3] References in this Report to a Section 218 Agreement mean a voluntary agreement between one of the 50 states (or Puerto Rico, the Virgin Islands, or an interstate instrumentality) and the Social Security Administration, entered into under the terms of Section 218 of the Social Security Act, which provides Social Security and Medicare, or Medicare-only, coverage for designated groups of state and local government employees.

[4] Of course, state and local government entities may also voluntarily cover employees with both Social Security coverage under a Section 218 agreement and benefits under a public retirement system.

issue guidance in 1991 for the *standard* types of retirement plans at that time: defined benefit pension and defined contribution individual account plans.

Revenue Procedure 91-40 was issued to provide guidance for defined benefit plans and provide safe harbors for plans that would automatically meet the specific standards. Similarly, Treasury Regulations Section 31.3121(b)(7)-2(e)(2)(iii)(A) provided the details for safe harbor coverage under defined contribution plans. Government entities continue to use both types of plan designs outlined in current guidance. However, in response to trends in the marketplace, some government entities are now replacing those traditional plan designs with hybrid plans, including cash balance plans and other new designs using a combination of plan types. The standard guidance issued in 1991 needs to be updated to address new plan types that have been developed over the last 25 years. The original guidance has become outdated.

As employers have sought to move to newer designs, the IRS has updated guidance in other areas to address issues that have arisen in the context of meeting the separate requirements for tax-qualified retirement plans under the Internal Revenue Code (Code) Section 401(a) rules. For example, in Notice 2007-6, the IRS introduced the term "statutory hybrid plan." The Treasury Regulations also use the term statutory hybrid plan, which means a defined benefit plan that contains a statutory hybrid formula.[5] A statutory hybrid formula means a benefit formula that is either a lump sum-based benefit formula or a formula that is not a lump sum-based benefit formula but that has an effect similar to a lump sum-based benefit formula.[6] Younger employees (and potential employees) tend to like lump sum-based formulas because they look more like the defined contribution account balances in 401(k) plans that are the standard retirement offering in the private sector and are easier for the average participant to understand. Cash balance plans are a type of statutory hybrid plan. In a cash balance plan, the participant's accrued benefit is defined as a hypothetical account balance or single-sum amount, which appears to the participant to look more like a defined contribution plan. The term "cash balance" to identify a plan was created to distinguish this type of defined

[5] Treas. Reg. Section 1.411(a)(13)-1(d)(5).
[6] Treas. Reg. Section 1.411(a)(13)-1(d)(4)(i).

benefit plan from the type of traditional defined benefit plan addressed in Revenue Procedure 91-40 in which the pension benefit provided is expressed as a periodic payment commencing at a "normal retirement date" that is a specified percentage of compensation (usually average compensation) or a specified dollar amount. These new plan types do not meet the traditional definitions used in Revenue Procedure 91-40, and, therefore, it would be helpful to a growing portion of the government entities community to update the equivalency methodology/actuarial assumptions for such plans. Without updating the current safe harbor guidance, FSLG examiners encountering these new designs must seek help in determining whether a plan meets the FICA replacement plan requirements. Additional training for FSLG examiners is required.

There is also confusion in the terminology used in this area. The Regulations provide that the exception from mandatory FICA coverage applies only if the person is a "qualified" participant in the public retirement system.[7] Whether a person is a qualified participant is determined based on whether the person actually earns a benefit under the plan and whether the plan itself meets the requirements under the Regulations. The terminology is further confused by references in IRS guidance to the term “qualifying” in regard to a FICA replacement plan.[8] Using the terms “qualified” and “qualifying” causes confusion with Code Section 401(a) and the parallel provisions of ERISA. Plans that meet the requirements to exclude covered employees from FICA coverage do not necessarily need to meet the requirements for Code Section 401(a) "qualified plans."[9] This confusion could be clarified by simply referring in all instances to a plan meeting the requirements of Code Section 3121(b)(7)(F) as a "FICA Replacement Plan."

Also, it has been almost 26 years since the IRS established the standard under Treasury Regulations for the defined contribution plan of 7.5 percent of combined employer and employee contributions as being the actuarial equivalent to the benefit provided under the Social Security program based on the 12.4 percent combined

[7] See Treas. Reg. Section 31.3121(b)(7)-2.
[8] See, for example, the Federal-State Reference Guide, published by the Social Security Administration, the IRS and the National Conference of State Social Security Administrators, at p. 5-10.
[9] In addition to tax-qualified retirement plans under Code Section 401(a), plans meeting the requirements of 403(b) or 457(b) could also satisfy the FICA replacement plan rules.

contributions for Social Security and disability. There appears to be a distinct disparity between the two percentages of combined contribution levels. Given the updates that have been made in other employee benefit plan guidance based on changes in actuarial data since 1991, it also may be appropriate for the IRS to again review their regulation as part of the updated guidance and during the issuance of further safe harbor designs for hybrid plans (including cash balance plans) and combinations of defined benefit and defined contribution plans.

As this Committee has addressed in past reports, the outreach to small local governments is difficult, not only for the IRS, but also for the State Social Security Administrators who are responsible for communicating proper Social Security coverage to each of their political subdivisions but who have no enforcement authority. There are more than 90,000 local government entities in the United States with an estimated 12 million full-time equivalent employees with payrolls in excess of $50 billion. Providing proper training and support for both the IRS examiners and the local entities on these complex requirements is critical to ensuring that these employees are *properly* covered by Social Security or a FICA replacement plan.

IV. DUE DILIGENCE

Survey of Federal, State and Local Governments (FSLG) agents

The Subgroup conducted a survey of current FSLG agents. Our intent was to determine whether the agents tasked with auditing these entities thought that current guidance was sufficient, and, if not, what issues needed to be addressed regarding FICA replacement plans and Section 218 coverage issues. The survey showed inconsistencies in approach among FSLG agents in various areas. It appears the only formal resources on FICA replacement plans are Revenue Procedure 91-40 and Publication 963, Federal-State Reference Guide. Many agents continue to be hesitant to refer government entities to their State Social Security Administrator. While many states appear to have complete Section 218 coverage, the truth is in the details of the State Administrator’s records. It is becoming more apparent that the progressive movement to authorize more locally controlled districts has created more political subdivisions that

are unaware of Section 218 and the impact of FICA replacement plans on their Social Security coverage. The survey also showed that confusion exists with FSLG agents on the mission for *proper* coverage, as many responses lent to the lack of importance in bringing attention to refunding payments made in error.

Conversations with Employee Plans and Federal, State and Local Governments leadership

The Subgroup also spent time with the leadership of EP and FSLG and their key staff members discussing these issues. Director Robert Choi, Director Paul Marmolejo and key members of their staffs were generously available to us so that the Subgroup could have informative and beneficial discussions by telephone. In addition to recognizing the concerns regarding the changes in plan design since the issuance of Revenue Procedure 91-40 that could impact its usefulness, several concerns were raised as part of these discussions. First, there seems to be some confusion regarding which area in TE/GE has ownership over the determination of a FICA replacement plan status. While the survey indicates that FSLG agents believe the process is to contact EP to obtain support on that issue, EP staff may not have access to necessary guidance or sufficient training to make the determination as to whether a plan meets the requirements to be a FICA replacement plan. It is critical to determine ownership of these issues so that both agents and those customers trying to obtain guidance know where to look for answers. We also learned that the new Knowledge Networks (K-Nets) (the online resources now available for staff in each area of TE/GE) are area-specific, so that EP staff may not access information on the FSLG K-Net such as guidance on FICA replacement plan requirements. Finally, FSLG agents reported that government entities are often alarmed that the entity's external auditors did not inform them of their failure to meet Social Security coverage laws. As failure to meet the FICA replacement plan laws and regulations can result in material financial consequences for the FSLG entities, this issue needs to be addressed with audit standard setting bodies, which we recognize is outside of TE/GE's jurisdiction.

V. CONCLUSION

The area of state and local government FICA compliance is exceedingly complex and requires specialized knowledge by IRS agents and continuous updating of support and training for IRS and state and local government entities. The Subgroup acknowledges there are significant budget constraints that may affect TE/GE's ability to immediately address some of the issues raised. Consideration could be given to whether some of the following recommendations (such as the need for enhanced or updated training tools) could be appropriate for future projects to be addressed by ACT Subgroups.

Recommendations

1. The Subgroup recommends that TE/GE consider eliminating the confusion between the 401(a) and ERISA rules by using the term “FICA Replacement Plan” instead of “qualifying” in all publications and guidance related to this topic. At a minimum, we recommend that TE/GE issue an internal snapshot through the K-Nets to communicate guidance clarifying the terminology with respect to FICA replacement plans.
2. The Subgroup recommends that TE/GE seek guidance from Treasury Counsel on revisions to Revenue Procedure 91-40 to include updated guidance on how cash balance and combination or hybrid plans can meet the requirements for a FICA replacement plan and set thresholds or safe harbors for these plan types. It would be extremely beneficial to the state and local government community for this updated guidance to provide safe harbors for cash balance and other hybrid plans, as well as combinations of plans that could meet the FICA replacement requirements.
3. Because the survey responses showed inconsistencies in approach among FSLG agents, the Subgroup recommends that TE/GE consider whether FSLG agents need more or better training on the tools and resources available regarding the Social Security coverage laws.
4. Based on feedback from the survey, the Subgroup also recommends that training for FSLG agents include clear information that their mission is *proper*

administration of required Social Security coverage. This includes enforcement when payments have been made without having legal coverage agreements, and assisting state and local entities in understanding the availability of the refund process when Social Security or Medicare taxes have been paid in error.

5. The survey of FSLG agents conducted by the Subgroup indicated that only 56% of the agents were rarely or sometimes referring entities to their applicable State Social Security Administrator for questions on Section 218 Agreements. The Subgroup recommends that the training for FSLG agents be strengthened to encourage this referral to happen in all applicable situations.
6. Because the Subgroup believes there is still a significant lack of understanding of the FICA replacement plan requirements by the state and local government plan community, the Subgroup recommends that TE/GE develop an education tool for entities and third-party plan administrators (such as brokers and prototype plan providers) to help their state and local clients understand the coverage impact to Social Security coverage and benefits before adopting a plan that may not provide the desired coverage.
7. The Subgroup recommends that TE/GE partner with audit standard setting bodies such as the American Institute of Certified Public Accountants and the U.S. Government Accountability Office for the Generally Accepted Government Auditing Standards to include Section 218 coverage and FICA replacement plan requirements in their financial statement auditing scope for state and local entities. Even though most auditing standards recognize compliance with federal and state laws, because this concept is buried in the regulations, it is often overlooked in a typical financial statement audit.
8. Based on both the survey results and discussions with EP and FSLG leadership, and due to the fact that FSLG has now been placed under the Exempt Organizations unit of TE/GE, the Subgroup recommends that TE/GE leadership clearly assign and communicate which group – EP or FSLG – owns the determination responsibility of whether a plan meets the requirements of a FICA replacement plan and related Social Security coverage rules and the

enforcement of those rules, which reaches into nearly every aspect of employment tax for governmental entities.

ADVISORY COMMITTEE ON

TAX EXEMPT AND GOVERNMENT ENTITIES

(ACT)

Future of the ACT Subgroup

Recommendations Regarding Changes Made to the ACT

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FUTURE OF THE ACT

I. EXECUTIVE SUMMARY

Recent changes to the Advisory Committee on Tax Exempt and Government Entities have had a significant impact on its role, purpose and future as an effectively functioning committee. Most of the reactions of current ACT members to these changes has been negative as the adjustment from the prior way in which ACT worked has been difficult from the perspective of these individuals. During this year, the ACT divided into three subgroups that crossed lines between the functional areas under the jurisdiction of the Tax Exempt and Government Entities Division of the Internal Revenue Service.[10] The report of this group (Report), the Future of the Act Subgroup (Future Subgroup), addresses the effect of these changes and assesses the future of the ACT. The Report contains input from current and former ACT members as well as TE/GE staff.

The recommendations of the Future Subgroup are:

- Maintain the five TE/GE functional area subcommittee structure for discussion of specific topics that arise during the course of the year so as to communicate concerns from each of those sectors allowing the ACT members' expertise to be fully utilized.
- Provide confirmation that there will be continued regular periodic interaction of the representatives of the five TE/GE functional areas with the directors of each such TE/GE area.
- Provide some formal mechanism pursuant to which representatives of the five TE/GE functional areas can interact with attorneys at the IRS Office of Chief Counsel who work in each such area, so the substantive subject matter expertise of the ACT's members is better utilized, while still recognizing that the ACT's members cannot advocate for specific positions as involvement in developing regulatory guidance is no longer an ACT function.
- Ensure that TE/GE staff informs ACT members when an issue that might be appropriate for a group project arises so that the ACT members are able to

[10] The five functional areas of TE/GE are Employee Plans; Tax Exempt Bonds; Indian Tribal Governments; Federal, State and Local Governments; and Exempt Organizations.

consult with staff in the formulation of the corresponding administrative, operational or enforcement guidance; for example, the EP representatives on the ACT could work with TE/GE EP staff on a project like the recently issued hardship distribution documentation guidance.

- Restore one or more in-person ACT meetings and integrate online meetings and/or web conferencing or some other interactive system for any remaining virtual meetings.
- Consider reinstating a number of member positions back to the ACT in lieu of further reductions in size as the shrinkage doesn't seem to represent any cost savings where almost all meetings are conducted on a virtual basis.
- Engage the ACT's subject matter experts in the IRS industry issue resolution program to take advantage of their breadth of knowledge.

The concerns of the principal parties affected by the changes made to the ACT are addressed in detail below. The recommendations made in the Report are aimed at assisting TE/GE and the IRS in making the ACT as useful and helpful to the IRS and the public as possible.

The Future Subgroup would like to thank all who participated in the survey and focus group interviews that enabled this Report to be prepared and TE/GE Division Commissioner Sunita Lough and TE/GE staff for their input and interest. In addition, a special note of thanks is given to former ACT members who participated in the survey process and provided comments concerning their experience and opinions as reflected in this Report. It is the Future Subgroup's belief that if the recommendations in the Report are seriously considered, the ACT can remain a particularly useful mechanism in assisting TE/GE with its administrative, operational and enforcement obligations.

II. INTRODUCTION

A recurrent goal of the IRS and, especially, TE/GE in recent years has been the enhancement of customer satisfaction. To that end, the IRS has issued numerous customer satisfaction surveys to both taxpayers and practitioners. The purpose of these surveys is, presumably, to gauge the level of the public's positive or negative feelings

about the IRS and to determine what operational changes would be likely to improve the effectiveness of constituent communications and service. At the same time, TE/GE has attempted to implement a reorganization based upon the "Lean Six Sigma" methodology to break down functional barriers in TE/GE and find efficiencies among the five constituent functional areas over which it has jurisdiction in light of budgetary and personnel constraints all with the overarching goal of enhanced customer satisfaction. As a result, significant changes have been made to the ACT.

With over a million charitable nonprofits in existence, the tax-exempt charitable sector, which by definition *pays no taxes* for its mission-based work, is regulated by a *tax-collecting* agency. This counterintuitive relationship means that it is imperative that the IRS hear from the sector and its experts to discern specific impacts that looming changes at the IRS may visit upon this fundamental and historic part of both the U.S. economy and its civil society.[11]

III. HISTORY

Federal advisory committees, as they exist today, had their genesis in the Federal Advisory Committee Act of 1972 (P.L. 92-463) (FACA). The ACT came into being in 2001. As stated in its May 11, 2015 Charter, the ACT is established "to provide an organized public forum for discussion of relevant employee plans, exempt organizations, tax-exempt bonds and federal, state, local and Indian tribal government issues between officials of the [IRS] and representatives of those communities; and to enable the IRS to receive regular input with respect to the development and implementation of tax administration issues affecting those communities. The ACT members will present in an organized and constructive fashion the interested public's observations about current or proposed Tax Exempt and Government Entities Division

[11] This counterintuitive situation is one of the principal reasons why the generally non-adversarial position between TE/GE and its stakeholders is important to retain by continuing to involve practitioners (legal, accounting and other professionals working in the five functional TE/GE areas) in IRS decision making instead of diminishing their role.

programs and procedures and will suggest improvements."[12] The ACT is also scheduled to hold a one-day public meeting with respect to which a final report on the year's projects (the Annual Report) is provided. In the early days of the ACT, the TE/GE functional area subcommittees had significant time to present their reports; now, report presentations are essentially limited to six or seven minutes. An integral part of the ACT's structure has, traditionally, included direct functional area subcommittee member contact with the directors of each of the five TE/GE functional areas [Employee Plans; Exempt Organizations; Federal, State and Local Governments; Indian Tribal Governments and Tax Exempt Bonds]. Another featured and highly valued longstanding component of the ACT has been the ability of members of each area subcommittee to discuss technical legal issues with attorneys and other subject matter experts (for example, communications and website personnel, etc.) assigned to TE/GE.

When the ACT's Charter was changed in May 2015 (without advance discussion with the ACT's members), the IRS announced that "[g]oing forward, the ACT's focus will be on tax administration issues in general encountered TE/GE-wide."[13] Simply put, it appears that the overall original purpose for establishment of the ACT, that is, to foster public discussion of issues relevant to five TE/GE functions has been modified; the IRS has, in essence, reconstituted the ACT as an entity to provide advice on administrative issues, necessarily crossing over any boundaries between the five TE/GE areas. The ACT's focus prior to recent changes was compartmentalized with the five subcommittees representing each of the five TE/GE functional areas focusing on concerns particular to each of those discrete areas.[14] In addition, the size of the ACT has been cut by roughly 29 percent, from 21 members to 15 members as of June 2016 and will be further cut by roughly another third - to 10 members as of June 2017 with all terms of

[12] For additional background on the ACT, see www.irs.gov/government-entities/advisory-committee-on-tax-exempt-and-government-entities-act. In the 2015 slide packet distributed during the orientation of new ACT members, the IRS also provided that "[t]he purpose of this committee is … to enable the Service to receive suggestions and constructive criticism with respect to the transformation of the Service's existing Employee Plans/Exempt Organizations entity into the new Tax and Exempt Government Entities Division." It is likely that this language was drafted in connection with the IRS Restructuring and Reform Act of 1998 (P.L. 105-206).

[13] For a more complete discussion of these changes from the IRS's perspective, see www.irs.gov/government-entities/irs-makes-changes-to-its-advisory-committee-on-tax-exempt-and-government-entities-act.

[14] Id.

new appointees fixed at three years and in-person working meetings being shifted to a "virtual format" (in other words, audio conference call). TE/GE Division Commissioner, Sunita Lough, when addressing these changes stated that: "[i]t is a good time to review and revise ACT's focus and better align it with what's going on within the changing environment of TE/GE [for example, the transfer of some of the legal technical team serving EP to the Office of Chief Counsel]. We will continue to consider more refinements of the ACT structure in coming months and potentially make more changes in 2017. We also remain committed to getting feedback and input from our stakeholders, both operationally within TE/GE and through the ACT."[15]

As one can readily ascertain, with such public pronouncements, it is evident that the structure, function and role of the ACT will be quite different prospectively as its scope has changed markedly over the last two years. In connection with these changes, for purposes of developing projects for the 2017 Annual Report, the traditional functional area subcommittees divided into three new cross-area groups: the FICA Replacement Plans subgroup, the Online Accounts subgroup and the Future of the ACT subgroup, which prepared this Report. For this reason, the 2017 Annual Report has a different focus than the annual reports from prior years, which focused on substantive matters in each of the five functional areas under the jurisdiction of TE/GE.

As further evidence of the deteriorating role of the ACT, the IRS requested that the ACT reduce the size of its reports down to 3-5 pages for each subgroup. IRS staff indicated that the prior reports that ranged from 200-300 pages each year were too burdensome under current staffing levels. The ACT pushed back and it was ultimately agreed that the reports could each be up to 20 pages in length. This is just another indication that the IRS no longer values the original mission of the ACT – to provide feedback from practitioners who have expertise in the functional areas under TE/GE jurisdiction and to promote a special relationship where practitioners can exchange information with the IRS with the ultimate goal of providing valuable customer assistance.

[15] Id.

IV. DUE DILIGENCE

The Future Subgroup undertook several measures to gauge the impact of the changes made to the ACT on affected parties and how such parties viewed the role of the ACT in the future. Amongst these measures were a survey of present and alumni members of the ACT, focus groups involving the IRS management-level staff and soliciting comments from the five TE/GE functional area subcommittees. A summary of the responses appears below.

A. The survey

The Future Subgroup conducted a survey of individuals who are current or previous members of the ACT. Approximately 44 percent of the survey respondents indicated that they completed their service on the ACT prior to July 2014. The remaining 56 percent of survey respondents completed their service on the ACT since July 2014 or are currently serving on the ACT.

When asked about the most valuable ways that the ACT contributes to TE/GE officials, a variety of responses were offered. Most of the responses fell within four main categories:

- Providing feedback/acting as a “sounding board.”
    - “Fosters an environment where regulators and practitioners can work together to foster compliance.”
    - “It allows the tax-exempt community that the IRS regulates to give valuable feedback to the IRS and to suggest ways to improve the IRS oversight of the tax-exempt sector.”
- Offering real world “on the street” input from the field.
    - “Provides the connective tissue between regulators and the regulated sector.”
- Preparing and presenting the Annual Report of Recommendations to the Commissioner of the IRS.

    - "ACT annual reports address (sic) specific and rigorous treatments of issues relevant to TE/GE officials, including best practices that are not clearly presented by the IRS."
- Helping IRS officials better understand the impact of changes to policies on IRS-regulated organizations.
    - "Makes them more aware of the impact of changes to policies, rules and regs (sic) for those trying to follow them. Permits dialogue that can lead to meaningful change."

Survey respondents were asked to rate their level of agreement with the following statement, "My work on the ACT has met the expectations I had when I applied and was selected to serve." There is a stark division in the responses to this question. To illustrate this division, those who served on the ACT in 2014-2015 were much more likely to report that their experience as a member of the ACT was in line with their initial expectations of ACT service. For instance, of those who served in 2014-2015 (after removing respondents who indicated that the question was not applicable to them), 52.9 percent strongly agreed and 29.4 percent somewhat agreed that the work met their expectations for a total of 82.5 percent of those with somewhat or strong agreement that expectations were met.

In stark contrast, those serving on the ACT in the current year (2016-2017), overwhelmingly indicated that their work on the ACT has not met the expectations they had when they were going through the ACT application and selection process. For current ACT members (after removing respondents who indicated that the question was not applicable to them), 50 percent of respondents strongly disagreed and 33 percent somewhat disagreed with the statement that their service on the ACT had met their expectations for a total of 83 percent of those who strongly or somewhat disagreed that their expectations were met. It is important to note that many of those who serve on the ACT in the current year, also served in the year 2014-2015. Presumably, the changes in the ACT have caused those members to significantly negatively alter their opinion on their service on the ACT.

	Strongly disagree	Somewhat disagree	Neutral	Somewhat agree	Strongly agree	Total responses
ACT members who served in 2014-2015	5%	11.7%	0	29.4%	52.9%	17
ACT members who served in 2015-2016	6%	31%	0	31%	31%	16
ACT members who served in 2016-2017 (current year)	50%	33%	0	8%	8%	12
ACT members who served in any year not listed above.	12.5%	0	0	31.2%	56.2%	16

For the purposes of the table above, individuals who indicated “not applicable” on their responses have been removed from the calculations.

The survey specifically asked those who were still active ACT members after July 2014, to provide their feedback on how the recent changes to the ACT have impacted the ACT’s ability to successfully function in connection with its stated purpose as incorporated in its Charter.

When asked to indicate their rating on a sliding scale of 0 to 100 (with 0 being most negative and 100 being most positive) of their agreement with the statement, “I believe the ACT’s shift to virtual meetings from in-person meetings has created an impact on how the ACT is supposed to function,” the average response from individuals was 10 on a scale of 100. Of the 19 individuals who responded to this question, 6 respondents or 31 percent of respondents indicated a rating of 0. Only 3 respondents stated ratings of over 25 percent.

This survey group was also queried to indicate their rating on a sliding scale of 0 to 100 (with 0 being diminished and 100 being strengthened) with the statement, “Due to the changes in the ACT Charter and function, my enthusiasm has diminished toward ACT’s importance and relevance.” The average response was a 16, well in the camp of

"diminished" with 26 percent providing a rating of 1. On the other hand, 26 percent of the respondents provided a rating of 25 or higher.

This trend continued with a sliding scale ranking question that queried, "I feel that my expertise, which merited my selection by the IRS and appointment by Treasury to serve on the ACT, is being put to its best use with respect to the current structures of the ACT." This question, garnered a response of 20, with 0 representing strongly disagree and 100 representing strongly agree. Of the 19 individuals who responded to this question, only 3 of 19 respondents (16 percent) stated a rating over 50.

All respondents were given the opportunity to answer the open-ended question, "In my opinion, the role the ACT should play in the future includes _____."

Responses generally fell within four main categories:

- Returning the ACT's role back to pre-2016 role.
    - "Same as in past."
    - "The ACT should go back to the role it had several years ago."
- Improving communication with those regulated by TE/GE.
    - Garnering "the ear of the IRS on issues that were impacting state and local governments. The ACT members brought that discussion to the table, and I believe communication resulted that improved that knowledge and understanding."
- Retaining the subject area subcommittee foci (EO, ITG, TEB, EP and FSLG).
    - "You need to go back to separate subgroups – at least with regard to pensions."
    - "…Address on a project basis, more major areas that impact…each of the functional areas…"
- Offering expert advice and feedback to the IRS regulators.
    - "Give the IRS input on programs, outreach, services that should be maintained and/or implemented."
- Reinstituting face-to-face meetings.

    - "Affect change through our projects, while continuing to meet face-to-face with the areas of leadership within TE/GE."
- Maintaining government-to-government relationships.
    - "The IRS must maintain a functional and interactive government-to-government relationship with the tribes."
    - "Keep ITG as a separate subcommittee as Indian Tribal Governments have unique needs in comparison to state and local governments."

ACT members participating in the survey offered a variety of comments. The comments by survey respondents who had completed their ACT service before 2014 (and prior to when the recent changes took effect) gave positive reflections across the board on their participation in the ACT. One respondent indicated, "I thought my time on the ACT was very well spent and resulted in some very good give and take with positive feedback." Another stated, "I was thoroughly pleased with the spirit of cooperation and support that was shown by IRS personnel. It was the most successful committee that I was ever a part of" and another mentioned, "The ACT is an extremely valuable resource, and I hope that it will continue."

While there were a few respondents who indicated that consideration should be given to disbanding the ACT, most individuals submitting comments who served on the ACT in more recent years (2014-2015, 2015-2016 and 2016-2017) shared that they believed the ACT should continue its work into the years to come, but that changes should be made to make the group as effective as possible, such as:

- "…Having members focus on issues outside their expertise seems to make little sense."
- "Strongly disagree with a consolidated report."
- The new setup of the cross-area group projects leave members feeling "disappointed in [their] ability to provide insights and assistance because there are fewer opportunities, few topics to which [members] have background and expertise."

There were many comments from respondents about the utility of ensuring that the ACT includes some in-person discussions with ACT members and IRS staff members:

- "The lack of in-person meetings has caused the prior comraderie [sic] of the ACT members to be greatly diminished which directly impacts the enthusiasm for preparing the annual report…"
- "The 'virtual' (i.e.: conference call) meeting concept has essentially destroyed the mission and productivity of the groups. Some members come from private industry and can still meet on occasion, however, those in state, local and tribal governments do not have a funding source to travel; nor should ANY of our employers be paying."
- "I would say that face-to-face meetings made a world of difference in building those relationships not only with the committee members but with the IRS staff. Everyone is being asked to do more with less and we need to be more effective and efficient in our communications to give guidance to stakeholders."
- There was even a comment about providing an opportunity for the ACT's alumni to gather "every few years with the goal of creating a short, collaborative paper on current TE/GE issues…"

Respondents thought there should have been consultation with current ACT members regarding the most recent Charter revisions that implemented the significant changes in the ACT's focus. Respondents indicated they understand that the current financial situation for TE/GE has made cost-cutting necessary. However, one respondent offered that with the "number of challenges that the IRS faces now, it seems like this is a great time to get the insights of dedicated volunteer advisors rather than setting up situations where they are being pushed away." Another respondent went on to say, the IRS should "…embrace and relish the opportunity for ACT members to inform, question, challenge and improve the…community."

B. Comments on the ACT changes by affected parties

1. IRS managerial-level staff

On March 1 and 2, 2017, the Future Subgroup conducted focus group interviews with certain IRS managerial-level staff. These staff members were asked to address how the changes in the ACT have impacted their positions and what role they believed the ACT should play in the future and were told that their comments would be treated as having been made without attribution. A variety of topics came into the discussion as described below.

a. Transfer of TE/GE attorneys to the IRS Office of Chief Counsel

It was noted that the role of the ACT fundamentally changed when almost all the attorneys assigned to TE/GE were shifted to the IRS Office of Chief Counsel. This, in turn, made it difficult for the ACT to have any impact on, or to be involved in, the formulation of regulatory guidance, but did offer the opportunity for the ACT to focus on the IRS operational, administrative and enforcement issues. Thus, in the future, this respondent viewed the ACT's role as focusing on specific industry issue resolution (IIR) matters and dealing with enforcement issues.

b. Crossover of functional areas

It was suggested that the future goal of the ACT should be to focus on the types of projects that crossover the discrete functional areas of TE/GE due to the limited financial and personnel resources available. This would necessarily mean directing the ACT's attention to such projects as improving the IRS website, assisting the small business division on matters relevant to that sector and producing more webinars, even under the present circumstances of limited outreach resources.

c. Snapshot responses

Another suggestion was that the ACT could be helpful to the IRS in formulating snapshot responses to pressing issues and in determining, during this transitional

period for the IRS, “where the IRS needs to go” as its transformation leads to a more electronic-based operational model.

d. Generic role for ACT

It was also suggested that, in the future, the ACT should serve a more generic function rather than focusing on the five discrete functional areas of TE/GE. From that perspective it was thought that the ACT should focus more on administrative issues, but it was also duly noted that the transition away from a focus on the five discrete TE/GE functional areas has been difficult for the current longer-term members of the ACT to accept based on the prior activities of the ACT, when each separate subcommittee dealt solely with issues applicable only to its distinct function; for example, the EP subgroup addressed issues of concern to the employee plans community. In summary, the belief expressed was that more cross-functional area types of projects are now appropriate for the ACT.

e. Lessen the ACT’s “academic” focus

Finally, it was suggested that the ACT, rather than focus on the five discrete functional areas of TE/GE, should instead act as a “sounding board” for emergent issues that arise during the course of the year for TE/GE. The opinion offered was that academic-type annual reports are not particularly helpful to the IRS, but rather the focus of the ACT should be on administrative, programmatic or operational issues which would help the IRS to be better able to accomplish its goal of providing useful service with respect to its constituency.

2. Comments by current ACT members by functional area[16]

a. Comments common to all functional areas

FACA was passed by Congress in 1972 to provide public input to the Executive branch of the federal government. In 1976, the President assigned to the U.S. General Services

[16] Some of these comments have been edited solely for purposes of compliance with the ACT Stylebook Guidelines and for stylistic consistency, but the tenor remains as originally submitted.

Administration (GSA) the role of managing advisory committees under FACA. The ACT is an advisory committee formed for the IRS to discuss issues and policies related to employee plans; exempt organizations; tax-exempt bonds; and federal, state, local and Indian tribal governments. TE/GE was established in the late 1990s to oversee compliance with the federal tax laws by the various members of the diverse communities served by the various functions under the TE/GE umbrella. Constituents of TE/GE are unique from most of the types of taxpayers served by the IRS, such as corporations, small businesses and the self-employed. By authorizing establishment of the ACT, it was recognized that the TE/GE community has special needs where the IRS could benefit from input from the different perspectives of the practitioners representing all five functional areas of TE/GE through the corresponding subgroups of the ACT.

The Charter for the ACT provides that the ACT members will present in an organized and constructive fashion the interested public's observations about current or proposed TE/GE programs and procedures and will suggest improvements. A number of recent changes have occurred with respect to the ACT and the administration of TE/GE generally. Most of the legal functions previously addressed within TE/GE have been moved to the IRS Office of Chief Counsel. This is an important change as generally questions of legal interpretation, or even suggestions as to revisions to applicable rulings and regulations, now do not properly come to TE/GE; however, at the same time, the role of TE/GE in administering the provisions of the Internal Revenue Code applicable to the communities under the jurisdiction of TE/GE is as important as ever.

The Charter for the ACT provides that ACT members are not paid for their time or services but will be reimbursed for the travel-related expenses to attend a public meeting and scheduled working meetings in person. As recently as three years ago, the general practice of the ACT was to hold three or four meetings per year in person, along with the public meeting generally held in June for the presentation of the ACT report. For reasons which have been explained to the members of the ACT as "budget reduction reasons," the meetings previously held in person as provided in the ACT Charter have been held as "virtual" meetings (what would be commonly referred to

outside the IRS as “conference calls”), except for the public meeting, and the number of attendees even at the public meeting has been severely curtailed.

The elimination of in-person meetings has substantially reduced the effectiveness of communications of the interests of the communities being represented by the ACT members. The members of each of the subgroups previously benefited from interaction with each other in face-to-face meetings and the personal interaction helped to provide continuity from year to year as different members transition on and off the ACT. All ACT members and their constituents also benefited from discussing issues unique to each of their respective subgroups and sharing that information among all members and subgroups.

Attending a scheduled meeting in person served as an effective means of focusing the attention of the members of the ACT on the matters before them. The members of the ACT are industry participants and are generally selected by the IRS based on, among other things, their credentials in the industry. In other words, they are leading participants in their respective industries, and have many other demands on their time. While the members of the ACT are sympathetic to the budget constraints of the IRS, the relative cost of assembling members of the ACT for a handful of meetings per year is simply not a significant cost. Furthermore, the value of the time of the members of the ACT to TE/GE in promoting the efficient use of the time and efforts of TE/GE far exceeds the cost of assembling the ACT a few times per year.

In addition, the number of members of the ACT has been reduced and our understanding is that all future members of the ACT are expected to participate in discussions about matters in all areas under the jurisdiction of TE/GE, notwithstanding the substantial differences between the different communities under TE/GE and the varying areas of expertise of the members. There is concern among the members of ACT in all the substantive areas that this change will not provide TE/GE with effective use of the ACT members’ specialized knowledge and particular expertise. The ACT’s members are selected as leaders within their respective fields of expertise; to then utilize those members for issues focusing on other matters only tangential to their expertise can only

be viewed as but another example of governmental waste of valuable resources and inimical to the original purpose of the ACT.

b. Indian Tribal Governments

The mission of the ITG is to provide ITG customers top quality service by helping them understand and comply with applicable tax laws, and to protect the public interest by applying the tax law with integrity and fairness to all. The ITG mission is guided by principles of respect for Indian tribal self-government and sovereignty. ITG is to maintain a functional and interactive government-to-government relationship between the IRS and Indian tribal governments.[17]

In carrying out its mission, the IRS must recognize the United States government has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes and court decisions. Tribal government powers include the authority to establish, within tribal boundaries, the form of the tribal government, determine tribal membership, regulate tribal and individual property, levy taxes, establish courts and maintain law and order. Indian tribes are sovereign entities within the borders of the states in which they reside. Tribal inherent sovereignty is the foundation upon which the government-to-government relationship stands.

Over the years, Presidential Executive Orders have directed federal government agencies, to the extent permitted by law, to "respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the federal government and Indian tribal governments."[18]

We remain very cognizant of the creation of the Treasury Tribal Advisory Committee (TTAC) pursuant to the Tribal General Welfare Exclusion Act of 2014 (GWEA).[19] The GWEA, in addition to various other issues, directed the Secretary of the Treasury to: (1)

[17] See Internal Revenue Manual, IRM 4.86.1, .2 and .3 (12/27/2016); www.irs.gov/irm/part4/irm_04-086-001.html.
[18] Executive Order No. 13175, 65 FR 67249, 11/6/2000.
[19] P.L. 113-168 General Welfare Exclusion Act of 2014.

establish a Tribal Advisory Committee to advise the Secretary on the taxation of Indians; (2) establish and require training and education for IRS field agents on federal Indian law and the implementation of the GWEA and (3) suspend audits and examinations of Indian tribal governments and members of Indian tribes and waive any interest or tax penalties related to the exclusion from gross income of Indian general welfare benefits. The TTAC's framework provides a structural foundation for tribal governments to provide input to the Treasury including the IRS on matters relating to the taxation of Indians and the training of IRS field agents. The goals of the TTAC will be enhanced significantly if its members are allowed to meet in person, which will promote a greater exchange of ideas and viewpoints. The support provided to the TTAC by the Treasury Department's Office of Economic Policy and Office of Tax Policy and the IRS pursuant to its charter is also crucial to the success of TTAC.[20] TTAC should also be able to look to, and draw support and assistance from, the ACT. This broad support should provide a wider view of the issues discussed resulting in a more informed TTAC and more thorough discussions.

The IRS must be guided by principles of respect for Indian tribal self-government and sovereignty. The IRS must maintain a functional and interactive government-to-government relationship with Indian tribal governments as envisioned by Presidential Executive Orders. The ITG was established to assist Indian tribes with their federal tax matters. Tribal governments and tribal associations provided valuable input into the design of ITG, which is focused on providing a single point of contact for assistance and the IRS in addressing federal tax matters. Tribal governments and tribal associations should be encouraged to continue to provide valuable input into the design of ITG, focused on providing a single point of contact for assistance and the IRS in addressing all federal tax related matters impacting tribal governments and entities. By changing the structure and focus of the ACT, the IRS has severely lessened the important opportunity that ITG members of the ACT had to provide their input to the IRS and does not further the relationship of the tribal governments to the IRS relating to the impact of federal tax law on the tribes.

[20] TTAC Charter dated February 10, 2015.

c. Employee Plans

As the ACT meetings evolved from face-to-face working sessions, the depth of conversations with IRS staff decreased and the difficulty and effort required in achieving the EP subgroup members' goals of providing high impact feedback to stakeholders dramatically increased. Additionally, the engagement process of researching and interviewing regarding the EP subgroup's project seemed to shift away from IRS staff instead to industry leaders. As the ACT's format evolved to using virtual meetings augmented by conference calls and other technology, the overall time commitment by EP representatives dramatically increased.

At the same time, the number of EP representatives on the ACT was reduced from 6 members prior to June 2016, to 4 members in the current year (2016-2017) and EP representatives will be further reduced to just 2 members in the upcoming year (2017-2018). Such reductions have and will greatly reduce the ability of the EP representatives to share and exchange ideas amongst a group of experts within the employee plans field with TE/GE leadership, which diminishes their ability to carry out the original mission of the ACT. The reduction in membership also causes a personal loss of value for the volunteers who would otherwise gain considerable opportunities networking with other members in the employee plans community across the nation.

With respect to the current fiscal year, the ACT was reorganized from a focus on specific TE/GE functions to a handful of special projects of interest to the IRS. While these projects reflected internal restructuring and endeavors that were important to the IRS, they did not reflect any specialized knowledge or skill of the EP representatives on the ACT or why they were selected by the ACT. In some respects, EP representatives on the ACT felt that absent training or knowledge in the fields of information technology and project management that they were ill-equipped to be of any relevant service to the ACT or, in reality, the IRS. EP representatives on the ACT would like to be involved in IIR matters relating to Employee Plans. For example, the IRS recently released an IIR called "Substantiation Guidelines for Safe-Harbor Distributions from Section 401(k) Plans." This would have been the type of project with respect to which the EP

representatives on the ACT could, or should, have become involved as it relates to an IRS enforcement issue. Even if ACT members cannot formally serve on an IIR committee, allowing for some conversation and feedback during the process would be a great role for EP representatives on the ACT. Future IIR topics for EP could include: (1) guidelines on how plan sponsors should handle uncashed checks and (2) guidelines on what steps plan sponsors should take to find missing participants to satisfy the minimum required distribution rules under Code Section 401(a)(9).

d. Federal, State and Local Governments

The changes discussed above that have been made to the ACT have diminished not only the input into the FSLG subgroup by its constituents, but also from all other unique areas that fall under TE/GE. Eliminating many of the ACT membership positions previously available to each of the TE/GE subgroups, such as reducing the FSLG subgroup membership from three to one, as well as changing from face-to-face meetings to virtual meetings, has significantly reduced the effectiveness of both the ACT as well as its individual subgroups. The changes that have been made to ACT over the last few years have weakened the ACT's original purpose and effectiveness. That, in turn, has devalued the public's input to the IRS because the ACT is no longer as robust and vigorous as it was in the past.

Further, the FSLG representatives have significant concerns regarding the planned IRS organizational changes, which, to our understanding, will include placing the former FSLG unit under Exempt Organizations. If FSLG is no longer going to be part of the former Government Entities section of TE/GE, it seems more appropriate to place it under Employee Plans, which is responsible for overseeing compliance with respect to retirement plans. Although EP significantly focuses on private, corporate retirement plans, and the IRS has enforcement over EP through the Form 5500, EP also provides support and oversight to governmental retirement plans and the necessary enforcement role could be added to its organizational function. A closer association between EP and FSLG would greatly benefit the federal, state and local governments and public pension

systems and, in turn, help to reduce the IRS's examination and compliance costs relating to those groups.

If the current placement under Exempt Organizations is adopted, there needs to be a recognition that while the employment tax issues confronting governmental entities often are the same as those applicable to the private sector, there are issues unique to FSLG, including compliance with the special Social Security and Medicare coverage rules that apply to these entities.

Wherever FSLG is placed organizationally, the IRS needs to continue to recognize that the FSLG entities are a very large and diverse community with a strong need to have direct input on the practical impact of decisions made by TE/GE on them. After all, these entities are faced with the same budgetary pressures facing TE/GE. Now is not the time to leave this constituency feeling disrespected and unheard, which likely will lead to political backlash or unnecessary ill will between fellow governmental entities.

e. Tax Exempt Bonds

The function of the ACT with respect to the TEB community and the ability of the members of the ACT who are particularly interested in the portion of TE/GE focused on tax-exempt bonds, have been substantially affected by recent changes to the ACT.

One of the reasons for participating on the ACT is an interest in meeting other members of the TEB community and other members of the ACT whose focus is on other communities under the jurisdiction of TE/GE. There is considerable value in the "cross-pollination" of ideas about how these different communities act, and how they establish with TE/GE various means of administering to their community. All the communities under TE/GE share the commonality of not generally being tax-paying entities; however, each of them has its own special needs and, over time, TE/GE has dealt with them separately and developed administrative procedures appropriate to each community. There is value to having members of the ACT from varying communities have the opportunity to discuss what works in their particular area as a means of identifying new

approaches which may be to the benefit of TE/GE and these communities. This level of communication has been lost by eliminating the “in-person” meetings.

In addition, given that the members of the ACT are not compensated for their time and efforts (which have been considerable over the years), eliminating the “in person” meetings simply was a statement to the members of the ACT that their input was not particularly valued. It will be very difficult in the future to recruit new ACT members to participate under the current method of operation.

In addition to its effect on present and future ACT members, the ACT served a valuable function as a liaison between the TEB community and TEB. There has been frank conversation between the representatives on the ACT interested in the TEB community, and members of TEB about issues and the administration of the applicable provisions of the Internal Revenue Code which has been very helpful in focusing the attention of TEB on relevant issues, and importantly, avoiding wasting time and energy of TEB on matters which did not involve relevant issues. This level of communication has largely been lost as a result of the recent changes. Members of the TEB community largely feel that their “voice” has been severely limited by the changes to the operation of the ACT to their detriment and to the detriment of the effective administration by TE/GE of the relevant provisions of the Code.

As these comments indicate, the recent changes to the operation of the ACT, particularly the elimination of in-person meetings and the substitution of “virtual” meetings, and the reduction in the size of the ACT, have had a severe impact of the effectiveness of the ACT. While there is great value in increasing the communication between the TEB community, the TEB representatives on the ACT and TE/GE generally, the recent changes have negatively impacted the effectiveness of this communication and the value to the TEB members of the ACT and to TE/GE of participation on the ACT. Within the TEB community, this is viewed as an indication that the IRS “doesn’t care” or is ignoring the willingness of industry participants who are more than happy to volunteer their time and efforts to promote effective management and application of the provisions of the Code applicable to their communities.

f. Exempt Organizations

The EO subgroup represents a unique cohort of regulated entities, and it remains crucial for the IRS to retain some vehicle for maintaining open communication with a group of practitioners specific to tax-exempt entities. The ACT and its EO subgroup already exist and could continue to be invaluable to the IRS in its administration and understanding of the sectors it regulates, but that goal is unlikely to be met through the ACT's new structure that focuses on projects not specific to each of the five functional area subgroups.

In addition, the charitable sector is particularly vulnerable to issues surrounding public trust. At a time when the IRS's ability to invest in enforcement and oversight is increasingly diminished, the EO subgroup of the ACT provides insights and understanding of the concerns and challenges for both the regulated entities and the regulator and serves as a necessary bridge between the two.

The ACT was intended to help the IRS identify strengths and weaknesses of the agency in its regulatory and enforcement mandate. The functional area subgroups were designed to ensure that particular substantive areas that may easily be otherwise overlooked received an opportunity to communicate to the IRS about trends, concerns and opportunities. Over the years, the EO subgroup has benefitted from the pro bono service of dozens of high-level experts in the EO field. The new structure of the ACT focused on administration only and without any subgroups for the discrete functional area sector, removes the ability of an IRS sector constituent, such as exempt organizations, to have meaningful and regular communication with the IRS on matters of paramount importance.

The current EO subgroup suggests that the IRS and its ACT retain the five functional area subgroups for specific discussions throughout the year, even if done in a different format or frequency. In particular, the EO subgroup should routinely be collecting information and perspectives from the field to communicate to the IRS through the ACT, as well. To lose the entire notion, fundamental in the original design of the ACT, that specific sectors may have specific characteristics or needs to be addressed by the IRS

is to lose much of the value of the ACT itself. The 2017 Annual Report should be carefully parsed by the IRS and a determination should be made as to whether the ACT in its new form will provide the intended substantive knowledge needed for thoughtful and consistent regulation of the unique and important tax-exempt sector.

With respect to the comments of the IRS managerial staff concerning Industry Issue Resolution (IIR) matters, Revenue Procedure 2016-19 provides that taxpayers may submit issues to TE/GE for consideration under the IRS IIR Program. As stated in Revenue Procedure 2016-19,[21] "[t]he objective of the IIR Program is to identify and resolve frequently disputed or burdensome tax issues that are common to a significant number of entities. Resolving issues through pre-filing guidance rather than post-filing examination is a goal of the IRS and the Office of Chief Counsel." It would seem that with the level of subject matter expertise of the members of the ACT, providing consultation to TE/GE on IIR matters and issues would be an extremely helpful and useful function for the ACT's members and make effective use of the ACT members' specialized knowledge. While it is understood that the IIR Program is not structured as a federal advisory committee under FACA (as the ACT is), we would hope that the ACT's members would be able to provide support to the IRS with respect to the expansion of the IIR Program and to offer advice on substantive matters with respect to which they have expertise.

V. CONCLUSION

Historically, the ACT interacted with IRS leadership to address issues affecting TE/GE constituents, which represents over three million customers and entities and approximately $245 billion in federal tax expenditures. It is also important to note the extremely diverse customer base served, including small local community organizations and municipalities to major universities, huge pension funds, state governments, Indian tribal governments and complex tax-exempt bond issuers.[22] Although not subject to taxes, the TE/GE entities must comply with specialized and highly complex provisions of

[21] IRB 2016-13, www.irs.gov/irb/2016-13_IRB/ar14.html and Fact Sheet: Industry Issue Resolution Program, www.irs.gov/businesses/fact-sheet-industry-issue-resolution-iir-program.
[22] 2003 ACT Report, p. 11-19, www.irs.gov/pub/irs-tege/tege_act_rpt2.pdf.

tax law.[23] For 15 years, the ACT's members have had the opportunity to report to the IRS and the public on specific aspects of the TE/GE interactions with its stakeholders providing an important link to the stakeholder public. TE/GE utilized the ACT and its functional area subgroups for ongoing consultation in the hope of improving the administration of the tax law and the relationship of the IRS to its constituencies. The ACT's principal activity has been a series of year-long projects with specific topics, culminating in the production of final recommendations and a report presented at the public meeting each year. Through such reports, the ACT members have provided significant input and feedback on important tax issues with IRS officials. ACT members have provided observations about current or proposed IRS policies, programs and procedures, and suggested improvements through annual reports, which were often extensive and complex, often hundreds of pages each year.[24]

Since inception, the ACT's Annual Reports have been considered by the IRS in evaluating processes, guidance and myriad tax administration and compliance projects. The Annual Reports have opened up dialogues and even assisted the IRS in examining existing guidance or examination projects. The fact that the IRS elected to adopt and implement a significant number of the recommendations made in ACT reports is further evidence of the value of such reports and all of the volunteered time and effort contributed in drafting the reports. The past Annual Reports are prime examples of why a formal advisory committee has been particularly appropriate for TE/GE: the unique issues and stakeholders that TE/GE deals with require approaches and solutions that are often unique within the federal tax system. The changes made to the ACT, unless modified, have damaged, and will continue to damage, the previous important information-sharing relationship between the ACT and TE/GE.

[23] 2004 ACT Report, p. G-1, www.irs.gov/pub/irs-tege/tege_act_rpt3.pdf.
[24] 2011 ACT Report, p. 3, www.irs.gov/pub/irs-tege/tege_act_rpt10.pdf.

Recommendations

In light of the above, the Future Subgroup makes the following recommendations:

- TE/GE should maintain the five TE/GE functional area subgroup structure for discussion of specific topics that arise during the course of the year so as to communicate concerns from each of those sectors allowing the ACT members' expertise to be utilized effectively.
- Confirm that regular periodic interaction of the representatives of the five TE/GE functional areas with the director of each such TE/GE area will continue.
- The IRS should provide some mechanism pursuant to which representatives of the five TE/GE functional areas can again interact with attorneys at the Office of Chief Counsel who work in each such area so that the subject matter expertise of the ACT's members is better utilized, even if the ACT no longer is involved in the development of regulations.
- TE/GE should ensure that TE/GE staff informs ACT members when an issue that might be appropriate for a group project arises so that the ACT members can consult with staff in the formulation of the corresponding administrative, operational or enforcement guidance; for example, the EP representatives on the ACT would work with EP on a project like the recent hardship distribution documentation guidance.
- TE/GE should restore one or more in-person ACT meetings and integrate online meetings and/or web conferencing or some other interactive system for any virtual meetings.
- TE/GE should add member positions back to the ACT in lieu of further reductions in size as the shrinkage doesn't seem to represent any cost savings when almost all meetings are conducted on a virtual basis.
- The IRS should set a reasonable maximum page limit with respect to the length of the committee reports so that ACT members can address important issues in a thorough and comprehensive manner without feeling that they must do so within a constricted 3-5 pages.

- TE/GE should engage the ACT's members in the IIR Program on some significant level, for example, as a focus group, to take advantage of the breadth of their knowledge.

Summary

The changes to the ACT have resulted in a loss of the supportive relationship between the ACT members and TE/GE. The external perspective that was previously exchanged and welcomed and which provided a deep and broad understanding of the issues faced by the IRS and the customers it serves has been significantly limited. In particular, the new Annual Report guidelines restrict the ACT subgroups to submitting reports of only a handful of pages; no longer is the same level of feedback as previously existed either requested or, apparently, particularly welcome for that matter. While the financial and personnel constraints plaguing the IRS are readily apparent, it is the hope of the Future Subgroup that IRS management and TE/GE seriously consider the recommendations set forth above in the hope that the ACT can serve in a productive role in the future.

We hope that this Future Subgroup's contribution to the 2017 Annual Report provides helpful suggestions on how the practitioner community might continue to work together with the IRS most effectively.

ADVISORY COMMITTEE ON

TAX EXEMPT AND GOVERNMENT ENTITIES

(ACT)

Online Accounts Subgroup

Recommendations Regarding Expansion of Online Accounts for Tax Exempt Entities

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ONLINE ACCOUNTS

I. EXECUTIVE SUMMARY

The Online Accounts Subgroup of the Advisory Committee on Tax Exempt and Government Entities was formed to review and make recommendations on how the Internal Revenue Service can develop and implement web-based online accounts to address the needs of the five functional areas within the jurisdiction of Tax Exempt and Government Entities: employee plans, exempt organizations, tax-exempt bonds, federal, state, local governments and Indian tribal governments (collectively, TE/GE Groups). The Online Accounts Subgroup makes four recommendations: (1) expand online accounts for TE/GE entities; (2) expand electronic payment options for TE/GE entities; (3) develop authentication and access protocols for TE/GE entity representatives and (4) ensure that traditional methods of communication will continue to be available for TE/GE entities.

II. INTRODUCTION

Before the creation of the ACT, no formal organization or structure existed for the expression of the diverse interests and concerns of those persons, plans and entities impacted by the work of TE/GE. The ACT was established to provide an organized, ongoing forum for the exchange of ideas between personnel of TE/GE and highly qualified representatives of the varied and diverse stakeholders/customers of the five TE/GE Groups.[25] Over the last two years, TE/GE has undergone changes that impact the role of the ACT. Lawyers who previously were embedded in TE/GE were transferred to the IRS Office of Chief Counsel.[26] As a result, the number of people on the ACT was reduced and its focus revised as the historical ACT projects often dealt with specific regulatory or interpretive changes in the law and regulations, which are now being addressed by the Office of Chief Counsel. In the process of "de-compartmentalizing" the ACT, the IRS asked ACT members to undertake projects that are less focused on advisory issues that impact the specific underlying TE/GE Groups and instead focus on

[25] See Charter of the Advisory Committee on Tax Exempt and Governmental Entities,www.irs.gov/government-entities/advisory-committee-on-tax-exempt-and-government-entities-act
[26] See Fifteenth Report of the Advisory Committee on Tax Exempt and Governmental Entities, www.irs.gov/government-entities/reports-of-the-advisory-committee-on-tax-exempt-and-government-entities-act.

general tax administration issues encountered across TE/GE Groups. By using common data across functions, the IRS hopes to use such data to clarify laws, simplify processes, streamline the workforce, eliminate duplication of functions and increase compliance overall.

III. HISTORY

TE/GE Division Commissioner, Sunita Lough, invited the ACT to focus on shared issues consistent with the IRS Future State and consider making a report focusing on online accounts and taxpayer digital communications.[27] A central component of the Future State is development of a complete online experience for interactions with the IRS. In response, a group of the ACT members formed a subgroup to explore how the IRS priorities with online accounts and taxpayer digital communications impact the TE/GE Groups.

The IRS has traditionally communicated with taxpayers by using mail, phone, fax and in-person contacts. New systems are being developed to allow the IRS to use online accounts as well as new digital communication methods such as messaging, text chat, click to call, video meetings and co-browsing.[28]

The IRS has announced in its IRS Future State initiative that it has been developing technology to improve its online services.[29] With this online service, individuals can: (1) receive transcripts online, (2) obtain updates on the status of a refund, (3) pay an assessment directly online and (4) obtain payment history. Online transcripts will provide data from tax returns, information returns as well as wage and income filings.

To obtain information online, an individual user must verify his or her identity by providing a Social Security number, mobile phone number and personal account information from one of a number of sources, such as a credit card or mortgage loan.

[27] See Future State Initiative, www.irs.gov/uac/newsroom/future-state-initiative and see www.irs.gov/pub/newsroom/FSTaxpayerInteraction.pdf.
[28] See www.irs.gov/uac/newsroom/tax-professionals-provide-insights-on-irs-future-state-feedback-efforts-continue-in-2017-as-online-account-shows-strong-early-use.
[29] See www.irs.gov/uac/newsroom/future-state-initiative.

The authentication process requires first-time users to submit an email address, receive an email confirmation code and receive an activation code on their mobile phone.

The IRS reports that the initial rollout of individual online accounts has been well received with much activity: taxpayers have checked their account balance over 76,000 times and have used their online accounts to make more than 8,600 tax payments, worth over $27.6 million, through the new online Direct Pay feature.[30]

IV. DUE DILIGENCE

ACT members took multiple steps to understand the scope of the IRS online accounts projects and develop recommendations to help address the needs of the TE/GE Groups. ACT members met with David Ellison and Andrea Schneider, each a supervisory program analyst with the IRS Online Services team. Ellison and Schneider provided two presentations related to the development of online accounts and taxpayer digital communications. Their presentations confirmed that online accounts and taxpayer digital communications are beneficial to the IRS and to individual taxpayers largely because they allow for a fast, convenient and cost-effective method to exchange information.

After consulting with IRS staff, the ACT members explored the two topics and decided to focus on online accounts. A group of the ACT formed the Online Accounts Subgroup that resolved to develop recommendations and suggestions to help the IRS in its expansion of online accounts for individuals to online accounts that will serve TE/GE entities. The Online Accounts Subgroup is composed of tax practitioners, attorneys and other professionals who represent four of the five TE/GE Groups. The Online Accounts Subgroup also consulted with the FSLG members of the ACT who did not formally participate on this subgroup, but still contributed their thoughts on and suggestions to, this report.

[30] Id.

V. CONCLUSION

The Online Accounts Subgroup makes four recommendations, which are discussed in greater depth below:

1. Expand online accounts for TE/GE entities. Detailed suggestions of organization specific information and educational items are included for all five of the TE/GE Groups.
2. Expand electronic payment options to allow TE/GE Groups to pay fees and taxes online.
3. Develop special protocols for TE/GE entity representatives to be authenticated and have access to select documents.
4. Continue to provide traditional methods of communication to serve TE/GE entities that do not have online access.

Expanded online accounts

As the IRS starts to think about creating online accounts for TE/GE entities, the Online Accounts Subgroup seeks to provide suggestions of the specific documents and types of materials that would be helpful to various organizations as well as recommendations regarding the access and security issues unique to TE/GE entities. We understand from IRS staff that some of these specific documents are not yet available electronically and that a process will first have to be undertaken to convert and scan items before they could be made available on the IRS portal.

Employee Plans:

1. Organization-specific information
    - IRS Employee Plans determination letter
    - IRS Form 5300, 5307 and 5310 – applications and related materials
    - IRS Form 5330 – Return of Excise Tax
    - IRS Voluntary Compliance Statements
    - IRS Private Letter Rulings

- IRS Notices
- IRS assessments, notices of examination and Information Document Requests (IDRs)
- IRS Form 872 – Consent to Extend Time to Assess Tax
- IRS 412(e) funding waivers and extensions
- PPA actuarial certifications filed with IRS
- Audit and compliance check letters and related documents

2. Educational items
   - Link to Listing of Required Modifications (LRMs)
   - Link to Cumulative Lists and Operational Compliance Lists
   - Link to Internal Revenue Code Sections, Rulings, Announcements, Procedures and FAQs that relate to EP
   - Link to Voluntary Correction Program forms
   - Alerts – upcoming filing deadline, and so on

Exempt Organizations:

1. Organization-specific information
   - IRS Exempt Organization determination letter
   - Notices and rulings from the IRS
   - Information (“print-out”) from the IRS master file
   - Notifications regarding exempt status (for example, revocation notice, status of exemption application)
   - Audit/compliance check letters and related documents
   - Link to annual tax returns and filings

2. Educational items
   - Link to Publication 557 – Tax-Exempt Status for Your Organization
   - Link to the applicable “Life Cycle” page/resource
   - Internal Revenue Code Sections, Rulings, Procedures, Announcements and FAQs that relate to EO

- Alerts – upcoming filing deadline, and so on

Federal, State and Local Governments:

1. Organization-specific information
   - Form 941 – Employer's Quarterly Federal Tax Return
   - Form 941-X – Adjusted Employer's Quarterly Federal Tax Return
   - Access to transcripts, including detailed payment history
   - Form 843 – Claim for Refund and Request for Abatement
   - Audit letters and related documents
   - Audit appeals filings and responses, including records related to FAST TRACK and/or other mediation processes
   - IRS or organization data and filings related to Collections, including Form 12153, Request for a Collection Due Process or Equivalent Hearing and IRS appeal decision

2. Educational items
   - Link to IRS Publication 963 – Federal-State Reference Guide
   - Link to Social Security Administration webpage regarding state and local FICA coverage and taxation (www.ssa.gov/slge/index.htm)
   - Link to National Conference of State Social Security Administrators (www.ncsssa.org/index.html)
   - Links to any information regarding appeals and mediation processes
   - Links to IRS Notices and Rulings related to employment tax

Indian Tribal Governments:

1. Organization-specific information
   - IRS Notices and Rulings
   - Links to annual and quarterly tax return filings
   - Audit and compliance check letters and documents
   - Information (“print-out”) from the IRS master file

2. Educational items
    - Internal Revenue Code Sections, Rulings, Procedures and FAQs that relate to the:
        - Tax status of tribes
        - Excise tax requirements for ITG, including exemptions
        - EP and EO issues for ITG
        - Issuance of both taxable and tax-exempt bonds by ITG
        - Tribal General Welfare Act
    - IRS guidelines for ITG consultation
    - Publication 3908 – Gaming Tax Law for ITG
    - Relevant and recent IRS announcements

Tax Exempt Bonds:

1. Organization-specific information
    - Form 8038 – Information Return for Tax-Exempt Private Activity Bond Issues, all versions and supplementary schedules
    - Form 8328 – Carryforward Election of Unused Private Activity Bond Volume Cap
    - Form 8339 – Issuer's Quarterly Information Return for Mortgage Credit Certificates
    - Form 990 schedule K – bond supplemental to the Form 990
    - Form 8609 – Low-Income Housing Credit Allocation and Certification
    - Form 8703 – Annual Certification of a Residential Rental Project

It should be noted, however, while some tax-exempt bond issuers (Issuers) may find it useful to have a separate portal to access Issuer specific information and documents, many Issuers will benefit from having access to online services provided to them as a TE/GE entity.

Many of the above-listed forms are completed by an Issuer's Municipal Advisor or Bond Counsel. Permitting these professionals access to the Issuer's online accounts will be

critical to ensure that accurate information is submitted and compliance matters handled in a timely manner. Security of the account is of some concern, though most of the relevant information on these forms is public in nature and thus only updating and submission restrictions may apply to users. Although not specifically related to the issuance of tax-exempt bonds, several Issuers also operate Housing Tax Credit programs on behalf of their state, which is why Forms 8609 and 8703 were included.

One unique situation that we are not recommending to be included in this component is the incorporation of Form 8329, Lender's Information Return for Mortgage Credit Certificates. Though this form is connected to an Issuer's reporting due under Form 8330, it is the responsibility of mortgage lenders to report this information and update directly to the IRS. Given the large number of lenders that can be involved in a given single-family mortgage revenue bond program, it would appear to be infeasible to include the 8329 in the Issuer's online portal.

Electronic payments

With the IRS's development of the ability for individual taxpayers to pay taxes online, the ACT recommends that the IRS expand such ability to allow for online payments by TE/GE entities. Specifically, for Employees Plans, there are user fees associated with a variety of filings and submissions that are not uncommon in the administration of plans. Likewise, with Exempt Organizations, there are user fees with certain filings and applications, such as the IRS Form 1023 and 1024 applications. The use of the online payment system for such user fees is a requested option. Further, the flexibility of the payment system to receive a variety of payment formats (e-Check, ACH, credit/debit card, etc.) is recommended. In addition, for FSLG clients and ITG, such entities would like to see the option to pay fees and taxes online. In the implementation of these payment options, the IRS should consider within the functionality that it is typically an associated professional such as counsel, attorney, TPA or other party that is actually handling the filing for the tax-exempt entity. The functionality of one party to enter the payment information with the associated tax ability of the tax-exempt entity to authorize payment would be an almost essential feature for practical use.

Access, authentication and security

The increasing occurrence of cybersecurity breaches and identity theft makes individual users vulnerable and worried about being exploited online. As the IRS expands the availability of online services, it has expressed its dedication to protecting taxpayer personal information and maintaining the security of its systems by strengthening the identity validating process used to access tools on irs.gov home page. In June 2016, the IRS increased its security measures to require a two-factor authentication process for all its online tools and applications, which is the strongest possible authentication process currently used by large organizations and financial institutions. The IRS has also developed protocols for individual users to authenticate their identities.

The Internal Revenue Service Advisory Council (IRSAC) recently provided recommendations regarding the enhancement of the IRS web-based online accounts for individual taxpayers.[31] IRSAC recommended that the IRS create a secure system to authenticate third parties and access online powers of attorney and the Online Accounts Subgroup reiterates the importance of such recommendations.[32] While many of the IRSAC's recommendations are applicable to TE/GE entities, the ACT Online Accounts Subgroup is recommending certain additional considerations for accessing online accounts that relate to TE/GE entities, which share both private and public information with the IRS. While the Subgroup is committed to transparency and appreciates that there are benefits for certain documents to be available in the public domain, other documents that contain private information of employees or financial transactions must be kept secure. Ensuring that TE/GE entities can choose which documents to share publicly and which require limited access will be critical to building an online account system.

TE/GE entities must also have additional control and flexibility over who may access their online accounts. Like any private or public institution, TE/GE entities are supported by professional counsel, accountants, financial advisors and staff that must have access

[31] See IRSAC 2016 Annual Report available at www.irs.gov/tax-professionals/2016-irsac-sbse-wi-subgroup-report.
[32] See www.irs.gov/tax-professionals/2016-irsac-sbse-wi-subgroup-report.

to our systems and the ability to communicate effectively with the IRS on our behalf. Again, TE/GE entities ask that flexibility be designed into the system so that it may provide the organizations with greater control over the management of permissions, logins and access to online accounts. Many TE/GE entities have cross-functional relationships with the IRS. Some organizations that issue tax-exempt bonds are also nonprofit corporations and some Indian Tribal Governments may manage employee plans. We recommend designing online accounts for TE/GE entities in a manner that will allow different types of users to select access to functions that are useful and appropriate, while permitting users to avoid other functions where access is not necessary.

We further recommend that there be an annual user renewal system, similar to systems used by other federal agencies for online access to secured data, which verifies whether users remain in positions of authority to continue to have access.

Digital divide impact

As the IRS seeks to expand online services to TE/GE entities, the Online Accounts Subgroup recommends that the IRS continue to provide traditional methods of communication to serve those individuals and entities that do not have access to online communications, with particular attention to limited broadband availability in rural areas of the country. The residents of the rural parts of this country are among the last citizens to gain access to the internet. Access to broadband is often unavailable or expensive in Native American communities, as this area of the country has largely been ignored and underserved by telecommunications providers.[33] Communities on tribal lands have historically had less access to telecommunications services than any other segment of the population. Therefore, it is important for the IRS to remain cognizant of this digital divide as it expands the availability of online services. The IRS should continue to allow for taxpayer communication to occur using traditional methods such as mail, phone, fax and in-person contacts so that taxpayers with limited broadband access are not left behind as the IRS moves forward with new online services.

[33] Federal Communications Commission. (2016). 2016 *Broadband Progress Report*. Washington, DC.