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MESSAGE FROM YOUR UNCLE

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This session will give the Internal Revenue Service (IRS) and the Treasury Department an opportunity to address specific issues of their choice.

MR. JOHN D. MARSHALL: It's actually a message from the IRS and the Treasury. To my left is Kathryn Marticello from the IRS and to my right, Harlan Weller from Treasury, and they both have messages. I was searching for the etymology of the title of this session, "Message from Your Uncle," and as you can tell from the mix of genders here, it shouldn't be uncle. It should be aunt and uncle. Uncle usually gives you kind of a warm feeling of somebody who's going to do something nice for you, but there is also, in every family, an uncle that nobody talks about. So I'm going to hold judgment about type of uncle we have until after the message.

MR. HARLAN M. WELLER: I'll start off by filling you in on the etymology of the name. This originally was a "Message from the IRS," and then I got recruited to join, and since I'm not part of the IRS, it became all of Uncle Sam together. But before I get into any substantive thing, I've got to flash my usual disclaimer/warning, which is that, the opinions you're going to hear are my personal opinions and they're not the opinions of the Department of Treasury, the IRS, or the administration. Any of you who work in large businesses know how hard it is to reach agreement on any type of a statement of principles or anything like that. The federal government is an enormous enterprise, and getting agreement on an official position is a very time-consuming, difficult matter. That's why regulations take so long to be issued. As a consequence, rather than try to reach the consensus necessary to have an official Treasury position before going out and doing a speech like this, we just present a disclaimer indicating that you're hearing personal opinions. This way, if I misspeak, I haven't committed the entire government to a course of action that is not wise to follow.

The outline for this program, which was prepared about a month ago, lists the first two items as a general discussion, and then the nondiscrimination regulations under 401(a)(17), and the separate line of business regulations. When Kathy was preparing this outline, we talked about what should be on it. I said was sure the regulations would be out by then, so I would be able to talk about them, so just put it on the outline as covering the first 20 minutes of our session. The timing will be perfect; it will be hot news. It is coming out right before the meeting. Unfortunately, it's not out yet, so I'm not going to be able to talk in detail about the regulation. But I can assure you the final pieces of the nondiscrimination regulation package, as we call it, which are the final regulations in 401(a)(17) and amendments to the final regulations on a separate line of business, will be out any day now. I will eat my hat if they're not out by next week, although I'm not wearing a hat. They are very close to being public, and I'm leery, in general, of predicting timing on regulations. But for these regulations, I know how far along they are in the process, and I know it will be soon.

In general, I can talk about some of the questions that came up that we had to address in the final regulations. In the 401(a)(17) final regulation the most persistent question that came up was how this works in a Section 401(k) plan. There's a sentence in the regulation that discusses a plan that determines accruals by piecing up periods of time, determines an accrual for each period of time such as for each month, and then adds up the accruals for each month to determine a yearly accrual. In this case, you need to prorate the compensation limit for those monthly periods. You can't have $150,000 compensation in the first month and then determine the benefit on that basis with no compensation taken into account in later months. You'd have to do a proration to do $12,500 a month for purposes of your benefit formula.

People asked how this plays out in the context of a 401(k) plan in which people are taking deferrals on a payroll period-by-payroll period basis. Obviously, you have a deferral that comes out of your periodic paycheck, whether it's a biweekly paycheck, a monthly paycheck, a semimonthly paycheck, or whatever it happens to be. You do make contributions to a 401(k) plan on a shorter than full-year basis, so they were concerned that the requirement that you have to prorate as described in the regulation would mean that you could only take into account, say, $12,500 worth of compensation in the month for purposes of the 401(k) plan. I think that is overreading what we intended by that example. Let's look at the example of situations in which, for instance, you might have benefits earned during only one month or only during the first six months of the year. If benefits are earned only during that short period of time, then it makes sense to say that you shouldn't get the full $150,000 worth of compensation, because otherwise you're effectively doubling or multiplying the amount of compensation that's taken into account under the plan by a factor of 12. So that's the kind of example that we are most concerned about.

We talk about how it's a matter of gradations between only accruing benefit for the first six months and accruing zero thereafter, or accruing a much larger rate during the first six months and a smaller rate thereafter. All these have been tossed in together, and essentially the rule says that if you are accruing piece-by-piece and adding up the results at the end of the year, you have to do a proration. But we don't think that applies in the case of 401(k) plans, where you're not accruing piece-by-piece; rather, you're just deferring out of compensation, which happens to be paid out piece-by-piece. I think it extends not just to 401(k) situations. The same kind of reasoning might apply to after-tax contributions in the 401(m) basis. So that's one question that I think we're going to respond to positively for people.

At the same time, you should be aware that we've heard statements that people in 401(k) plans are ignoring the $150,000 limit all together, except when they come down to the bottom line of the average deferral percentage test, and we don't believe that is proper. If you have a plan that says your contribution rates may be up to 5% of pay, then a person is going to be limited to 5% of $150,000. Then, depending on how you draft that plan, you don't necessarily have to make it in the first $150,000 that comes through the pipe. So you don't necessarily have to say that a person who happens to make $150,000 every month, makes $1.8 million for the year. That person doesn't have to do all deferrals in the first month and not be able to defer thereafter. If you draft your plan properly, you could spread out the effect of your $150,000 over a year. But you are supposed to take into account that $150,000 limit if, in fact, you had a plan provision that is a function of compensation. One of the reasons that this is important is, for instance, if you had a matching program.

Let's say you had a plan formula that allowed people to contribute up to 6% of pay, and then you said you would match only the first 3% of pay. If you were to take this high roller who puts in, say, $9,000 worth of deferral while making $300,000 worth of compensation, then, if I do my arithmetic correctly, $9,000 is 3% of his $300,000 of compensation. Then you'd assume he's contributing at the 3% rate. His entire 401(k) deferral is available or subject to the match. That is not the right result. In this case, he is effectively contributing $9,000 on $150,000 worth of compensation. He has a 6%-of-pay deferral, and, if your plan formula says your matches are based only on the first 3% of compensation, he gets a match only on the first 3% of compensation. So there is some involvement in the 401(k) world, but I think the clarification that we want to get across is that the chunk-by-chunk issue of the contribution pattern in 401(k) plan should not cause you to do a proration of $150,000. But at the same time, you can't blindly ignore the $150,000 limitation.

If you want to minimize the impact of $150,000 limit in your 401(k) plan, one small technique would be to remove the percentage of pay rules from your plan. For instance, you could say that a person could contribute a dollar amount. So a person could choose to contribute $500 a month or $600 a month, whatever you want to allow, that's not a percentage of pay. In doing so, there's less of a tie to the plan compensation; therefore, you don't need to worry about the $150,000 limit until you reach the average deferred percentage (ADP) test. At this time, you would, in fact, take the $150,000 limit into account in determining actual deferral percentages, which then get averaged into the ADP test. Beyond that, we don't anticipate seeing many changes in the 401(a)(17) regulation. I think the people who looked at it in December saw that it was essentially unchanged since the 1991 version, except that it reflects the second or the further reduction in the 401(a)(17) limit that was included in the 1993 legislation.

I'd like to turn to the separate line of business regulations. They generated more comment than the 401(a)(17) regulations. To give you an indication of that, our usual pattern is to hold a public hearing for people who want to make oral comments on the regulations in addition to people who made written comments on proposed regulations. With the 401(a)(17) regulation, the request for a public hearing and making oral comments was so underwhelming that it was canceled. One person wanted to make comments, and we convinced him that we could just take it over the phone without a public hearing.

By contrast the separate line of business regulations did generate a number of comments, and we held a hearing to hear from parties interested in the proposed amendments for the separate line of business regulation. At the same time, I'd say we generated a number of comments. It was a greatly reduced number of comments from the 1991 version of the regulations. Those of us who have been in the business for a while are aware that the nondiscrimination regulation has been a saga that has lasted a very long time, starting in November 1988, when the first version of the 401(l) regulations was proposed. Here we are nearly six years later, and we're finally getting it done. And it's been hard on the pension community, but it's been hard on the government, too. It's not the best way for regulations to be written, but that's an aside.

The separate line of business regulations did get a number of comments. They primarily centered on the issue of employees who are in headquarters positions or in staff positions that don't have a clear home between one or another of the separate lines of business. As you may recall, the regulation establishes three ways of allocating these people among the separate lines of business. It is clear from the legislative history that everyone in the company must be assigned to one separate line of business or another. There are no leftover people. In the regulation we have a process in which, first, you determine people who spend a substantial portion of their time working on one particular line of business. They have a natural home in that line of business. Then you assign those people to that line of business for nondiscrimination purposes. But there is going to be a leftover group of people who don't have an obvious home, a separate line to which they should be assigned. The regulation sets out three different methods for assigning those people.

One method is what we call the "dominant line," which is probably the most popular method. In this method, you find one particular line of business that is the largest line of business by a fairly substantial margin. You then send the leftovers ("residual shared employees") there. I think "residual shared employee" sounds better than calling a person a "leftover." But residual shared employees all get sent to that single dominant line.

The other two methods both involve sprinkling the residual shared employees among all the lines, and there are particular formulas to determine how many go to each line. The formulas are different for highly compensated employees and non-highly-compensated employees. It's fairly involved, but the fundamental result is that, if you have, for instance, a headquarters that has a good number of highly paid employees, a good number of them may end up being sprinkled into a line of business that has a predominant non-highly-compensated employee population if it becomes very difficult for them to retain a high benefit level while still passing the nondiscrimination rules. So employers were running up against that quite a bit. The sprinkling was also causing a problem with employers who found that they were having difficulty allocating employees who worked together. In the most sympathetic cases, the guy in the office right next to you or at the desk across the hallway from you, because of the sprinkling approach, gets sprinkled into a different line of business than you do and may, therefore, have to get a different benefit level than you do. That's obviously not good employee relations.

The thing that we heard most, and I think we've come up with some positive responses to the needs of employers, is to do more flexible kinds of allocations among their residual share, so that you don't often have the problem of people working together being sent to two different lines of business. This, in turn, may mandate two different benefit levels for them. There will be some other changes in the separate lines of business regulations. They probably won't have as much impact as the one I just referred to, although I haven't told you what the change is.

Separate lines of business regulations, like the rest of the nondiscrimination regulations, are effective for plan years beginning in 1994. Now we recognize that this is June 1994, and we agonized over the issue of whether there should be some sort of delayed effective date. We have concluded that there is adequate time because the 401(b) period allows for the remedial amendment period to get amendments completed. Kathy can talk more about that later, to the extent that the regulations are issued. They're so very close to being out the door that I can taste it. In the very near future there will be six months worth of time for people to do whatever planning they need to and get their plans drafted and submitted to the IRS retroactively to the beginning of the year, so that the entire nondiscrimination package will be in effect and will apply to benefits accrued in 1994. You have until the end of 1994 to make these amendments, and there have been several notices since 1988 when there had been delays in effective dates on the nondiscrimination regulation. The most recent notice, I believe, is 92-36. It continues to allow an employer to keep its old benefit formula through the end of 1994 as long as certain conditions are met and as long as any excess accruals that occur during 1994, as a result of maintaining that benefit formula and not making the change earlier in the year before benefits were accrued, are not taken into account in the nondiscrimination testing. So you get forgiven for having additional accruals that might not be permitted under the new rules if you get everything in order by the end of the year. That takes a lot of the pressure off in trying to do something with the January 1, 1994 effective date.

Later on, when we get to questions and answers, I'm going to question the audience a little bit to find out its experience with the separate line of business regulations and with the submissions of plans under the revenue procedures that Kathy's going to talk about in general, so I'll pass it onto Kathy.

MS. KATHRYN G. MARTICELLO: First, I'd like to echo Harlan's caveat. Any comments that I make are my own and don't in any way represent the official position of the service. I'd like to talk a little bit about the services determination letter and examination program and some of the modifications and changes we've made recently to try to help plan sponsors cope with the myriad of rules and regulations for which they have to amend their plans.

Of course, I'm sure you all know the determination letter program has been open for all plans, even for plan testing, nondiscrimination, and amount using the general test or cross testing since October 1993. The parameters of the program are presented in revenue procedure 93-39. And in that revenue procedure the service did try to be a little more flexible than we have been in the past, in that the plan sponsor could decide how much documentation it wanted to submit and, as a result, how much reliance it would have on the determination letter. For example, if your plan does not base nondiscrimination testing in benefits, benefit amounts, etc. on a design base safe harbor, your determination letter will not consider nondiscrimination issues unless the plan sponsor affirmatively requests such a review and provides a demonstration that the plan satisfies the general test or cross testing, etc. The same is true with coverage. If your plan does not satisfy the ratio percentage test, you have to specifically request that your determination letter cover the average benefits test.

Revenue procedure 93-39 also took a flexible position on benefits, rights, and features, so that if you wish to have reliance that your benefits, rights, and features satisfy the current availability rules, you have to inform the service which benefits, rights, and features you wanted to have us look at and provide a demonstration that they did satisfy the current availability rules. Your determination letter would then be favorable and would provide you with reliance for those benefits, rights, and features and for no others. The determination letter would caveat anything that we didn't review, and it would say that you could not assume reliance on issues we hadn't looked at. There are some things you could never get reliance on through this determination letter program, for example, substantiation quality of data or effective availability of its rights and features.

One thing that we noticed in the revenue procedure is a section that applies to plans that are mandatorily disaggregated, or disaggregated for some other reason, or permissively aggregated. The revenue procedure does require that you provide a demonstration as to why the plan is disaggregated and the basis for the disaggregation. You have to demonstrate that you've passed coverage and nondiscrimination for each unit. With some of the requests that we have reviewed, especially in the field where you have a profit sharing plan that has a 401(k), 401(m) arrangement, plan sponsors may have thought this was so simple that the service couldn't fail to see it and sort it out. Plan sponsors don't provide a lot for demonstration based on the mandatory disaggregation for 401(k), 401(m), and the profit sharing. But remember, that is disaggregation. You do have to explain to us how each unit satisfies all the tests. And if, for example, you don't pass the ratio or percentage test for the profit-sharing plan, you do need to do your average benefits test, taking into account the 401(k) amounts, the 401(m) amounts, etc. So we have had some problems with that.

I think it would be very helpful if plan sponsors would look at the appendices that are attached to revenue procedure 93-39 because they are very helpful. If you try to follow them, it will save you a lot of trouble, and it will save the service a lot of trouble, because we have had to go back and ask for additional information in many cases. Recently in 1994 we have made some changes to the determination letter program to try to ease the burden on plan sponsors. For example, under revenue procedure 93-39, you have to specify each benefit right or feature that you want us to look at. Under revenue procedure 94-37, which was issued recently, if your plan passes coverage as a whole, or if you have separate units of your plan that pass coverage, then if you have benefits, rights, or features that are available to everyone equally, any unit that you have tested successfully for coverage can have reliance that those benefits, rights, and features satisfy current availability rules. Of course, if there is anyone in the coverage unit who doesn't get a benefit, right, or feature, then you have to fall back on the old procedures, and you have to independently demonstrate compliance.

The second liberalization was a reduction in the amount of information on past service that has to be submitted. If you have past service that's taken into account under the plan only for other issues required for qualification, you don't need to submit information on that past service. That may be also of some help.

Third, there are special provisions for documents of standardized plans. For standardized regional prototype, master, and prototype plans, sometimes those plans do have to request determination letters specifically if the plan is terminating. This new revenue procedure allows you to avoid providing all the information that would have been required under Section 5 of revenue procedure 93-39 if the plan is one of the standard plans.

In addition, the service has recently issued announcement 94-85, which deals with extended reliance. As you all know, revenue procedure 93-39 did provide for extended reliance for plans that requested a determination letter before June 30, 1994, including volume submitter plans. The problem with some volume submitter plans is that, in order to request a determination letter, you had to have a copy of an advisory letter for the volume submitter plan. It may have happened that you would not be able to get your advisory letter in time to be able to submit your determination request by June 30. So this announcement provides some relief in that situation. It says that when an advisory letter has been requested before June 30, 1994, adopters are eligible for extended reliance if they submit the determination letter before December 31, 1994.

As a point of interest, the service is handling the request for determination letters under this program a bit differently than we have in the past. Usually the field agents work on determination letter requests. In this case, though, for this new batch of determination letter requests, the national office is looking at a sampling of the cases. This helps us because we become aware much more quickly of trends and problems that are developing so we can act more quickly to try to issue guidance. It also helps the people in the field because there's more cross pollination on technical issues between the national office and the field.

So far we're very pleased with the way this is working, and we think it's given a lot more insight than we have now on problems the field agents and plan sponsors are facing.

I'd like to talk a little bit also about examination program and some of the modifications we've made to it to try to help plan sponsors bring their plans into compliance. Of course, the main goal of our examination program is to get plans to comply. We do that, basically, in three ways. We have administrative programs with plan sponsors, and we try to encourage them to come in and voluntarily bring their plans into compliance. We have recently started to publish examination guidelines relating to various issues, which we're hoping that plan administrators can use almost as a self-auditing technique. And, of course, we have our ongoing examination program.

The three administrative programs that we have to help encourage voluntary compliance are, starting at the lowest level, the Administrative Policy Regarding Sanctions (APRS). Basically that's a minor housekeeping program. If you have a minor defect in your plan that's not repeated and if it's just a housekeeping program, you can correct that defect without any sanction.

It's minor operational defects. Generally there will not only be correct form in the plan, there will be operational procedures and administrative procedures established and it's just a minor mixup that's occurred. It's not part of a lack of decent administrative procedures for the plan.

We also have the Voluntary Compliance Resolution (VCR) program, which started back in 1992. It's a pilot program. It was initially designed to be temporary, but it's been extended. This program applies only to clients with operational defects. It applies to clients whether it is a determination letter for the TEFRA DEFRA and REA Amendment. It applies to plans that are not under examination and that are not aggregated with plans under examination. Under this program, as it was initially established, the plan sponsor comes to us, suggests a way to correct the defect, corrects the defect, pays a sanction, and pays a fee. There is no specific sanction related to the otherwise applicable tax effects. It's a standard fee, which varies by the size of the plan.

When the VCR program was established, there was at least one problem that people complained about: plans with repeated flagrant violations were not permitted to come into the program, and there was some confusion about what this means. There was a desire to have a more broad acceptance of plans into this program, and so in 1994 we extended the VCR program in two ways. We took out the reference to repeated flagrant violations, and we started something called "plans with egregious operational defects," and there are two examples in the revenue procedure that describes any program. We wanted to eliminate the idea that just because you had a defect in more than one year, you couldn't come into the VCR program.

We also tried to link the VCR program with our ongoing closing agreement program (CAP), so that even if you did have a defect that was egregious, and you tried to bring your plan into the VCR program to correct the defect, and we thought that it didn't fit in that program, then there was still some way that the plan sponsor could correct the defect on a more favorable basis than a sponsor would find if the plan was examined and the defect was discovered, and the plan sponsor entered into the CAP. That was done by coordination with the CAP. I'm going to describe a CAP next, and I'll describe a change we made to that program for this accommodation. But I just want to mention one other thing that we did to the VCR program in 1994. We instituted a standardized VCR program with specific defects and correction procedures. This program was intended to be a simplified way to correct certain defects because the fee is less, the aggravation is less, and we're hoping that people will take advantage of the standardized VCR program. As a matter of fact, we are currently on the horizon of expanding the number of defects with model corrections so that there will be more defects that can be corrected through this simplified way. By the spring of 1994 we received 650 cases under VCR and we received 100 cases under the simplified program. So people are using the VCR program, and recently we have had a very large increase in the number of plans that have come in for relief.

The CAP is different from the VCR program in how it was initiated and in its availability for plans that are under examination. It's also available to foreign defects. However, it's more expensive because there's a sanction associated with the CAP program. If you're in a CAP, there's a negotiated sanction for your defect, and the negotiated sanction is based on what your maximum tax exposure would be because of the disqualification of the plan. Because of the response from individual practitioners wanting some relief because they couldn't get into the VCR program because, either they didn't have a TEFRA, DEFRA, REA letter, or their defects were too serious, there was some reason they couldn't get into the VCR program. They wanted a way to voluntarily correct their defects anyway, so in 1994 we opened the

CAP to what we call "Walking CAP," which is individuals who voluntarily want to come into CAP to correct the type of defect that can't be corrected under VCR. For example, if you have an operational defect that you don't have a TEFRA, DEFRA, REA letter, or if you have a defect that turns out to be egregious, the advantage of this is that your sanction is limited to a specifically reduced amount of the sanction that would apply if you were examined and you went to the CAP program. So we still offer an advantage to come forward voluntarily to fix your plan rather than waiting until your plan is examined.

The CAP program has been very popular. By the spring of 1994, we put 820 cases covering 335 participants and 107 cases still pending. On the horizon we are trying to think of a way to initiate a new program, which will not be exactly like the CAP or the VCR program, but will look into correction of plans with 403(b) problems.

MR. WELLER: I think it's important to note that the IRS has seen a trend that shows up in the employee plans. It's showing up in exempt organizations. It will also show up in the PBGC proposal, which is looking for an intermediate sanction as the code word. Because the effect of disqualifying a plan is so large and has repercussions for so many individuals, the IRS was reluctant to use that weapon. It's the old neutron bomb that destroys the plan but leaves the building standing. The use of intermediate sanctions is something the government hopes will actually be used more because the IRS would be less reluctant to apply such sanctions. At the same time, practitioners would wake up to the fact that the IRS is going to enforce the law, even down to minor operational defects.

MS. MARTICELLO: A part of this whole program would have also started to issue audit guidelines, and in the next couple of months, we intend to issue guidelines on prohibited transactions, valuation of assets, termination of plans that don't have determination letters, cash-or-deferred arrangements. We're also working very hard on guidelines for single fund distribution, two joint survivor annuity issues, deduction limits for self-employed, and, a little further on the horizon, guidelines for top-heavy requirements, general distribution requirements, limits under Section 415, especially Section 415(e) which is sort of arcane and complex for some people to handle, and, later on Section 403(b) arrangements. Part of the desire to publish these guidelines is that they can dovetail nicely with the VCR program and with the CAP program, because plan administrators can look at these guidelines and do an examination of their own plans to see what we would be looking for if we would examine your plan. You can find your own defects, and come in voluntarily before we come after you.

Lastly, of course, we intend to continue to conduct examinations on various focus areas. I don't know how many of you have heard comments at prior meetings, but we recently completed examinations of a large number of underfunded plans, a byproduct of those examinations. The data have been assembled at the national office, and our economists and various other individuals are working hard to analyze the data to determine whether we can learn something about underfunded plans. We're also conducting examinations on prohibitive transactions, valuation of assets, and various other issues.

There's one other thing that I would like to mention that is not on the outline: filing the claim in Schedule B. We are now working on the 1994 5500 Schedule B. There probably will not be any major changes; however, one change that we would like to make and that we hope we will be able to make is to clarify the instructions a little bit for individuals who are in multiple-employer plans, especially individuals who are in multiple-employer plans and are subject to the rules under Section 413(c)(a), where you're required to calculate your funding as if each employer was a single plan. There has been some confusion about filing a Schedule B for those cases, and we're going to try to clarify that there should be one Schedule B filed for those plans, but each individual employer does not file a separate Schedule B. It's still one plan, and the entries to the single Schedule B should be backed up by work sheets for each employer showing the calculations that would apply if they were done based on a single-plan concept.

One thing that can be confusing is that, in such a situation, while many of the entries on Schedule B will be purely additive, the lines for funding deficiency and credit balance will not be additive, because we will not be able to offset a funding deficiency for one employer with a credit balance for another. So, on the Schedule B, for each of the individual employers, you need to sum the credit balance for the ones that have credit balances, and you'll sum the funding deficiencies for the ones that have funding deficiencies. So you could end up with a Schedule B like you've never had before, which shows both a funding deficiency and a credit balance on the same Schedule B. We're hoping to be able to clarify the instructions for that.

MR. WELLER: I turn to the list of priorities that was established earlier in this year. Since 1992 the Treasury and the service have been publishing lists of their priorities, items that they expect to be working on in the upcoming 12 months. That does not mean that anything that is missing from this list will not be worked on, but our energies will go first to completing the items on this list, and I would certainly hope to complete nearly all the items on the list. Sometimes we do have some carryover from one year's list onto the next year's list, but this year, knowing that we have a lot of legislative activity, we didn't create such an ambitious agenda. I'll be discussing some of the legislative issues in the following session. But knowing that there's a lot of legislative activity going on in 1994, we didn't create too tough of a hurdle for us to jump over. This is a list of items that we expect to be working on, and I can remind you of the things that actually have been completed up to the halfway point for the calendar year.

Look on page four of our outline. The additional guidance under 162(m) dealt with the $1 million compensation limit for executives. There was a notice issued within the last couple of weeks that discussed the issue of what it means to have a preestablished goal. The notice will extend a temporary rule that says that "preestablished" doesn't necessarily mean it has to be before the beginning of the year. We're giving you up to three months within the compensation plan year to establish the goals. This change was in response to many employer comments that said that it wasn't practical to decide appropriate performance goals for the executives for an upcoming year until they have their financial results from the prior year.

The second item we talked about earlier—the final regulations in the 401(a)(17)—will be here very soon. The third item, which has been called a "concordance," but I don't think it's the right term, is really a cleaning up of some of the 401(k) and 401(m) issues relating to subsequent changes in the 401(a)(4) nondiscrimination packages. The 401(k) regulations, I believe, were completed in August 1991, and, since that time, there have been final regulations under 401(a)(4) and modified regulations under 410(b), etc.

We're going to try to do a better coordination between those regulations. I don't anticipate that we're going to have many surprising changes there, but I think we will probably address some of the issues that people have talked about in the 401(k) regulation since that time. For instance, I received a letter not too long ago that dealt with the question of people who had taken one-time elections. As you may know, the 401(k) regulation allows you to say, if you do a one-time election to a particular level of contribution prior to entry in any employer plan, then that election is not treated as a cash or deferred election that is subject to 401(k). It falls in its own category. There are people who made a one-time election who have to contribute, for example, 10% of pay to some plan, and now the 401(a)(17) limit has dropped from $200,000 plus indexing to $150,00 plus indexing. They would like to get a chance to reopen their one-time elections. Maybe they're not going to do it one time. We may look at those kinds of issues—whether we can be a little more flexible on the one-time election rule in the 401(k) regulations, but I don't anticipate many changes.

Something that has been on the agenda a few times is the cash balance plan. Some people would describe this as the safe harbor for a cash balance plan. As you may recall, there was a safe harbor in the 401(a)(4) regulation. That has not been modified. You have to look very carefully at the way it works in the *Federal Register*, but when we proposed and finalized the restatement of the 401(a)(4) regulation in 1993, we left cash balance safe harbor untouched. So it's exactly as it was issued back in 1991. It is still on the book. And that is not necessarily what we're looking at this juncture in the cash balance. We are trying to do a more global look at the 411 issues under cash balance plans. What is the accrued benefit if you have a variable index? How do you cash out the variable index when you don't know what its value will be over the period of time if you want to pay a lump sum? So those are the kinds of issues that we'll be looking at in the cash balance context.

One of the things I discovered as I worked on the 401(a)(4) regulation is that the 411 world is very complex, and several times we had interactions between the 411 rules and the 401(a)(4) regulation. For instance, the issue of how to handle disability benefits, whether they are qualified disability benefits. The issue that we talked about in the cash balance plan is what accrued benefits are for 411 purposes. We decided, in the process of the 401(a)(4) regulations, that those were long enough without trying to answer those questions, too. So there's still work to be done in the 411 context. It's a very complicated statutory and regulatory structure.

Number five is something that I'm personally committed to getting out. It's a very interesting, very complicated set of rules having to do with foreign pension plans. The interplay between the accounting issues, the international tax issues, and the actuarial issues is fascinating. We have done a proposed regulation on this. We've received lots of comments, and we are working toward finalizing the regulation. We are lucky in this respect that the Assistant Secretary of Tax Policy and the newly appointed Deputy to the Assistant Secretary are both international specialists, so they have a lot of understanding of that side of the issue to go with the understanding of the pension side, which we'll be providing.

Number six is a revenue ruling on transferring money purchase to profit-sharing plans. That ruling is under way, but I don't know what it is. During the process of revenue rulings, they are often held back at the service for a long time until they are close to completion. Then Treasury gets involved. There's a little division of labor, so I can't tell you what's involved there.

Number seven and eight were issued within the last couple of weeks. Neither of them is particularly fascinating reading or too surprising. The 412(c)(8) is the provision that permits a retroactive decrease in accrued benefits. And the revenue procedure that you request from the IRS—the approval to do this retroactive decrease—has been updated to reflect some judicial observations about the old IRS procedures. There was a case in 1987 in which the judges were not too pleased with the process, so they laid out some new guidelines identifying what the profits should be. The revenue procedure now reflects those guidelines.

Item number eight development is also released, and that was more of a good housekeeping item. Those of you who have gone through the process of doing a funding waiver know that you had to take an old revenue procedure from about ten years ago together with information provided in notices from six years ago and four years ago, and just sort of throw them all together. The new revenue procedure lays it all out in one place.

MS. MARTICELLO: There's one new thing in that revenue procedure on waivers. Prior to this point we had not addressed the rules for multiple-employer plans requesting waivers, and that has been included in this revenue procedure. Of course, there's a model notice that has been included in the revenue procedure. Rather than have employers draft their own notice based on our specification, which often has to go back and forth, we now have a modeled notice for employers to distribute.

MR. WELLER: There is a model notice under the 412(c)(8) federal procedure. The only other completed item, if we look on page five, is item number 11, which was a notice requesting public comments on survivor forms and consent rules. The origin of this is that the General Accounting Office (GAO) had done an audit of joint survivor forms and decided that these joint survivor forms were inadequate. I guess the GAO took employer forms at random and said they're not following the law. So the GAO wrote a report encouraging the IRS to write rules specifying what should be in a joint survivor form. The notice that the IRS issued sort of laid out GAO's suggestions for what should be included in a joint survivor notice and then asked for comments. And we are serious. We would like to hear what you think of those suggestions or hear your own suggestions on what should be in a joint survivor notice.