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4245 North Fairfax Drive
Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

Testimony of Robert Richter, Submitted to the U.S. Department of Treasury, Internal Revenue Service On Behalf of:

The American Society of Pension Professionals and Actuaries (ASPPA)

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Hearing on the Regulations Governing Practice before the Internal Revenue Service

Good morning. My name is Robert Richter and I'm speaking today on behalf of the American Society of Pension Professionals and Actuaries, also referred to as ASPPA.

ASPPA is a national organization of more than 7,300 members who provide consulting and administrative services for qualified retirement plans. ASPPA members are retirement professionals of all disciplines, including, but not limited to, plan administrators, enrolled actuaries, enrolled agents, enrolled retirement plan agents, CPAs and attorneys.

We have 2 primary areas of concern that I'll address. The first concern relates to the application of Circular 230 and the tax return preparer registration rules to preparers of Form 5500. The second concern relates to proposed changes to the approval process for continuing education programs.

I'll start with how Circular 230 and the Code Section 6109 regulations apply to the preparation of Form 5500. Many of our members are third party administrators of retirement and employee benefit plans. In that capacity, most also are paid to assist with the annual preparation of Form 5500. Form 5500 is used to fulfill a plan sponsor's or plan administrator's reporting obligations under the Employee Retirement Income Security Act (ERISA). The Form provides information that is shared with the IRS, the Department of Labor and the Pension Benefit Guaranty Corporation (PBGC). In most cases the form is filed electronically with the DOL and the information is then made available to the other agencies. It's our understanding that the DOL expects approximately 1 million Form 5500 returns to be filed for the 2009 plan year.

There's a great deal of uncertainty over whether Form 5500, which is primarily an information return, is a "tax return" for purposes of the paid preparer registration

requirements. The confusion is due to an apparent inconsistency between the return preparer penalty regulations issued under Code §6694 and the recently finalized paid preparer registration regulations under Code §6109. The Code §6694 regulations cross reference the definition of tax return preparer found in Reg. § 301.7701-15. That regulation specifically includes information returns within the definition of a tax return. Additionally, Revenue Procedure 2009-11 lists Form 5500 as an information return that could potentially subject a paid preparer to penalties if the information reported constitutes a *substantial portion* of a taxpayer's tax return or claim for refund. This seemingly might apply when "prohibited transactions" listed on a schedule to Form 5500 are relevant to an excise tax liability reported on Form 5330, which is clearly a tax return.

The final regulations issued under Code §6109, however, do not cross reference the definition of tax return preparer in regulation §301.7701-15. Rather, the only potential application of the 6109 regulations to an information return is through Regulation §1.6109-2(h), which provides, in part:

> The Internal Revenue Service, through other appropriate guidance, may also specify specific returns, schedules, and other forms that qualify as tax returns or claims for refund for purposes of these regulations.

ASPPA supports the Commissioner's efforts to promote competency and professionalism in regard to the preparation of tax returns and requests clarification on whether these rules are meant to apply to the preparation of Form 5500. Informal comments at conferences by IRS officials within the Tax Exempt-Governmental Entities Division of the IRS have implied that the registration and Circular 230 rules might apply. As I stated, the final regulation did not specifically address the issue. Given the current lack of clarity, I'll preface my remarks by stating that they are based on the assumption that the Form 5500 is in an information return subject to these rules in a fashion similar to the preparer penalty regulations. Assuming that is the case, we strongly recommend that special rules apply with respect to paid preparers of Form 5500.

It's fairly common to have many individuals assist with the preparation of a single Form 5500. Information must be gathered from numerous sources such as investment providers, plan administrators, actuaries, and other service providers. The result is that it could be possible to have numerous individuals who would need to be registered paid preparers even though each of them may have a very limited focus on the preparation of the Form. This could significantly increase the costs associated with the preparation of the Form, which ultimately may be borne by plan participants.

ASPPA believes that a balance should be struck between the benefits and the costs associated with being subject to the registration requirements. Since Form 5500 is primarily informational in nature, ASPPA recommends that the IRS provide that when there is more than one individual involved with the preparation of Form 5500, that only one such preparer needs to be associated with preparation of the Form. Specifically,

this would be the individual who has supervisory authority over the “team” preparing the Form and who is ultimately responsible for the content therein.

In addition, ASPPA recommends that the mechanics of the implementation of the tax return preparer registration requirement to Form 5500 be coordinated with both the DOL and practitioners. Presently, there is no signature line or other place to indicate whether a paid preparer assisted with the preparation of Form 5500. ASPPA recommends that if the Form cannot be modified to specifically provide for a paid preparer signature line, that the implementation be handled by a separate file attachment rather than retrofitting this into a schedule to Form 5500.

If the approach of limiting paid preparers of Form 5500 to one individual is not adopted, then ASPPA believes it is critical that detailed guidance be provided as to which components of Form 5500 and its attendant schedules would have a sufficient impact on tax returns to require the person assisting with that component to be a registered tax return preparer. For example, the information pertaining to service provider disclosure on Schedule C of Form 5500 will have no bearing on any tax return or claim for refund. We would expect that a person who only assists with the preparation of that schedule would *not* need to be a registered tax return preparer.

To clarify, ASPPA supports the application of Circular 230 and Code Section 6109 to paid preparers of Form 5500, but only if they are narrowly applied, as I have explained, in order to avoid increased fees to participants and retirees.

Our second area of concern relates to a proposed change in the process of obtaining approval of an educational program that qualifies for continuing education, or CE, credit under Circular 230. Specifically, Section 10.9 of the Proposed Regulation would require that each continuing education program be approved in order to qualify for CE credits. Although the regulation leaves open the time and manner in which the approval of each program will take place, ASPPA has been led to believe by individuals at OPR that it is likely that under the new rule, each program will need to be submitted at least 60 days in advance of the program date. This is a significant change from the current rules which permit a qualifying sponsor to provide qualifying educational programs without having each individual program approved.

We understand the IRS wants to ensure that programs contain information that is appropriate for continuing education credits. However, the laws relating to retirement plans are frequently amended by Congress and are heavily regulated by the IRS, DOL, PBGC and others (such as the SEC). Often changes are made in the law, regulations or other guidance within 60 days of an upcoming conference. For example, the recently enacted Small Business Jobs Act contained a significant change to the Roth conversion provisions. ASPPA will have sessions on this topic at our annual conference, which is less than 3 weeks after the law was enacted. At just this conference, there are 75 different substantive sessions. That means the IRS would have to review 75 outlines and they would need to have been submitted long before the conference date. ASPPA

alone does 18 conferences each year as well as numerous Webcasts and other presentations.

In addition, most programs are instructed by volunteers who are experts in their field but who are not compensated for their efforts. It is simply not practical, or in some cases possible, to ask volunteers to submit course materials sufficiently early enough to obtain pre-approval. The approval process would make it impossible to send out brochures and registration materials which could unequivocally state that CE credit has been granted. The unintended result would likely be "stale" and less meaningful program content.

We strongly urge the IRS to reconsider this change and instead retain the current approach of approving the qualifying sponsor rather than the individual program. This system has worked well and we are not aware of any abuse that needs to be addressed. We believe a better use of IRS resources would be to periodically review or audit courses by these qualifying sponsors as part of the process of retaining and renewing the sponsor's approved status.

This concludes our remarks and I thank you for the opportunity to be here today.