COMMENT ON PROPOSED REGULATIONS
UNDER CODE SECTION 419A(f)(6)

The following comments are the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These comments were prepared by members of the Employee Benefits Committee of the Section of Taxation. Principal responsibility was exercised by George L. Whitfield. Contributions were made by Russell E. Greenblatt and Ronald H. Snyder. The comments were reviewed by Thomas R. Hoecker, Taina E. Edlund and Greta E. Cowart of the Employee Benefits Committee. The comments also were reviewed by the Employee Benefits Committee’s Quality Assurance Group, which is chaired by Diane J. Fuchs and consists of former Chairs of the Committee, by Bruce D. Pingree on behalf of the Committee on Government Submissions and by Stuart M. Lewis, Council Director for the Employee Benefits Committee.

Although the members who participated in preparing these comments have clients who would be affected by the federal tax principles addressed by these comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

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EXECUTIVE SUMMARY

Sections 419 and 419A were added to the Internal Revenue Code of 1954 in 1984 to limit deductions for contributions to a welfare benefit fund. Section 419A(f)(6) of the Internal Revenue Code of 1986, as amended (the “Code”) provides an exception to this limit for 10 or more employer plans to which no employer normally contributes more than 10% of the total contributions and in which there is no separate experience-rating arrangement with respect to participating employers.

Promoters have used the exception afforded by section 419A(f)(6) to market plans which purport to qualify for the exception, but which also attempt either to isolate an employer or its employees from the benefit claims and experience of other participating employers or to provide some level of retirement benefits or deferred compensation. Despite the issuance of prior guidance in the form of Notice 95-34 and the Internal Revenue Service’s success in two notable Tax Court cases, the design and marketing of these plans has persisted.

In an apparent effort to block abusive arrangements, the Treasury Department and the Internal Revenue Service (the “Service”) have now issued regulations under section 419A(f)(6) of the Code. The proposed regulations have three components -- an expansive documentation and recordkeeping requirement, a detailed definition of the meaning of “experience-rating arrangement,” and a listing of characteristics suggesting that a plan either includes an experience-rating arrangement or fails in some other way to qualify as a 10 or more employer plan under section 419A(f)(6).

We believe that detailed guidance and consistent enforcement is needed in order to curtail arrangements that go beyond a fair and reasonable interpretation of section 419A(f)(6) of the Code. We commend the Treasury Department and the Service on the issuance of the proposed regulations.

In order to enhance the value of the proposed regulations, we offer the following suggestions and recommendations:

1. The regulations should include guidance on the necessary and appropriate information or information alternatives that will satisfy the requirement of section 1.419A(f)(6)-1(a)(2). (Please note that all references to regulations are to the proposed regulations unless otherwise indicated.)

2. The regulations should be modified to clearly indicate whether the entire plan loses the benefit of section 419A(f)(6) if experience-rating is maintained for any one employer.

3. The relationship between section 1.419A(f)(6)-1(b) and section 1.419A(f)(6)-1(c) should be clarified.

4. The regulations should be modified to include more specific guidance regarding the establishment and maintenance of reserves and should permit appropriate funding based on conservative assumptions.
5. The regulations should be modified to more clearly identify the treatment of leased employees.

6. The regulations should be modified to make it clear that the use of cash value life insurance policies is permitted as long as the attributes and differences among the policies are shared proportionately and do not inure to the benefit of a single employee, or that employee’s employer, or the other employees of that employer.

7. The regulations should clearly indicate that the section 419A(f)(6) exception is unavailable if any attributes of a policy inure to the benefit of any employee, the employee’s employer, or any other group other than an appropriate rating group.

8. The regulations should clearly indicate that any special right or benefit that is linked to termination of employment, or any employer’s withdrawal from a program, might result in the loss of the section 419A(f)(6) exception.

9. The regulations should be modified to affirmatively state that a failure to be a “10 or more employer plan” or the existence of experience-rating results not from use of any particular insurance policy as an investment or funding vehicle but rather from special rights or benefits that flow from a policy to an employer or one or more of its employees or some other limited group.

10. Additional guidance is needed regarding the exceptions to the 10% limit on contributions by a single employer. Transition rules should be permitted for both new and terminating plans. Transition rules also should be available in the event of significant economic changes that affect participating employers.

11. The regulations should be modified to expressly indicate that Notice 95-34 continues to apply following the finalization of the regulations pending further guidance.

12. The regulations should be modified to include a more expansive discussion of the single plan requirement.

13. The regulations should be modified to indicate that other Code provisions will affect the availability of deductions in the first instance.

14. The regulations should specify whether private letter rulings will be available regarding the experience-rating issues.

15. The regulations should be modified to clarify the application of sections 414(b), (c), (m) and (n).

16. The regulations should be modified to include a reference to the non-discrimination requirements of Code section 505 and the potential penalty under Code section 4976.
17. The regulations also should be modified to include additional guidance regarding the types of plans that will qualify for the exception provided by section 419A(f)(6).

COMMENTS

I. Introduction/Background

Sections 419 and 419A contain special rules and limitations applicable to the deduction of contributions to a “welfare benefit fund.” Section 419A(f)(6) contains an exception to the general rules of sections 419 and 419A.

Section 419A(f)(6) is relatively straightforward. It provides:

(6) Exception for 10-or-more employer plans.

(A) In general. This subpart shall not apply in the case of any welfare benefit fund which is part of a 10 or more employer plan. The preceding sentence shall not apply to any plan which maintains experience-rating arrangements with respect to individual employers.

(B) 10 or more employer plan. For purposes of subparagraph A, the term “10 or more employer plan” means a plan --

(i) to which more than 1 employer contributes, and

(ii) to which no employer normally contributes more than the 10% of the total contributions contributed under the plan by all employers.

As noted in the preamble to the regulations, the legislative history states that the principal purpose of sections 419 and 419A “is to prevent employers from taking premature deductions, for expenses which have not been incurred, by interposing an intermediary organization which holds assets which are used to provide benefits to the employees of the employer.” The legislative history states that the section 419A(f)(6) exception is appropriate because “the relationship of a participating employer to the plan often is similar to the relationship of an insured to an insurer.” Similarly, the preamble to the regulations notes that the exception is warranted because any contribution by a participating employer in excess of the minimum necessary to provide current benefits under the plan is “effectively lost” to that employer where there is no experience-rating with respect to individual employers.

The preamble also states that the economics of shared risk will discourage excessive contributions by participating employers. It notes, however, that the economics change and there is an opportunity or incentive for contributions in excess of the minimum necessary to provide current benefits if the contributions of an employer are protected by experience-rating.
Enactment of sections 419 and 419A was spurred by the perception of widespread abuse in the form of excessive deductions and suggestions by promoters and others at that time that a voluntary employees’ beneficiary association (or “VEBA”) trust established under section 501(c)(9) might be a vehicle for tax deferral to supplement qualified plan retirement benefits. The enactment of sections 419 and 419A substantially curtailed excessive deductions for welfare benefits. However, over the years some vendors have seized upon the 10 or more employer exception as a potential vehicle for tax deferral and wealth accumulation. As informal guidance and actual enforcement progressed, vendors developed more limited and complex programs, some providing only death benefits, proclaiming that their respective programs fully met the section 419A(f)(6) exception.

The Service and the Justice Department pursued an arrangement known as the “Prime” plan resulting in a decision favorable to the government in Booth v. Commissioner, 108 T.C. 524 (1997). While that case was pending, the Service issued Notice 95-34, 1995-1 C.B. 309, identifying arrangements that, in the view of the Service, did not satisfy the 10 or more employer exception. The government also was successful in Neonatology Associates, P.A., et al., v. Commissioner, 115 T.C. 43 (July 31, 2000), although that case does not substantively apply section 419A(f)(6). Notice 95-34 is reproduced in its entirety in the preamble to the regulations, a helpful inclusion.

In Notice 2000 -15, superseded by Notice 2001 -51, 2001 -34 I.R.B. 190, the Service identified transactions like those described in Notice 95-34 as “listed transactions” for purposes of the tax shelter regulations. The preamble to the regulations also states that the transactions described in Notice 95-34, independent of status as listed transactions, may be subject to the disclosure requirements of section 6011 of the Code, the tax shelter registration requirements of section 6111 or the list maintenance requirements of section 6112. Persons who fail to comply with required registration of tax shelters may be subject to penalties under sections 6707(a) and 6708(a). Treasury Decision 9000, issued July 15, 2002, also addressed these topics.

Neither the publication of Notice 95-34 nor the decisions in Booth and Neonatology have ended the quest for a small employer tax deferral program under section 419A(f)(6). In fact, some advisors have suggested that these cases provide a “roadmap” for the design of programs fully compliant with section 419A(f)(6). It is too soon to know whether the tax shelter notices in 2000 and 2001 will significantly curtail existing and new programs. Similarly, it will take a substantial period of time to know whether the proposed and ultimately final regulations under section 419A(f)(6) will have the intended effect of eliminating arrangements that attempt to avoid the pooled-risk requirement of section 419A(f)(6).

II. Comments on Specific Provisions of the Regulations

We support comprehensive guidance concerning 10 or more employer welfare benefit plans. Both guidance and enforcement are needed to stamp out abusive programs that will continue only in the absence of audit scrutiny and pose a costly trap for the unwary employer. (See, for example, Finderne Management Co., Inc. v. Barrett, Superior Court of N.J., App. Div., (2002) Doc. Nos. A-2873-00T2, A-5028-00T5.) At the same time, as noted in the legislative history and the preamble to the regulations, the exception for 10 or more employer arrangements
is important and valid. We encourage all necessary steps to prevent abuse and illegitimate use of the exception while permitting valid programs to exist. This Comment is meant to be constructive and to support consistent enforcement of the applicable law.

A. § 1.419A(f)(6)-1(a)(2)

**Issue:** Section 419A(i) states that “the Secretary shall prescribe regulations as may be appropriate to carry out the purposes of” sections 419 and 419A, and specifically states that “the regulations may provide that the plan administrator of any welfare benefit fund to which more than one employer contributes shall submit such information to the employers contributing to the fund as may be necessary to enable the employers to comply with the provisions of section 419A.”

The regulations cite the section 419A(i) authority as the basis for a requirement that a 10 or more employer plan must be established and maintained pursuant to a written document that requires the plan administrator “to maintain records sufficient for the Commissioner or any participating employer to readily verify that the plan satisfies the requirements of section 419A(f)(6) and the regulations and that provides the Commissioner and each participating employer (or a person acting on the participating employer’s behalf) with the right, upon written request to the plan administrator, to inspect and copy all such records.”

The regulations do not define or describe records that would be “sufficient” to “readily verify that the plan satisfies the requirements” of section 419A(f)(6).

**Recommendation:** The regulations should include guidance on the necessary and appropriate information or informational alternatives that will fulfill this requirement. The guidance might impose specific recordkeeping and accounting requirements, offer suggested examples, or suggest other documentation or means of compliance. Development of publicly available audit guidelines that address the recordkeeping requirements also should be a priority. One alternative method of demonstrating compliance that could be included in the regulations would be development of a compliance certification form that contains detailed statements, each of which must be answered under penalties of perjury, that would collectively deny the existence of experience-rating elements. Another approach would be to require completion of a separate information return or a form required to be attached to the return of the plan or fund, or to the Form 5500 annual report where applicable, containing detailed questions designed to elicit the possible existence of individual employer experience rating.

B. § 1.419A(f)(6)-1(b)

**Issue:** Section 1.419A(f)(6)-1(b) sets forth general and special rules for determining the presence of an experience-rating arrangement, including definitions. The statutory language prohibits “experience-rating arrangements with respect to individual employers,” while the regulations prohibit an experience-rating arrangement with respect to “any individual employer.” We understand that it is the position of the Service that experience-rating with respect to a single employer causes the entire plan to fail.
**Recommendation:** If the entire plan fails to satisfy the exception if experience-rating is maintained for any employer, the language of the regulations should be revised to clarify this.

**C. § 1.419A(f)(6)-1(c)**

**Issue:** Section 1-419A(f)(6)-1(c) describes five characteristics which indicate that a plan is not a 10 or more employer plan. Subsection (c)(1) states that the presence of any one of these characteristics, standing alone, generally indicates that the plan is not a 10 or more employer plan “unless established to the satisfaction of the Commissioner that the plan satisfies the requirements of section 419A(f)(6) . . . .” The standard in subsection (c) may go beyond the scope of legislative regulation by appearing to provide an element of discretion to be applied by the Commissioner on a case by case basis in determining qualification as a section 419A(f)(6) plan.

**Recommendation:** Eligibility for the section 419A(f)(6) exception should be based on reasonable, articulated standards. The regulations should set forth the list of factors that are relevant and will be taken into account in making the ultimate determination. If the existence of one or more of the characteristics in subsection (c) simply creates a presumption and establishes a rebuttable burden for the proponents of the plan to overcome, then that should be stated.

The relationships between subsections (b) and (c) also should be clarified. Are the characteristics in subsection (c) primarily intended to indicate the existence of experience-rating or are they intended to go beyond experience-rating and indicate other reasons why a plan would not qualify under section 419A(f)(6)? Subsection (b) describes when there is experience-rating with respect to an individual employer. Subsection (c) addresses characteristics of a plan that does not qualify as a 10 or more employer plan, yet subsections (b) and (c) appear to include overlapping concepts.

If subsection (c) is intended to more broadly address the absence of a 10 or more employer plan rather than merely augment and apply the definition of an experience-rating arrangement in subsection (b), as has been suggested in informal explanations of the regulations, then that should be clearly stated. Perhaps this could be done by reversing the order of subsections (b) and (c) and/or at least stating that while some of the characteristics may suggest experience-rating, some also may suggest the existence of multiple plans or of deferred compensation. The statutory basis for identifying these characteristics, to the extent it is other than experience-rating, also should be clearly stated.

**D. § 1.419A(f)(6)-1(c)(5)**

**Issue:** This provision states that a plan will not qualify if the cost is “unreasonably high.” No standard is provided to determine what cost is unreasonably high, other than an example of 200% of actual cost.

**Recommendation:** The regulations should include more specific guidance on the establishment and maintenance of reserves. The regulations also should specifically countenance a policy for funding and establishing reserves that will aid the plan in protecting against large
cost increases that may occur in the future. The emphasis should be on pooling the experience and the regulations should not prevent appropriate funding based on conservative assumptions.

E. § 1.419A(f)(6)-1(d)(4)

**Issue:** The second sentence of this definition of “employer” contains two points about leased employees. First, leased employees are treated as employees of the recipient of their services. Second, for purposes of the regulations, any contributions made by the leasing organization attributable to services performed for the recipient will be treated as made by the recipient.

**Recommendation:** The regulations should more clearly identify the treatment of leased employees either by moving this sentence to subsection (b)(1) or by adding it to the special rules under subsection (b)(4) with a “Leased employees” heading.

F. Life Insurance Issues

Vendors of 10 or more employer plans have an expansive view of section 419A(f)(6) and the intent of Congress in enacting it. Comments submitted by the proponents of small employer 10 or more employer plans almost universally assert that the regulations prohibit use of cash value life insurance to fund benefits. The consequences of funding death benefits with insurance are, therefore, among the most controversial aspects of the regulations.

While use of cash value life insurance to fund benefits may be impractical or at least very unattractive under the regulations, our reading of the regulations suggests that the regulations do not prohibit the use of cash value insurance. We agree, however, that there are issues with respect to the funding of death benefits through life insurance that are not directly addressed in the text and are not fully addressed by Examples 4 through 7 and 11 through 13. All of these examples involve life insurance and only Examples 6 and 7, which have the same fact pattern involving term rather than cash value insurance, conclude that there may be a valid 10 or more employer plan. We believe that the following issues should be separately and specifically addressed either in the text of the final regulations or through examples.

Addressing these issues will eliminate the ambiguity and uncertainty that has provided fertile ground in the past for creative plan design and will make the regulations more useful and effective.

1. **Issue:** Are the regulations intended to prohibit the use of cash value life insurance as a means of funding death benefits and other benefits under a 10 or more plan?

**Recommendation:** If a flat prohibition of cash value life insurance is not intended, the final regulations should make clear that cash value policies are permitted as long as the attributes and differences among the individual policies are shared proportionately. The regulations should distinguish between funding with an insurance policy and conferring specific economic rights or benefits under the policy on the insured employee or the employer or other employees of that employer. Even though it may be unlikely that cash value insurance policies subject to those restraints will be used, the right to do so should be clarified. As long as the benefits inure only to
the whole group of participants or a qualified rating group in an appropriate manner, there should be no risk of experience-rating and no other disqualifying characteristic. In other words, the same result provided with respect to term insurance policies in Examples 6 and 7 should apply, even if cash value policies are used, as long as all benefits and consequences of the cash value policies, including cost differentials, cash values and death benefits, are shared appropriately by all participating employers and their participants.

2. **Issue:** Does a right to purchase a policy or to continued coverage by any policy that funds a death benefit, or to convert to an individual policy (other than by state mandated conversion rights) that is exercisable by or for or conferred upon the insured employee indicate experience-rating or allocation of assets potentially causing the plan not to be a 10 or more employer plan?

   **Recommendation:** Example 6 implies that any right to or benefit of any individual policy of life insurance that is available to the insured employee, the employer or other employees of that employer, other than payment of an appropriate and uniform amount of death benefit, will be an experience-rating arrangement, regardless of the type or nature of the policy that funds the death benefit. Because the plan in Example 6 excludes all rights and features, however, the consequence of any one of them is unclear. Any purchase, conversion, rebate, refund or other right or benefit tied to a policy, as well as any cost differential, value or disproportionate death benefit, is clearly a unique feature, not otherwise available, that has economic value. Regardless of the type of insurance, it should be affirmatively stated either in the text of the final regulations or the final examples that the availability or benefit of any single one of these features or rights to less than an appropriate rating group, can cause failure to qualify for 10 or more employer status. To the extent a policy is held as a general asset of the trust and does not otherwise cause the trust to lose the benefit of the exception, the purchase of such a policy from the trust (in a manner that satisfies the applicable prohibited transaction class exemption) should not be problematic.

3. **Issue:** Do the regulations intend that any benefit or feature of a plan that would disqualify the plan from 10 or more employer status because it arises on withdrawal of an employer from the plan would also potentially disqualify the plan from retaining 10 or more status if available on termination of employment?

   **Recommendation:** Distinctions should be drawn between employer withdrawal and employee termination, since employee termination is less likely to raise the same questions, (e.g., the separate plan issue). Example 6 refers to both. But the example in subsection (c)(6) and Examples 11 and 12 only address employer withdrawal. The final regulations should indicate that any special right or benefit that is linked to termination of employment, including involuntary termination, can result in disqualifying a plan from 10 or more employer status.

4. **Summary:** In summary, with respect to the foregoing issues, the final regulations should affirmatively state that failure to be a 10 or more employer plan, or the existence of experience-rating, results not from use of any insurance policy as an investment or funding vehicle, but rather from special rights or benefits that flow from a policy to an employer or, in some cases, to one or more of its employees or some other limited group. This distinction should
be clearly expressed even if only in the explanatory text of the examples. The problem is not the use of cash value insurance; instead it is the attempt to limit or direct any special right or benefit of a cash value policy to any individual or group other than an appropriate rating group.

III. General Comments

The regulations primarily offer guidance on the meaning and existence of experience-rating. There is a need for additional guidance.

A. 10 or More Employer Plan

Section 419A(f)(6) exempts a “10 or more employer plan” from the deduction limits of section 419 if the plan does not maintain experience-rating. Section 419A(f)(6)(B) defines the term “10 or more employer plan” to mean a plan to which more than one employer contributes and “to which no employer normally contributes more than 10% of the total contributions contributed under the plan by all employers.” This language has not been modified since enactment in 1984. In addition, subsection (b)(4)(iii) of the regulations exempts a rating group from experience-rating, provided that “no employer normally contributes more than 10% of all contributions with respect to that rating group.”

The key element in the quoted phrase is the word “normally.” The regulations do not address the meaning of this requirement. Guidance should be provided with respect to when exceptions may be permitted such as when the 10 or more employer plan is in its formative years. Also, guidance would be helpful in the event one of the employers undergoes a merger, acquisition or disposition resulting in a significant impact on the level of such employer’s participation.

For example, the regulations should specify whether the 10 percent maximum threshold must be achieved with respect to a year before the plan can qualify or whether a plan that is established for the purpose of qualifying for the section 419A(f)(6) exception can have some reasonable period of time, in which the 10 percent maximum will not apply. A restrictive approach would specify that any plan is subject to section 419 and 419A until the 10 percent maximum is achieved for a year. We believe that there should be a reasonable developmental period in which the 10 percent threshold would be increased to the percentage that would be obtained by dividing the maximum number of participating employers at any time during the year by 100. To avoid abuse, this developmental period could be subjected to a requirement that the 10 percent maximum must be achieved by the fourth year and must be maintained for at least two consecutive years in order to have the section 419A(f)(6) exemption for any year. Availability of the development period could be conditioned on an appropriate waiver or extension of the applicable statute of limitations by the plan and all participating employers.

In addition, the regulations should provide an exception when the 10 percent threshold is exceeded by any participating employer after the first year for which it is achieved. Again, perhaps, the 10 percent maximum should increase to the percentage represented by the number of participating employers for a year in which the number falls below 10 for other reasons, such as significant changes in employee demographics or benefit costs. Unanticipated withdrawal by participating employers for any reason, and unanticipated changes in demographics or benefit
costs, would be beyond the control of any participating employer and should be a reasonable basis for an exception and transition period.

Standards are needed for a reasonable transition period. We believe that a three year period would be appropriate. In the case of an increase in the contribution percentage beyond the 10 percent limit due to unexpected causes, the exception provided by section 419A(f)(6) should remain applicable through the end of the three year transition period. At that point, it would continue to apply if the 10 percent threshold is again met or would cease to apply if it is not.

In all cases, any developmental or transition period in which the 10 percent contribution threshold is exceeded by one or more participating employers should be available only if all other requirements of section 419A(f)(6) and the regulations are met, including particularly the absence of any experience-rating or excessive contributions by or with respect to any employer.

Another question about the requirement that no employer normally contributes more than 10 percent is whether it applies in the aggregate or must apply on a benefit by benefit basis, or both. We believe the limitation should be an aggregate limitation. The regulations should address this and related questions concerning circumstances when an adopting employer is allowed to participate selectively in less than all of the benefits of the plan. Guidance should consider whether that can be an available option or whether there must be an all-or-nothing participation.

These are difficult questions, but they illustrate why guidance is needed. The question of a transition period that may occur during the life cycle of a plan, particularly if resulting from an economic downturn in general or for a particular business segment, is more difficult. The legislative history suggests a clear intention on the part of Congress that the 10% limit may be increased in certain circumstances. The Conference Report states that the language as enacted “authorizes Treasury regulations under which the percentage may be increased in appropriate cases. For example, a higher percentage could be appropriate in the case of a plan maintained by employers in the construction industry if unusual building activity in the geographic area covered by the plan causes temporary and unusual distortions in the contribution pattern under the plan.”

We also recommend that guidance permit exceptions to the 10% limit for a reasonable period when business or economic conditions cause the participating work force of one or more employers to sharply increase or decrease, or results in a withdrawal from the plan of a significant number of employers.

B. Status of Notice 95-34

While Notice 95-34 is included in the preamble to the regulations, the provisions of Notice 95-34 have not been included or incorporated into the text. The preamble states that the regulations are consistent with the analysis in Notice 95-34. The preamble also states that the regulations “generally clarify existing law.” Nevertheless, the status of Notice 95-34 will be uncertain once final regulations are issued. Other comments below suggest the addition of specific portions of Notice 95-34 to the regulations. Whether or not this is done, the final
regulations also should state affirmatively that Notice 95-34 remains in effect, in addition to the regulations, until further notice.

C. Single Plan

Section 419A(f)(6) refers to “a plan.” Subsection (a)(1) of the regulations requires a “single” plan. Among the nonqualifying arrangements described in Notice 95-34 is any arrangement that is, in fact, one including multiple plans. Separate plans for participating employers are experience-rated. The regulations should address the requirement of a single plan. It might be sufficient to state that the existence of separate plans causes experience-rating and failure to qualify as a 10 or more employer plan. The regulations also should specify that determination of the existence of a single plan or separate plans is a facts and circumstances determination based on the totality of the arrangement. The regulations could specify relevant factors or simply state that some of the indicia of experience-rating also may point to the existence of separate plans. (See Finderne Management, supra).

D. Denial of Deduction for Other Reasons

Notice 95-34 and the preamble to the regulations affirmatively remind the taxpayer that sections 419 and 419A impose limits on deductions but do not provide the basis for the deductions in the first place. Accordingly, the Notice and the preamble both point out that even if an arrangement satisfies the requirements of section 419A(f)(6), employer contributions may not be deductible under other Code sections. The example given is an arrangement providing deferred compensation. The final regulations should expressly address this fundamental point, including references to the “ordinary and necessary” and “reasonable” compensation limits, and should include the deferred compensation example.

E. Rulings

Notice 95-34 states that the IRS has never issued a ruling approving the deductibility of contributions to a 10 or more employer plan. The question of whether the Service will now entertain private letter rulings on experience-rating issues should be addressed in the preamble to the final regulations or by a cross-reference to the appropriate source of that information. In addition, the statement about exemption letters for VEBAs in Notice 95-34 should be repeated in the preamble or the regulations to emphasize that a letter determining the exempt status of a Veba does not in any way address the deduction limit exception in section 419A(f)(6).

F. Controlled Group Aggregation

The definition of “employer” in subsection (b)(4) of the regulations includes all related employers required to be aggregated under Code sections 414(b), (c) or (m). Section 419A(h)(2) states that rules “similar to” the rules of sections 414(b), (c), (m) and (n) apply for purposes of sections 419 and 419A. Rather than stating that these rules directly apply, the regulations should specify that the rules of those subsections will be “considered to” apply pursuant to the cited authority.
G. Nondiscrimination Requirements

The regulations do not refer to the nondiscrimination requirements of Code section 505. That section applies to welfare benefit funds whether or not funding is through a VEBA under section 501(c)(9) of the Code. Failure to comply with the requirements of section 505 result in a 100% excise tax on disqualified benefits under Code section 4976. The final regulations, or at least the preamble, should refer to the nondiscrimination requirements of Code section 505 and the potential penalty under Code section 4976.

H. More Affirmative Guidance

Also, to reiterate, more examples of what will qualify as a 10 or more employer plan would be extremely helpful to taxpayers and practitioners. Even if carefully and narrowly drawn, affirmative examples will provide needed guidance. The mere insertion of new examples or text in the existing examples showing changes in the applicable facts that will result in a qualifying 10 or more employer plan would be useful.