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VIA E-MAIL ([notice.comments@irsounsel.treas.gov](mailto:notice.comments@irsounsel.treas.gov))

Internal Revenue Service  
CC:PA:LPD:PR, (Notice 2018-24)  
Courier's Desk  
1111 Constitution Ave., NW  
Washington, D.C.

Re: **Notice 2018-24:** Comments Relating to Potential Expansion of Scope of Determination Letter Program for Individually Designed Plans During 2019 Calendar Year

Dear Sir and/or Madam:

This letter is in response to requests for comments made by the Internal Revenue Service (the "Service") in Notice 2018-24.

Thank you for providing this opportunity to comment on the potential expansion of the scope of the determination letter program for individually designed plans during the 2019 calendar year. We are happy to provide responses to the Service's request for comments and hope that our comments will be helpful to your consideration of re-opening the determination letter program for individually designed plans during 2019 and possibly in subsequent years. We understand that the Treasury Department and the Service are interested in specific feedback as to the issues applicable for certain types of plans that would justify the review of that particular plan during a re-opening period in calendar year 2019.

### **Access Needed for Governmental Plans**

We believe that consideration should be given to re-opening the determination letter program to governmental plans in 2019 and at regular intervals thereafter to the extent the Service's work load would allow.

In California, as in many states, most public sector employees receive their retirement benefits from multiple employer retirement plans. The three largest multiple employer systems established by state statutes are the county retirement systems governed by the County Employees' Retirement Law of 1937 (the "CERL"), the California Public Employees' Retirement System ("CalPERS"), and the California State Teachers' Retirement System ("CalSTRS"). We represent a number of systems governed by the CERL<sup>1</sup> (called "'37 Act" systems"), most of which are multiple employer plans. We also represent a number of governmental agencies that

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<sup>1</sup> Gov. Code § 31450 et seq. (All references to the Gov. Code are to California statutes.)

sponsor defined benefit plans that are created through amendments to the applicable municipal code or city and/or county charter or other action equivalent to statutory action. For example, under the CERL any California county may establish a '37 Act retirement system governed by that statute.<sup>2</sup> Once a county establishes a '37 Act system, the CERL determines what other government agencies may participate in that system, and new participating employers are added periodically by statutory amendment.<sup>3</sup> The CERL has been amended a number of times to allow participation by new participating employers. The 20 California county retirement systems operating under the CERL alone cover approximately 447,000 members and beneficiaries and hold almost \$135 billion in assets necessary to fund retirement benefits.<sup>4</sup>

Under the California Constitution, governmental retirement systems must be administered by independent retirement boards, other than some grandfathered situations.<sup>5</sup> Each '37 Act system is governed by a nine-member board of retirement that has the plenary fiduciary responsibility to administer the system, to invest system assets, and to hold its assets solely for the benefit of participants and beneficiaries.<sup>6</sup> This responsibility includes maintaining the tax-qualified status of the retirement system. In this respect, the '37 Act retirement systems operate differently from private sector retirement plans, where the administration of the plan is effectively controlled by the sponsoring employer who has ultimate responsibility for plan administration. For most governmental plans in California, the board of retirement has complete and sole responsibility for system administration and is separate and apart from the employer.

In addition to the significant number of governmental defined benefit pension plans, many governmental entities also sponsor one or more defined contribution plans. While many governmental defined contribution retirement plans are able to use pre-approved plan documents, a number of our clients sponsor large plans that were adopted under statutes many years ago and cannot easily (if at all) switch to pre-approved documents. These plans include hundreds of thousands of participants and many billions of dollars in assets. The fiduciaries for these plans also are responsible for maintaining the tax-qualified status of those plans.

For both defined benefit and defined contribution retirement plans sponsored by governmental entities, it is important that these fiduciaries are able to access the best investment opportunities in order to protect the retirement income for the affected members and beneficiaries. Accessing these opportunities often requires some form of "proof" of the plan's tax-qualified status, which has traditionally been met by providing a copy of the plan's current favorable determination letter.

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<sup>2</sup> Gov. Code § 31500.

<sup>3</sup> Gov. Code § 31468.

<sup>4</sup> Figures are based on data published in the 2017 State Association of County Retirement Systems ("SACRS") membership roster. (SACRS is an association in which all the County retirement systems covered by the CERL participate.)

<sup>5</sup> Cal. Const. art. XVI, §17.

<sup>6</sup> Gov. Code § 31694.1; Cal. Const. art. XVI, §17.

We believe the Service should allow individually designed governmental plans access to the determination letter process during 2019 (and hopefully on a periodic basis thereafter) because of the following special circumstances:

- The terms of individually designed governmental retirement plans that are created by statute can be changed in any number of ways by legislation or court decisions that the plan's fiduciary does not control. The determination letter process provided an important way for the fiduciaries to present the legislative body able to make changes to the plan a directive to take action necessary to maintain the plan's tax-qualified status. In essence, it sometimes helps to be able to say "The IRS says we have to amend the plan to contain these specific provisions in order to continue the plan's tax-qualified status."
- Governmental plans may include the ability under the existing statutory framework for the sponsor to adopt changes in the terms where important details necessary to ensure continued tax-qualified status may not be included in the terms of the plan originally submitted in the last determination letter process. For example, Article 11.5 of the CERL includes the framework for a county sponsor to adopt a Deferred Retirement Option Program ("DROP") for eligible safety members. However, both sponsors and fiduciaries of the '37 Act systems would be best served by having the ability to obtain a determination letter on the specific provisions adopted for a new DROP offered under a system.
- Many governmental entities across the country are looking at changes to the design of their retirement systems due to pressure to lower future retirement costs. California adopted pension reform legislation in 2012, the California Public Employees' Pension Reform Act of 2013 ("PEPRA"), which included very significant changes in benefits. Efforts across the country to produce "pension reform" may result in significant changes to the design or formula for affected plans, which in turn often produce a need to seek a new determination letter covering the changes in order to ensure continued tax qualification.
- Following the adoption of changes to the retirement plans to address pension reform issues, there may be litigation challenging certain changes made. For example, in California there are a number of cases pending before the California Supreme Court challenging certain changes adopted under PEPRA, which was effective January 1, 2013.<sup>7</sup> Depending on the outcome of this and other similar

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<sup>7</sup> See *Marin Association of Public Employees et al., v. Marin County Employees' Retirement Association et al.*, 2 Cal.App.5th 674 (1 Dist. 2016), *Review granted*, 383 P.3d 1105 (S.Ct. 2016); *Cal Fire Local 2881 et al., v. California Public Employees' Retirement System et al.*, 7 Cal.App.5th 115 (1 Dist. 2016), *Review granted*, 391 P.3d 1190 (S.Ct. 2017); and *Alameda County Deputy Sheriff's Association et al., v. Alameda County Employees' Retirement Assn. et al.*, 19 Cal.App.5th 61 (1 Dist. 2018), *Review granted*, 413 P.3d 1132 (S.Ct. 2018).

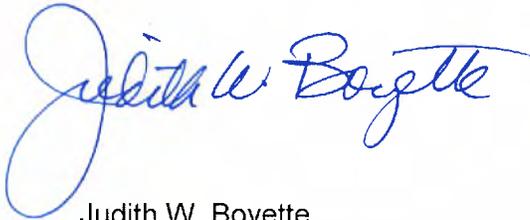
litigation, difficult issues regarding potential retroactive adjustments may arise. Access to the determination letter process would be important in order to receive assurance of continued tax-qualified status for the plans involved.

- Individually designed governmental plans have many billions of dollars to invest. In order to meet their fiduciary duties, plan fiduciaries want access to the best investment options available. Many of the investment managers require a current determination letter in order to participate in the investment opportunity. To the extent there have been changes in the terms of the plan since the last determination letter was issued, the investment managers may be unwilling to accept funds from a particular governmental plan. While this would also be true for non-governmental plans, because of the size of investments and the numbers of participants involved there may be more scrutiny on investments by governmental plans.

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Thank you for your consideration of our comments. We would be happy to provide any further information that may be helpful.

Respectfully,



Judith W. Boyette



Edward M. Bernard