What Is An Advance Notice Of Proposed Rulemaking?

- **Purpose.**
  - Solicits Comments.
  - Draft of Proposal.
  - Describes Process.

- **Comments.**
  - Town Hall Meetings – Oakland, CA (March 15); Cleveland, OH (May 3).
  - Comments Due – June 18, 2012.
  - Public Hearing – DC (July 9)
What Was The Starting Point For The IRS And Treasury In Drafting The Proposal?

- Court Cases.
  - Alley v. RTC, 984 F.2d 1201 (DC Cir. 1993)
  - Rose v. Long Island Railroad Pension Plan, 828 F.2d 910 (2nd Cir. 1987)
What Was The Starting Point For The IRS And Treasury In Drafting The Proposal? (cont’d)

- Revenue Rulings.
  - Rev. Rul. 57-128 (Employment Tax)
  - Rev. Rul. 89-49

- ERISA
  - Section 3(32)
  - Section 4021(b)(2)
What Was Happening in the "Governmental Plan World"?

- The last PLR issued under 414(d) – 2006
- PLRs were being issued under 457(b), 1415(m), and 115
- Cycle C
- Cycle E
Why Is This So Important?

- ERISA Exemption
- PBGC Exemption
- Exemption from many IRC Requirements
- Special IRC limits and grandfathering – IRC 415, 401(a)(17)
- Pick-Up Plans – IRC 414(h)(2)
- Delayed effective dates and delayed amendment dates
How Would A Governmental Plan Be Defined?

- General Definition of a Governmental Plan (ANPRM § 1.414(d)-1(a)(1)).
- "Established and Maintained" by a Governmental Employer for its Employees (ANPRM § 414(d)-1(k)).
  - What's a Governmental Employer?
  - Who are its Employees?
How Would Governmental Employers Be Defined?

- Definition of United States (ANPRM § 1.414(d)-1(b)).
  - IRC § 7701(a)(9)
How Would Governmental Employers Be Defined? (cont’d)

- Definition of Agency or Instrumentality of the United States (ANPRM § 1.414(d)-1(c)): a facts and circumstances test
  - Performance of Government Function.
  - No Private Interest Involved or U.S. Government has Ownership Power and Interests.
  - Federal Control and Supervision.
  - Tax Exemption by Act of Congress.
  - Creating by the U.S. Government by Specific Enabling Statute.
How Would Governmental Employers Be Defined? (cont'd)

- Federal Financial Assistance.
- Federal Court Decision.
- Governmental Recognition as an Arm of the U.S..
- Employees Treated as Federal Employees for Other Purposes.

- Example

  - A federal credit union is not an agency or instrumentality of the U.S.
How Would Governmental Employers Be Defined? (cont'd)

- Definition on state (ANPRM § 1.414(d)-1(d)).
  - Any State or DC
How Would Governmental Employers Be Defined? (cont'd)

- Definition of Political Subdivision of a State (ANPRM § 1.414(d)-1(e)).
  - A regional, territorial, or local authority created or recognized by state statute to exercise sovereign powers, and
  - Governing officers are appointed by state officials or publicly elected.
How Would Governmental Employers Be Defined? (cont’d)

- What's the fuss about "Political Subdivisions"?
  - What if a public school system has no taxing authority, no police power, and no power of eminent domain?
  - What if a utility has eminent domain but its board is not appointed or elected?
- If they are instrumentalities, can they create an instrumentality?
How Would Governmental Employers Be Defined? (cont’d)

- Definition of Agency or Instrumentality of a State or Political Subdivision of a State (ANPRM § 1.414(d)-1(f)): A Facts and Circumstances Test.

- Main Factors.
  - (A) Control of Governing Body by a State or Political Subdivision.
  - (B) Public Election of Governing Body (an alternative to (A)).
  - (C) Fiscal Responsibility by State or Political Subdivision.
  - (D) Treatment of Employees as Public Employees for other purposes.
  - (E) Delegated Sovereign Powers.
How Would Governmental Employers Be Defined? (cont'd)

- Other Factors.
  
  (A) Operational Control by State or Political Subdivision.
  
  (B) Direct Funding through Tax Revenues or Other Public Sources.
  
  (C) Specific Enabling Law.
  
  (D) Treatment as Governmental Entity for Federal Tax Purposes.
  
  (E) Treatment Under State Law as an Agency or Instrumentality.
  
  (F) Court Decision by State or Federal Court.
  
  (G) No Private Interest.
  
  (H) Serves a Governmental Purpose.
How Would Governmental Employers Be Defined? (cont’d)

- What's the fuss about "Agencies or Instrumentalities"?
  - Multiple employer plans (NCTR/NASRA Survey).
    - 85% of "State" Plans have other employers in the plan.
    - Of that 85%, 69% include other than "conventional" public employers – 59%.
  - Other Public Employers.
    - Charter Schools - 57% of the 85% - 48%
    - Economic Development Entities – 23% of the 85% - 20%
    - Municipal Utilities – 36% of the 85% - 31%
    - Associations – 41% of the 85% - 35%
How Would Governmental Employers Be Defined? (cont’d)

- Where are the Challenging Areas?
  - Privatized functions.
    - County hospitals.
    - Former governmental functions – children, the aged, the poor, the disabled
  - Legislative mandates.
    - Charter schools
    - Public-private partnership
How Would Governmental Employers Be Defined? (cont’d)

- Requested Changes.
  - Safe Harbors Are Needed.
  - Facts and Circumstances Test Should be Retained.
How Would Governmental Employees Be Defined? (cont’d)

- Employee (ANPRM § 1.414(d)-1(l)).
  - Common Law Employee.
How Would Governmental Employees Be Defined? (cont’d)

- What's the fuss about "Governmental Employees"?
  - Can a governmental employer cover the employees that it leases out to a nonprofit?
    - Economic development
    - Alumni association
  - Employees on extended leave without pay?
How Would The Governmental Plan Proposal Deal With Changes In Status?

- Ceasing to be a Private Entity (ANPRM § 1.414(d)-1(k)(2)(i)).
- Ceasing to be a Governmental Entity (ANPRM § 1.414(d)-1(k)(2)(ii)).
Would The Governmental Plan Proposal Allow De Minimis Private Participation?

- Factors – Private Employees.
  - Formerly Governmental Employees.
  - Formerly Plan Participants.
  - De Minimis Number.
  - Governmental Purpose.
  - Eligibility of Employer to Participate Under the Plan.
Would The Governmental Plan Proposal Allow De Minimis Private Participation? (cont’d)

- Factors – Private Employers.
  - Multiple Employer Plan.
    - 800 Employers + 2 "Private Employers"
  - Pick-Ups.
  - Minimum Funding.
Should The Governmental Plan Proposal Provide For Transitional Relief?

- Employers who were eligible, but now are not, to participate in or sponsor a governmental plan.
- What corrections/transitions should be allowed?
  - Need to consider legislative process.
  - Should employers and/or employees be grandfathered?
  - Need to consider long-term employees.
What Would Be The Effective Date?

- No earlier than the plan year that begins after publication of final rules.
  - Cycle C^2 – should proceed with "Self-Identification."