

STEPHEN R. BRUCE LAW OFFICES

EXCERPT FROM #35 DIALOGUE WITH  
THE INTERNAL REVENUE SERVICE  
2003 CONFERENCE OF CONSULTING ACTUARIES  
ANNUAL MEETING  
NOVEMBER 4, 2003  
TUCSON, ARIZONA

**P 2103**

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P R O C E E D I N G S

SPEAKER: Is this question on cash balance plans?

MR. SHER: One is and one isn't. I actually have two questions. Larry Sher from Mellon. The first one, as I think we might have mentioned earlier, it certainly came up in the earlier session today, on determination letters for cash balances, my understanding is, is that there is no moratorium. In fact, there have been many determination letters issued on new fresh start-type cash balance plans.

SPEAKER: That's correct.

MR. SHER: I guess two parts to this question. I don't know whether one should infer from that that given the IBM case, for example, and given other litigation and other issues that have been raised as far as not only conversions but fresh start issues on cash balance plans.

I suppose, though, that one should not infer that the IRS position is that there is no issue. One might infer that because of the

**P 2104**

1 continual -- continuing issuance of the  
2 determination letters, that the IRS has concluded  
3 there is no issue under 411(b)(1)(H) --

4 SPEAKER: Well, I guess we'd have to say  
5 that that single district court case does not  
6 cause us to conclude that all cash balance plans  
7 are necessarily bad. I guess we would need to --  
8 at this point anyway, we certainly haven't drawn  
9 that conclusion. We're not even considering  
10 changing our position with respect to new cash  
11 balance plans at this time.

12 There could be further developments, but  
13 at this point, you know, we're not changing that  
14 particular position.

15 MR. SHER: Okay. Then as a follow-up to  
16 that --

17 SPEAKER: Did you think we should?

18 MR. SHER: No. No, I think, though, that  
19 what would be helpful would be for the Treasury  
20 and IRS to come out with regulations and to  
21 follow up on the regulations that were issued  
22 last year affirming that position.

**P 2105**

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1           SPEAKER: By the farthest stretch of the  
2 imagination, could you ever interpret the  
3 provisions in the congressional bills about  
4 restrictions on IRS funding has prohibiting them  
5 from issuing determination letters in  
6 circumstances that as Larry described?

7           SPEAKER: That has not been suggested.

8           SPEAKER: Good.

9           MR. SHER: Okay. Follow-up question. If  
10 you have a conversion where you do an -- what  
11 many of us call A&B, where you freeze the old  
12 plan accrued benefit and then provide just a  
13 future service cash balance benefit, given that  
14 you're approving new plans, is there any  
15 rationale for not approving those kind of plans?  
16 Assuming that there are no other -- there's no  
17 wear-away issue and you really have an A piece  
18 plus a B piece, you don't have any other issues,  
19 I guess I'm concerned -- I'm confused as to -- I  
20 don't think those are released, and I don't know  
21 why they wouldn't be given your position on the  
22 fresh start plans.

**P 2106**

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1           SPEAKER: And that you could do with a  
2 freeze and a brand new plan.

3           MR. SHER: You could do it -- right. Set  
4 up a new plan, and is it just because you haven't  
5 sort of separated them or --

6           SPEAKER: If you did a freeze and then  
7 set up a plan, we would look at that as a  
8 conversion.

9           MR. SHER: So, you'd look at that as a  
10 conversion?

11          SPEAKER: Yes. If we look at anything  
12 that even remotely smells like conversion, and we  
13 bring it within the purview of the September 1999  
14 moratorium.

15          SPEAKER: If you terminated and set up a  
16 new plan, that would not be a conversion. But if  
17 you froze --

18          MR. SHER: Okay. But conceptually, is  
19 there anything to distinguish between the two? I  
20 can understand why politically there might be,  
21 but from a strictly qualification perspective, is  
22 there any reason to distinguish between --

**P 2107**

1           SPEAKER: We don't know where our  
2 guidance has been. We don't know what the  
3 ultimate resolution will be in terms of guidance  
4 or possibly legislation.

5           MR. SHER: So, you've just drawn a line  
6 at any conversions being held up?

7           SPEAKER: Practically speaking, it's not  
8 always easy to see that the plan is using sum of  
9 versus a wear-away or som of conversion, whether  
10 it's a greater of the benefits. I mean, the same  
11 -- you can make the same argument for a plan that  
12 gives the greater of an ongoing DB accrual,  
13 traditional DB accrual, that continues off and  
14 then this new cash balance plan accrual.

15           We also on that case which is even -- you  
16 know, more sympathetic, to say that's a  
17 conversion and, boy, I've been getting questions  
18 on this for four years, and all I can say is, you  
19 know, it's not always easy to tell what's going  
20 on, and we'd actually have to go in and look at  
21 all the plans to figure out exactly what's going  
22 on and that's intensive resources, etc.

**P 2108**

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1           MR. SHER: Let me follow up. Because  
2 actually, my second question is kind of, you  
3 started to delve into it, and that is, the  
4 greater of situations, and this doesn't just  
5 involve cash balance conversions. It involves  
6 many situations where you have multiple formulas  
7 where, if you try to apply the 133 and a third  
8 percent rule, you could very well be in  
9 situations where you have plateaus or reduced  
10 rates, accrual rates followed by increased rates,  
11 and this sort of gets both to the question as far  
12 as where's does any type of regulatory projects  
13 stand on this. I know that it was on the  
14 business plan, I'm not sure if it still is, at  
15 some point.

16           And then sort of the second part of that  
17 is do you view a -- sort of a -- when you run the  
18 133 and a third percent test many of us who have  
19 taken the position and particularly when you have  
20 a frozen old plan benefit and then you supersede  
21 that with a new benefit for all years of service  
22 so you have the potential wear-away, that you

**P 2109**

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1 only really look at the new plan benefit formula,  
2 that you disregard the effect of sort of this  
3 frozen 411(d)(6) protected benefit when running  
4 the 133 and a third percent test, so at least in  
5 that situation, you don't run into this potential  
6 for there being a plateau on account of 411(d)(6)  
7 as distinguished from the case where you have two  
8 ongoing benefit formulas.

9 I guess I just -- you know, where does  
10 the regulatory process stand, and do you -- is  
11 there a distinction between those two cases?

12 SPEAKER: Well, yeah. Larry, this is  
13 something we've known about obviously for quite  
14 awhile, and I guess 20 years if you actually look  
15 at it, but we've known about it with a particular  
16 sense of urgency for the last three or four  
17 years, and in my view it's one of the three major  
18 guidance issues that needs to be cleared up with  
19 respect to cash balance plans, the other two  
20 being the interest rate issues and the age  
21 discrimination issues.

22 But the -- this has been the last of the

**P 2110**

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1 issues we've addressed and that we really  
2 haven't, in my view, ever really gotten started  
3 on a resolution of this particular question, and  
4 I don't know what the fix is going to be.

5 We've got a great proposal on putting a  
6 fractional rule overlay in and if we complied  
7 with that, that would theoretically taken care of  
8 it, but I'm not sure that that's the best way to  
9 go and I don't think we have any consensus. I  
10 don't think we've even started the discussions on  
11 that.

12 SPEAKER: And just to underscore Larry's  
13 point, this applies not only to cash balance  
14 plans.

15 SPEAKER: Sure.

16 SPEAKER: This applies to --

17 SPEAKER: We've had this for 29 years.

18 MR. SHER: And I assume then that the  
19 fact the cash balance guidance may be suspended  
20 pending what Congress does to cash balance plans,  
21 this issue -- as Don points out, I hope that this  
22 issue doesn't necessarily remain at a standstill

**P 2111**

1 just because cash balance plans and guidance on  
2 them may be at a standstill. Because this is a  
3 much broader question.

4 SPEAKER: It is. You could take it out  
5 of the context of the cash balance plan, although  
6 cash balance plans have put the spotlight on it  
7 for the last couple of years. But I recognize  
8 it's been there for years and years. I've always  
9 -- I've been surprised since I learned about it  
10 that we didn't really focus on it earlier, and I  
11 don't know. Is it on the guidance plan, Don? Do  
12 you recall? I don't remember it being --

13 SPEAKER: It was at one point, but I  
14 don't recall seeing it on this year's plan.

15 SPEAKER: Yeah.

16 SPEAKER: I think it may be --

17 SPEAKER: I'm pretty sure it's not on the  
18 plan this year, and I guess what I would suggest  
19 since obviously we at the Service and the Office  
20 of Chief Counsel and the Treasury are giving it a  
21 fairly low priority, if you think it should  
22 deserve -- it needs a higher priority or deserves

**P 2112**

1 a higher priority, please let us know that.

2 Please send an e mail and send one to me.

3 SPEAKER: Well, the Academy sent a letter  
4 in about two to three years ago, Larry, and with  
5 not only drawing attention to the problem but a  
6 rationale for the correct resolution of it.

7 SPEAKER: Right. Well, I guess I'm  
8 suggesting that you renew that effort and try to  
9 -- the more -- the more you raise our attention  
10 to certain issues, the more likelihood it is that  
11 we'll address them. It's just a matter of just  
12 practical fact.

13 SPEAKER: And then I'll leave. If you  
14 have a comment on this question of how to do the  
15 133 and a third even in this simple wear-away  
16 case, then --

17 SPEAKER: I want to comment on that just  
18 real quick. You could have two situations. You  
19 could have a wear-away or you could not have a  
20 wear-away initially or you know that there's a  
21 wear-away if the interest rate is higher than --  
22 to calculate your opening account balance, and

**P2113**

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1 then if that's a frozen plan, your typical type  
2 wear-away, there's an issue as to whether that  
3 will satisfy the 133 and a third rule when you  
4 have zero percent accrual rate for a few years  
5 and then your cash balance plan formula kicks in  
6 and you have positive accruals.

7 But even if you convert with 417(e)  
8 interest rates, you have -- at the time, you have  
9 no wear-away. I guess you could have the  
10 interest rates fluctuate later on so that you  
11 could have a similar-type situation, but it's an  
12 issue and that's one of the trickier ones.

13 MR. SHER: Let's forget about cash  
14 balance. I have traditional formulas. I'm  
15 changing one to another, and I have a wear-away  
16 period. How do I do the 133 and a third percent  
17 test? Do I just look at the new benefit formula  
18 without regard to the fact that the old -- no  
19 cash balance. This is just I change from a two-  
20 percent formula to a one and a half-percent  
21 formula.

22 SPEAKER: Right now, the regulation --

**P 2114**

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1 the rule and the regulations that we have talked  
2 about in connection with cash balance is the same  
3 answer. It's aggregate effect. You look at the  
4 net benefit and when you have a zero -- a period  
5 of zero years and then the other kicks in, it's  
6 an issue on the 133 and a third rule. There's an  
7 aggregate rule in the regulation that I think  
8 would require possibly some regulatory change or  
9 statutory change.

10 SPEAKER: My recollection is it's  
11 definitely in the reg and it may actually be in  
12 the statute as well.

13 SPEAKER: It's not in the statute. It's  
14 just in the reg.

15 SPEAKER: But it is a regulation. The  
16 aggregation rule.

17 SPEAKER: Dave (Inaudible) with Mercer.  
18 This is a question dealing with distributions  
19 when you have to the top 25 highest-paid people.

20 (End of Tape)

21

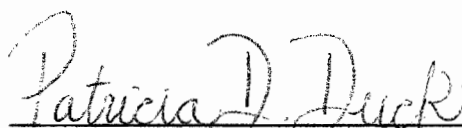
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**P 2115**

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CERTIFICATE PAGE

I hereby certify that the attached proceeding entitled EXCERPT FROM #35 DIALOGUE WITH THE INTERNAL REVENUE SERVICE, 2003 CONFERENCE OF CONSULTING ACTUARIES, ANNUAL MEETING, November 4, 2004, is an accurate, verbatim transcript of the cassette tape as provided by the Stephen R. Bruce Law Offices and that this is the original transcript thereof for the file of the Stephen R. Bruce Law Office.



Patricia D. Duck, Transcriber

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August 11, 2006

DIALOGUE WITH THE IRS/TREASURY

November 4, 2003

MODERATOR

Donald J. Segal  
The Segal Company

PANEL

Paul T. Shultz, IRS  
Martin Pippins, IRS

In this session the representatives of the IRS will inform us regarding recent regulatory developments and will answer questions from the audience. Among the topics that they may provide answers on are:

- EGTRRA
- Aggregate EANC funding method
- Changes in funding methods
- Valuation date and data
- Retroactive annuity starting dates
- IRC Section 415
- Age discrimination regulations
- IRC Section 417(e)
- IRC Section 401(a)(4)
- Nondiscrimination testing and gateways
- Mergers and spinoffs
- Minimum funding standard account
- Equivalent value regulations
- Eliminating forms of payment
- EPCRS program
- Cash balance plans
- Interest rate relief
- Determination letter process