



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR District Counsel,                      District  
CC:

FROM:                      Associate Chief Counsel  
                                 (Employee Benefits & Exempt Organizations)  
                                 CC:EBEO

SUBJECT:    v. Commissioner

This Field Service Advice responds to your memorandum dated May 13, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Taxpayer =  
Date 1 =  
Date 2 =  
Date 3 =  
Date 4 =  
Date 5 =  
Year 1 =  
Year 2 =  
Year 3 =

ISSUE:

Whether the Tax Court has jurisdiction to determine the employment status of Taxpayer's workers based on a notice of determination (issued after the effective date of Code section 7436) predicated upon a controversy over Federal Unemployment Tax Act (FUTA) taxes, that were assessed and abated prior to the effective date of section 7436.

### CONCLUSION:

Notwithstanding the assessment and abatement of FUTA taxes prior to the effective date of section 7436, since the statute of limitations for assessment of the FUTA taxes had not expired prior to the date the notice of determination was issued allowing for reassessment of the tax, the Tax Court has jurisdiction to determine the status of the workers upon whom the proposed assessment of FUTA taxes is based.

### FACTS:

On Date 1, the Internal Revenue Service (Service) began an employment tax audit of Taxpayer for all taxable periods of Years 1 through 3. On Date 2, a date prior to the August 5, 1997, effective date for section 7436 of the Internal Revenue Code of 1986, the Service assessed against taxpayer FUTA taxes, penalties and interest relating to Years 1 through 3. On the same day, the Service abated those FUTA taxes. On Date 3, a date prior to the effective date for Code section 7436, the Service assessed against taxpayer Federal Insurance Contributions Act (FICA) taxes, income tax withholding, penalties and interest with respect to all quarters of Years 1 through 3. That assessment has not been abated.

On Date 4, a date after the effective date of Code section 7436, the Service issued to Taxpayer a notice of determination concerning the status of his workers during Years 1 through 3. Attached to the notice of determination were schedules indicating that the employment taxes in controversy were FICA, income tax withholding, and FUTA taxes for all taxable periods in Years 1 through 3, as well as penalties and interest relating to those taxes.

On Date 5, taxpayer filed in the United States Tax Court a petition for redetermination of the employment status of the workers described in the attachments to the Notice of Determination.

### LAW AND ANALYSIS:

Prior to August 5, 1997, if the Service determined in an audit that a taxpayer's workers should be classified as employees and, as a result, the taxpayer owed additional employment taxes, the Service assessed the employment taxes. I.R.C. § 6201. Because employment taxes were excluded from the statutory definition of "deficiency" (I.R.C. § 6211) and thus were excluded from the scope of a "notice of deficiency" (I.R.C. § 6212), a taxpayer could not challenge a proposed assessment of employment taxes in the United States Tax Court. A taxpayer wishing to challenge the Service's determination of the employment status of its workers in court was required to pay a divisible portion of the assessed tax and sue for refund in the United States district courts or the United States Court of Federal Claims.

Section 1454(a) of the Taxpayer Relief Act of 1997 ("TRA '97"), Pub. L. No. 105-34, 111 Stat. 788, 1055 (1997), added new section 7436 (Proceedings for Determination of Employment Status) to the Internal Revenue Code of 1986. Section 7436(a) of the Code provides the Tax Court with jurisdiction to review determinations by the Service: (1) that workers are employees for purposes of employment taxes under subtitle C of the Code, and (2) that the person for whom services are performed is not entitled to treatment under section 530 of the Revenue Act of 1978.<sup>1</sup>

Section 7436(d)(1) provides that the principles of certain Code sections shall apply to proceedings for determination of employment status "in the same manner as if the [Service's] determination . . . were a notice of deficiency." One of the sections referenced in section 7436(d)(1) is section 6213(a), which prohibits the assessment of a deficiency during the time that a taxpayer may file a petition in the Tax Court or, if a petition is filed, until the Tax Court decision becomes final. If an assessment is made during the prohibited period, a taxpayer is entitled to an automatic abatement of the assessment (see Notice 98-43, 1998-33 I.R.B. 13, 14-15) or the assessment can be enjoined by a proceeding in a proper court (see I.R.C. § 6213(a)). In application, this section acts to prohibit assessments of employment taxes during the period a taxpayer may litigate its issues in the Tax Court. This section became effective August 5, 1997. See § 1454(c), TRA '97.

The Service has the authority to abate the unpaid portion of a taxpayer's tax liability. I.R.C. § 6404. In essence, abatement is merely a unilateral statement by the Service that it will not currently seek payment and it creates no rights in a taxpayer to preclude a later assessment. Gray v. Commissioner, 104 F.3d 1226, 1228 (10<sup>th</sup> Cir. 1997). Provided the statute of limitations for assessment has not expired, no legal authority bars the Service from assessing taxes again after abatement. Gray, 104 F.3d at 1228 ("issuance of an abatement does not prevent the Commissioner from redetermining or reassessing a tax deficiency, so long as the Commissioner acts before expiration of the applicable statute of limitations"); Service Bolt & Nut Co. v. Commissioner, 724 F.2d 519, 524 (6<sup>th</sup> Cir. 1983) (abatement of an assessment is not a binding action that can estop the Commissioner from reassessing a deficiency).

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<sup>1</sup>Section 530 of the Revenue Act of 1978, as amended, provides taxpayers with relief from federal employment tax obligations if certain requirements are met. A taxpayer who files returns consistent with its classification of workers, who after December 31, 1978, has not treated its workers as employees, and who has a reasonable basis for not treating the workers as employees is not liable for the employment taxes that might otherwise be due if the workers were determined to be employees.

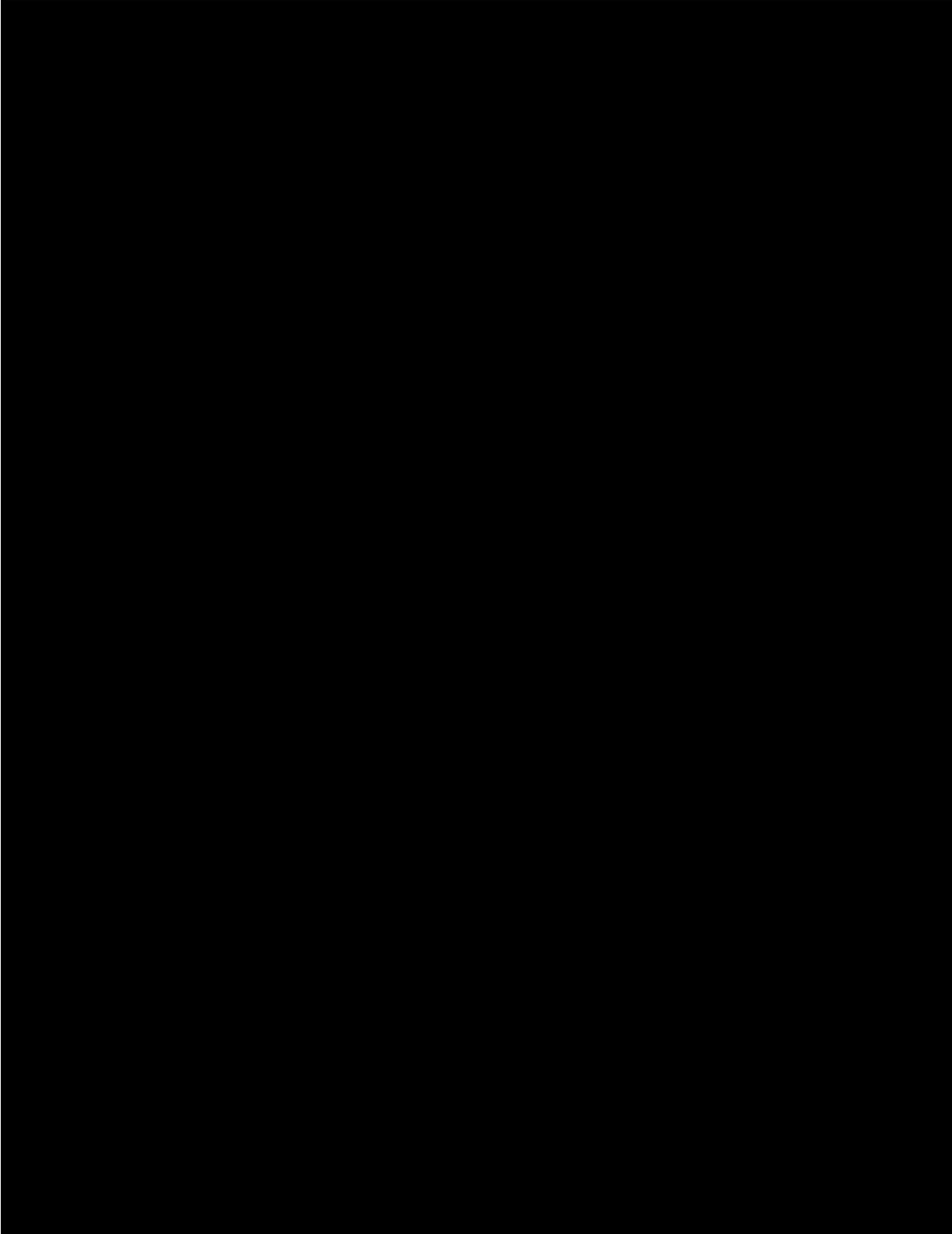
In this case, FUTA taxes were assessed and thereafter abated. Before the statute of limitations for assessment had expired, the Service wanted to reassess the taxes. But in the meantime, Code section 7436 had become effective. Accordingly, the Service followed the new statutory provisions and issued a notice of determination concerning worker classification under section 7436 with respect to the FUTA taxes. When Taxpayer filed a timely petition, the Tax Court obtained jurisdiction over the proceeding for determining worker status for the taxable periods covered in the notice of determination. The prior assessment and abatement of the FUTA taxes does not affect the Tax Court's jurisdiction over the case.

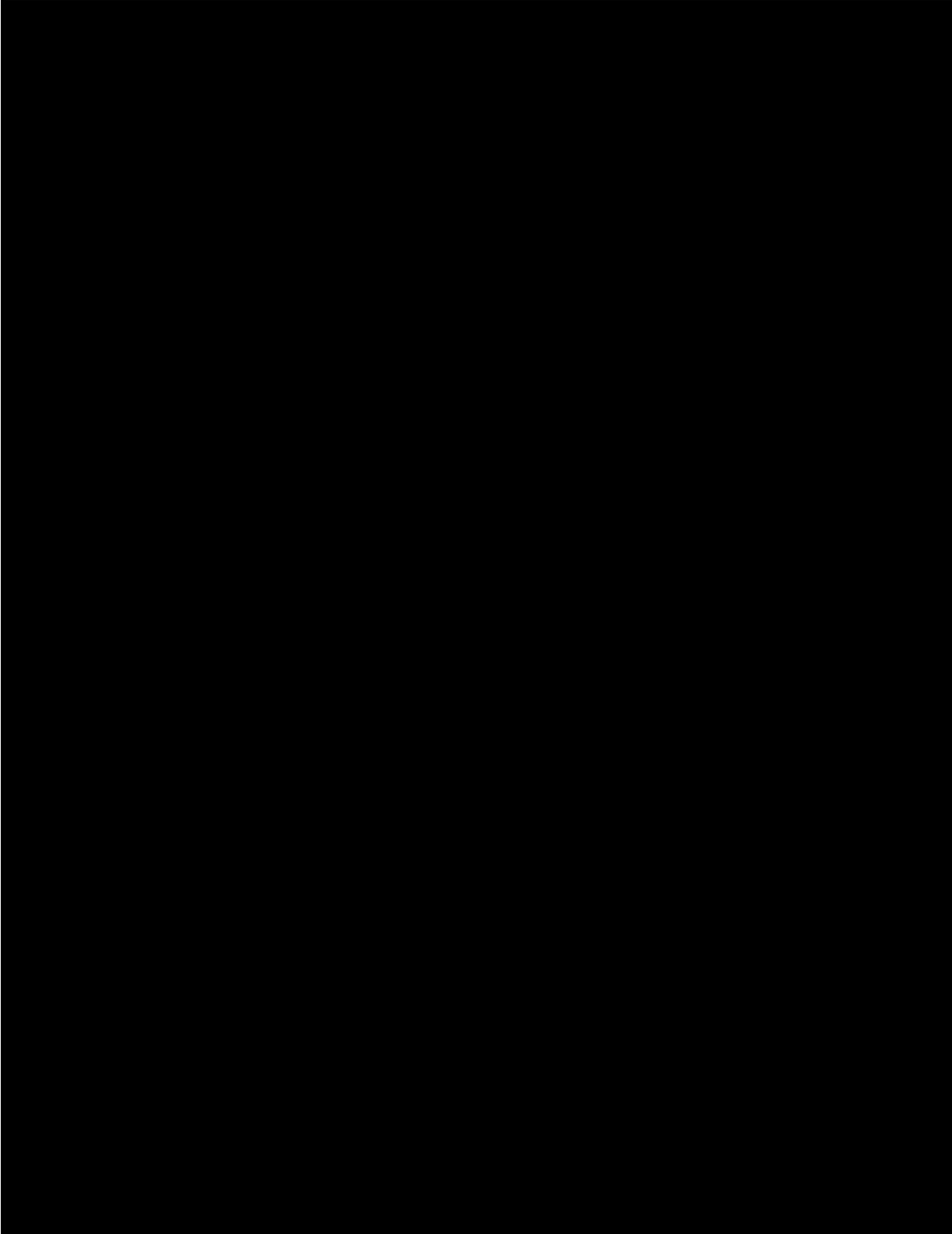
CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

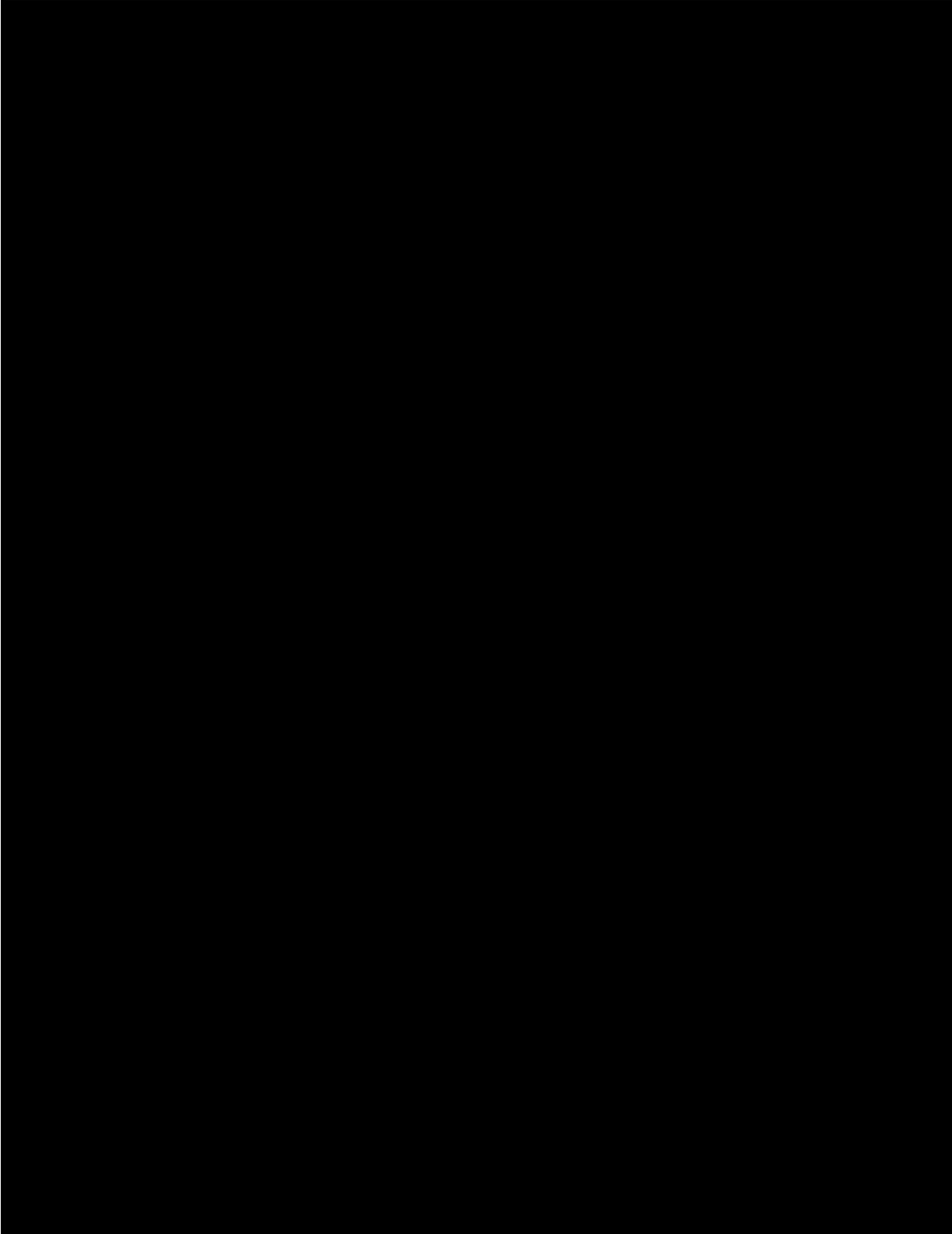
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If you have any further questions, please call 202-622-6040.

Associate Chief Counsel  
(Employee Benefits & Exempt  
Organizations)

By: \_\_\_\_\_  
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