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Mr. James E. Holland, Jr.
Manager, Employee Plans, Tax Exempt and Government Entities Division
Internal Revenue Service
1750 Pennsylvania Avenue, NW
Washington, DC 20006

Re: Final Treasury Regulation Sec. 1.401(m)-1(a)(2)(iii)(A) and coordination with IRC §4980(d)(2)

The American Society of Pension Professionals & Actuaries (ASPPA) is writing to comment on, and request clarification of, the Internal Revenue Service's (IRS) guidance as it relates to the exceptions to the pre-funding restrictions outlined in Treasury Regulation Sec. 1.401(m)-1(a)(2)(iii)(B) for qualified replacement plan allocations made pursuant to IRC §4980(d)(2).

ASPPA is a national organization of more than 6,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Summary of Recommendation

The following is a summary of ASPPA's recommendation. It is described in greater detail in the Discussion of Issue section.

In order for an employer to apply a 20% excise tax rate on any employer reversion of excess assets from a terminated defined benefit plan, IRC §4980(d)(2) outlines the requirements for transferring all or a portion of these excess assets to a qualified replacement plan. In situations whereby a 401(k) plan is established as the qualified replacement plan, there exists some ambiguity around whether or not the transferred assets can be reallocated as an IRC §401(m) matching contribution. This ambiguity is due, in part, to the prefunding restrictions of Treasury Regulation Sec. 1.401(m)-1(a)(2)(iii)(B).

Assuming the plan satisfies all of the qualified replacement plan requirements within the statute (*e.g.*, participation and asset transfer levels, allocations meet the IRC §415(c) limits and comply with the prescribed seven-year allocation period), ASPPA is requesting

clarification from the Service as to the allowable treatment of the allocated transferred assets as IRC §401(m) matching contributions.

Discussion of Issue

IRC §4980(d)(2) generally provides that the applicable excise tax rate on reversions from terminated defined benefit plans is reduced where 25% of the excess is transferred to a qualified replacement plan. The Service has ruled that using the transferred excess assets to reduce matching contributions under a plan will not result in the plan failing to be a qualified replacement plan, provided the other qualified replacement plan requirements are met (*e.g.*, see Private Letter Rulings 9834036 and 200107038). While these Private Letter Rulings may not be relied upon by other taxpayers, many practitioners have applied the same reasoning used in these rulings to use transferred assets to reduce employer matching contributions.

The above referenced Private Letter Rulings were issued prior to the release of revised Treasury Regulations under IRC §401(m). Treasury Regulation Sec. 1.401(m)-1(a)(2)(iii)(A) generally precludes an employer from contributing employer matching contributions prior to related employee contributions being currently available. However, Treasury Regulation Sec. 1.401(m)-1(a)(2)(iii)(B) generally provides limited exceptions to this pre-funding restriction for forfeitures reallocated as matching contributions and for the release of shares from an ESOP loan suspense account.

IRC §4980(d)(2)(B)(iii)(II) precludes an employer from taking a deduction for the amounts transferred to a qualified replacement plan. With no ability for the employer to recognize any tax deductible benefits for the amounts transferred to the qualified replacement plan, the transferred amounts could be viewed in a similar fashion to a plan forfeiture that is reallocated as an IRC §401(m) matching contribution. Finally, there would be no concern about accelerating deductions, which is a condition that must be met with respect to employer contributions to leveraged ESOPs [Treasury Regulation Sec. 1.401(m)-1(a)(2)(iii)(B)(2)].

Consequently, ASPPA recommends an additional exception to the pre-funding restrictions on IRC §401(m) employer matching contributions be provided for allocations of transferred assets which meet the requirements of IRC §4980(d)(2).



These comments were prepared by the 401(k) Subcommittee of ASPPA's Government Affairs Committee, Robert M. Kaplan, CFP, CPC, QPA, APA, Chair, and were primarily authored by Joseph A. Emmons, CPC, QPA, QKA. Please contact us if you have any

comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

/s/

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/s/

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cc: W. Thomas Reeder
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