DOL Guidance on Allocation of Expenses in a Defined Contribution Plan

November 26, 2003

Carol Gold, Director
TE/GE Employee Plans Division
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224-0001

Re: Department of Labor Guidance on Allocation of Expenses in a Defined Contribution Plan

Dear Ms. Gold:

With the issuance of Department of Labor (DOL) Field Assistance Bulletin 2003-03 ("DOL Bulletin"), plan sponsors and their advisors began debating the ability of employers to distinguish between active and terminated plan participants with respect to the payment of certain plan expenses. ASPPA requests that the Service issue guidance indicating that it concurs with the DOL's Bulletin. Further, the IRS should clarify its position that the plan's payment of administration expenses for participants who are active employees, but not for terminated vested participants, does not violate §411(a)(11).

ASPPA is a national organization of over 5,000 members who provide actuarial, administrative, consulting, legal, and other professional services for qualified and other retirement plans. ASPPA members rely on the ability to provide documents as sponsoring organizations of Master and Prototype (M&P) plans and volume submitter plans, in addition to those plans requiring individual design.

On May 19, 2003, the DOL issued Bulletin 2003-03 providing guidance on the allocation of expenses in a defined contribution plan. The guidance established that plan sponsors and fiduciaries have significant flexibility in establishing rules for allocating expenses among defined contribution plan participants, including rules as to whether expenses will be charged to individual participants as a "user fee" or to the plan as a whole, and whether expenses charged to the plan as a whole will be allocated on a pro rata or per capita basis.

The DOL Bulletin makes it clear that a plan sponsor may distinguish between actively employed participants and terminated vested participants in paying plan expenses. In particular, the DOL Bulletin states:

Nothing in Title I of ERISA limits the ability of a plan sponsor to pay only certain plan expenses or only expenses on behalf of certain participants. In the latter case, such payments by a plan sponsor on behalf of certain plan participants are equivalent to the plan sponsor providing an increased benefit to those employees on whose behalf the expenses are paid. Therefore, plans may charge vested separated participant accounts the account's share (e.g., pro rata or per capita) of reasonable plan expenses, without regard to whether the accounts of active participants are charged such expenses and without regard to whether the vested separated participant was afforded the option of withdrawing the funds from his or her accounts or the option to roll the funds over to another plan or individual retirement account.

Some commentators have raised the concern that paying plan expenses only on behalf of active participants in a defined contribution plan may violate Code §411(a)(11), which provides that a plan may not immediately distribute a participant's accrued benefit without the participant's consent, if such benefit exceeds $5,000. The basis for this concern is Treas. Reg. §1.411(a)-11(c)(2)(i), which states that consent to a distribution is not valid if "a significant detriment" is imposed under the plan on a participant who does not consent to an immediate distribution. In Revenue Ruling 96-47, 1996-2 C.B. 35, for example, the Service ruled that automatically requiring a terminated vested participant's account to be invested in a money market fund, rather than among a broad array of mutual funds available to actively employed participants, imposed such a "significant detriment" in violation of the regulation.

It is common industry practice for a defined contribution plan administrator to charge a per capita fee for the maintenance and administration of plan accounts. These fees may either be paid by the employer or debited directly to participant accounts. ASPPA believes that many employers who do not pay such expenses now would be willing to do so for active, but not for former, employees.

ASPPA respectfully requests that the Service issue guidance clarifying its position that the plan's payment of administration expenses on behalf of participants who are active employees, but not for terminated vested participants, does not violate §411(a)(11). The DOL is correct that employers may legitimately distinguish between active and terminated employees in determining how much of the burden of plan administrative expenses it wishes to bear. In addition, the IRS has stated in its audit guidelines (Announcement 95-33) that an employer must have a legitimate business reason for any disparate treatment between former and active participants for such treatment not to be considered a significant detriment. ASPPA believes that an employer would have a legitimate business reason to pay expenses for employees who continue to perform services for the employer. Moreover, to the extent that such plan administrative expenses are reasonable and prudent as required by ERISA, ASPPA does not believe that having to pay such expenses would constitute a "significant detriment" under Treas. Reg. §1.411(a)-11(c)(2)(i) in any case.

Because there is substantial uncertainty among plan sponsors and their advisors regarding the ability of employers to distinguish between active and terminated plan participants, ASPPA requests that the Service issue guidance indicating that it concurs with DOL Bulletin 2003-03.

Sincerely,

Fredric S. Singerman, Esq., APM, Chair
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cc: Paul Shultz, IRS
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