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Clarification Request to IRS on Short Service Employee Memorandum

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December 22, 2004

Carol Gold, Director Employee Plans
Internal Revenue Service
TE/GE Employee Plans Division
1111 Constitution Avenue NW, Room 441
Washington, DC 20224-0001

Dear Ms. Gold:

On October 22, 2004 you issued a memorandum to the Directors, Employee Plans Examinations and Determinations Redesign, regarding "short service employees and other meaningful benefit schemes and abuses." The undersigned organizations support the continued efforts of the Service to identify and prevent abusive practices respecting qualified retirement plans. In particular, we have no objections to the provisions in the memorandum designed to curtail the use of questionable hiring practices as a device to satisfy the nondiscrimination rules. However, we have concerns about some language in the memorandum, which in our view could easily be misinterpreted in an overbroad manner inconsistent with the language's intent as we understand it.

Specifically, we have concerns with the language beginning with the second paragraph on page four of the memorandum that provides, "[i]n the absence of questionable hiring practices, a violation may also occur where the employer uses a plan design to limit benefits to a select group of highly compensated employees and to the lowest paid of the non-highly compensated employees."

On its face, we believe this language would render invalid a number of plan designs that have long been considered acceptable by the Service through the issuance of prior determination letters. As a result, the issuance of the memorandum, and in particular the above referenced language, has created significant uncertainty among plan sponsors and retirement plan practitioners as to whether their current plan design is now appropriate. This uncertainty naturally adds cost to the administration of a retirement plans.

Given the importance of promoting retirement plan coverage, and the need to minimize unnecessary administrative costs, we respectfully request the Service clarify the meaning and intent of the highlighted language with respect to the following two issues:

- 1) Please describe the specific types of plan designs that are intended to be covered by such language. Is the Service primarily concerned about arrangements where benefits are specifically targeted to employees with the lowest levels of compensation (sometimes referred to as bottom-up leveling)?
- 2) Was the language in question intended to be restrictively interpreted in light of the example that follows the language in the memorandum?

We appreciate your prompt attention to this important matter.

Sincerely,

Brian H. Graff, Esq., Executive Director/CEO
American Society of Pension Professionals & Actuaries

Edward Ferrigno, Vice President of Washington Affairs

Profit Sharing/401(k) Council of America

Paula Calimafde, Esq., Chair
Small Business Counsel of America

cc: Paul T. Shultz