Incorporation by Reference Within Qualified Retirement Plans

December 11, 2003

Paul Shultz, Director
EP Rulings & Agreements
Internal Revenue Service (T:EP:RA)
1750 Pennsylvania Ave., NW, Room 483
Washington, DC 20006

Dear Mr. Shultz:

The American Society of Pension Actuaries ("ASPPA") offers the following comments in response to various informal IRS requests for comments regarding the ability of a qualified retirement plan to incorporate by reference certain provisions of the Internal Revenue Code and the regulations thereunder.

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 Master and Prototype (M&P) plans and individually designed plans (including volume submitter plans).

Discussion

ASPPA acknowledges the importance of having a written qualified retirement plan document that complies with the qualification requirements and includes specific rules for properly administering the plan. On the other hand, both the IRS and Congress recognize that incorporation by reference is appropriate in certain situations as illustrated by provisions of §1106(h) of the Tax Reform Act of 1986 and numerous items in the IRS Listing of Required Modifications ("LRMs").

Thus, the issue is not whether plans can incorporate source materials by reference; rather, the issue is the extent to which plans may incorporate various provisions by reference. Ultimately there must be a balance between the inclusion of every possible rule that affects a plan and the competing interests that a plan provides definitely determinable benefits as well as meaningful guidance for plan sponsors and service providers. In some situations, including general statements about a particular requirement may be the most efficient method of alerting a plan sponsor or service provider about the proper course of action.

Currently, there appears to be a lack of consistency on the provisions the IRS permits to be incorporated by reference. In general, the trend of the IRS has been to prohibit incorporation by reference of many of the provisions relating to testing §401(k) plans (e.g., the actual deferral percentage tests) and, more recently, §401(a)(9). On the other hand, plans are not required to include any reference to the mechanics of other operational requirements, such as §§401(a)(26) and 410(b). Furthermore, some rules are incorporated by reference without any additional explanations [e.g., the controlled group and affiliated service group rules of §§414(b), (c) and (m)].

Recommendations

ASPPA recommends that for those areas where there are extensive regulations, incorporation by reference should be permitted. However, it would be appropriate to require that a plan contain provisions when an administrator or plan sponsor is required to make certain elections, other than elections related to the operational coverage and nondiscrimination requirements. For example, specific language

should be required in order to specify whether a plan is utilizing the ADP and ACP safe harbor provisions [§401(k)(11) and §401(m)(12)] or to coordinate two plans for the §415 limits and the top-heavy provisions of §416. However no specific plan provisions should be required for the operational coverage and nondiscrimination requirements such as options used to perform the ADP and ACP tests of §§401(k) and 401(m) (such as prior year/current year testing and permissive disaggregation).

In particular, ASPPA recommends that incorporation by reference by permitted in the following areas:

1. ADP and ACP Tests. With respect to the incorporation by reference of the ADP and ACP tests, ASPPA submitted comments to Mark Iwry in March 1999. ASPPA's position as presented in the letter has not changed. A copy of the text of that letter is attached.

2. IRC §415 Limits. Currently, individually designed plans are permitted to incorporate provisions that are optional. This should be expanded to pre-approved plans (i.e., Master and Prototype and Volume Submitter plans).

3. Top-Heavy Rules. These rules are particularly difficult to apply and rather than attempt to reiterate the existing guidance, incorporation by reference should be permitted for the non-optional provisions.

Conclusion

Reference to outside documents is essential to the proper operation of any qualified retirement plan. Even in those areas where the Service arguably does not permit incorporation by reference (such as optional testing methods used in applying the ADP and ACP tests), there are gaps where, by necessity, one must refer to outside resources. Attempting to include every relevant provision would essentially require a plan to include every provision from the Code, ERISA, applicable regulations and other guidance. Aside from not being practical (or even possible), this limits flexibility allowed by the Code, invites noncompliance and requires more amendments. Attempting to cover every possible rule in a plan is not feasible and would not benefit practitioners, plan administrators, or the IRS.

These comments have been prepared the Reporting & Disclosure and Plan Documents Subcommittee of the Government Affairs Committee. We appreciate the opportunity to provide these comments, and are available to discuss them with you further.

Sincerely,

Robert Richter, Esq., APM, Chair
Reporting & Disclosure and
Plan Documents Subcommittee

Brian H. Graff, Esq.
Executive Director

Sal Tripodi, Esq., APM, Co-Chair
Government Affairs Committee

Jeffrey C. Chang, Esq., APM, Co-Chair
Government Affairs Committee

Ilene H. Ferenczy, CPC, Chair
Administration Relations Committee

cc: William F. Sweetnam, US Treasury

March 15, 1999

J. Mark Iwry, Benefits Tax Counsel
Department of the Treasury
Office of Tax Policy
1500 Pennsylvania Avenue, NW
Room 3111
Washington, DC 20220
Re: Plan Documentation Issues for 401(k) Plans
Dear Mr. Iwry,

The American Society of Pension Actuaries (ASPPA) is a national organization of approximately 3,000 members who provide actuarial, consulting, administrative, legal and other services for qualified plans and tax-sheltered annuities. ASPPA's members and their clients are committed to compliance with the legal requirements affecting these plans and arrangements.

In recent notices (Notice 97-45, 98-1, and Notice 98-52), it appears that the Service has taken a position that every testing decision be contained within a 401(k) plan document. Examples of the testing criteria currently required to be included in 401(k) plan documents include the following:

Calendar year data election (Notice 97-45)
Top-paid group election (Notice 97-45)
First year deemed 3% rule (Notice 98-1)
Decision to use prior or current year testing option (Notice 98-1)
The protocol for correcting excess aggregate contributions (Treas. Reg. 1.401(m)-1(e)(4))

This can be contrasted with the treatment of other plans that may operationally use the testing techniques available in the regulations under Code Section 410 (b) and 401(a)(4) without including such techniques in the plan document.

We strongly urge that plan documents for 401(k) plans should not be required to include specific nondiscrimination testing criteria because:

1. Simplified documents encourage the implementation and adoption of qualified plans
2. Complexity increases the administrative burden on plan sponsors
3. Requiring specific testing details in documents increases reliance on IRS corrective programs
4. Plan participants will bear the brunt of the costs associated with plan amendments
5. The "definitely determinable" argument is flawed
6. This flexibility is permitted by the law

Discussion

Our reasons for requesting a reconsideration of this position are listed below:

1. Simplified documents encourage the implementation and adoption of qualified plans. Simplified document requirements will increase retirement savings by encouraging plan sponsors to continue and adopt plans. Document complexity serves to discourage the formation of new plans. Plan sponsors are justifiably concerned that detailed requirements, determined in advance, leave them little flexibility and greatly increase the risk of operational failures that could lead to tremendous financial penalties. "Complexity of Tax Law" was named as the most serious problem facing taxpayers in the recently released 1998 IRS National Taxpayer Advocate's Annual Report to Congress. The Service should respond to this problem with simplified rules in every possible area.

2. Complexity increases the administrative burden on plan sponsors. The structure of the plan documents themselves will be impossibly complicated and confusing. Consider a 401(k) plan amended to comply with GUST in 1999: it will need to memorialize different choices for testing that may have been made in each of the years spanning from 1997 to 1999. After 1999, amendments will be required each time a testing option is changed. This means unneeded additional costs to plan sponsors including the cost of:

Plan Amendments
Possible User Fees to Submit Amendments to the IRS

By setting up this administrative burden on plans, the result will be some level of noncompliance—not because people are unwilling to comply, but because details slip through the cracks. The result for many ASPPA members will be a lawsuit for malpractice for an innocent mistake. There is no offsetting benefit to the system, as everyone involved will lose:

The plan sponsor will incur legal costs in pursuing a malpractice suit, decreasing their ability to contribute to their retirement plans

The ASPPA member will incur legal costs in defending the lawsuit, resulting in greater overhead and increased administrative expenses

The Service will realize an increased workload due to increased dependence on corrective programs as discussed below.

Requiring specific testing details in documents increases reliance on IRS corrective programs. By requiring such complex plan documents, the Service has increased the odds that prototype and volume submitter documents will be completed incorrectly. This increases the probability the plans will not be operated in accordance with the terms of the plan document. By necessity, this will increase dependence on the IRS corrective programs, including VCR, CAP, and APRSC. This is an extra, unneeded cost for the plan sponsor that detracts from the ability of the plan sponsor to contribute to its qualified plans. This also adds to the Service's work burden. Additionally, this may force more plan sponsors into individually designed plan documents, which increases the plan sponsor costs and the Service's workload.

Plan participants will bear the brunt of the costs associated with plan amendments. The cost of making the above changes will be borne, at least indirectly, in the form of reduced company profit sharing or matching contributions. This will directly affect the rank-and-file participants. Our experience is that small employers tend to view the cost of a plan as a package, lumping together contributions and administrative costs. If the administrative burden and costs are increased, by necessity the company contributions will decrease. From the Service's standpoint, this is a revenue-neutral event; it neither increases nor decreases tax revenues. However, it will definitely decrease retirement savings for all participants.

The "definitely determinable" argument is flawed. We understand that the reason for the detailed document requirements is that the amount allocated to an individual in a 401(k) must be "definitely determinable" within the confines of the plan document. We respectfully submit that it is not possible to "definitely determine" the final amount allocated to an individual in a 401(k) plan merely based on the plan document, even if the above testing choices are committed to writing within the plan document.

Allocations can be affected by several independent decisions under the coverage rules such as permissive aggregation and the separate testing of otherwise excludable employees. It is impossible to anticipate all of the future events that might occur and spell out how those events will be handled.

For example, the Service has not issued formal guidance on nondiscrimination testing involved in mergers and acquisitions. If the Service has not been able to formulate guidance on mergers and acquisitions; plan sponsors could not reasonably be expected to do so in individual plans. If it is acceptable to remain mute about how nondiscrimination tests will be handled in such situations without violating the definitely determinable requirement, it should be no less the case with the annual testing requirements.

This flexibility is permitted by the law. Quite simply, our proposal is that plan sponsors be permitted to use the flexibility which the law, regulations, notices, etc. allow. What we propose will violate neither the letter nor the spirit of the Code and regulations. The law already permits flexibility which is not required to be hardwired into the document.

For example, the plan sponsor can decide, if the plan fails the ADP test, to return excess contributions or put in QNECs. In this case, it is the decision of the plan sponsor to determine whether it will make HCEs unhappy by returning excess contributions or excess aggregate contributions or make some or all NHCEs happy by making additional contributions in the form of QNECs or QMACs.

Fundamentally, we believe that ASPPA and the Treasury share the same goals: to increase retirement plan coverage and reduce reliance on Social Security. We believe our proposal will be a step in the right direction.