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WORKING FOR AMERICA'S RETIREMENT

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June 8, 2011

Mr. Andrew E. Zuckerman
Director, EP Rulings & Agreements
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224-0002

Re: Suggestions for Improvements in the Pre-Approved Plans Program

Dear Andy,

The American Society of Pension Professionals and Actuaries ("ASPPA") appreciates the opportunity to provide suggestions for improving the pre-approved plans and the determination letter program (the "Program") with respect to defined contribution plans. ASPPA also has suggestions for improving the Program with respect to defined benefit plans, which it will provide at a later date. As you know, ASPPA has been a supporter of the Internal Revenue Service's ("IRS") Program for many years and strongly supports the IRS's efforts toward improvement.

ASPPA is a national organization of more than 7,500 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, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-based retirement plan system.

One of the primary purposes of the Program is to reduce both the IRS's and practitioners' workloads by having the IRS review and approve specimen plan documents that can be used by many plan sponsors. This program has been extremely successful as most retirement plans now utilize pre-approved documents. However, ASPPA believes additional improvements can be made to the Program in order to provide even greater efficiencies. Our recommendations follow.

Summary

I. Reduce the Need for "Protective" Determination Letter Filings - ASPPA recommends that the IRS modify its procedures to lessen the need for "protective" determination letter applications. As described in greater detail below, this could include providing limited audit relief, adopting a plan document registration program, allowing for certification on Form 5500, and providing for certification of adoption of amendments by the pre-approved document sponsor. Changes such as these could significantly reduce the number of determination letter applications.

II. Modify Existing Program for Approval of Trust Documents - ASPPA recommends that the IRS modify its existing Program to approve trust documents separately in order to avoid multiple IRS reviews of the same trust document.

III. Reliance on Opinion and Advisory Letters in Bankruptcy - ASPPA recommends that the IRS clarify and strengthen the wording used in opinion and advisory letters to align with the wording in Revenue Procedures ("Rev. Proc.") 2005-16 and 2011-6. Plan sponsors will be less likely to file for determination letters if they are comfortable that the opinion or advisory letter for their plan will be treated as a favorable determination under Internal Revenue Code ("Code") section 7805 in the event a participant files for bankruptcy protection.

IV. Harmonize the Master & Prototype and Volume Submitter Plan Programs - ASPPA recommends that the IRS modify the Program to incorporate the best current practices of both the "nonstandardized" Master and Prototype ("M&P") and volume submitter programs into each pre-approved plan program. By minimizing the distinctions between these programs, the IRS can increase its efficiency in reviewing plans (and thereby minimize the time it takes to review them) by reducing the complexity involved in the review. Harmonization of both programs may also cause document sponsors to reduce the overall number of documents they use, thereby reducing the time needed for the pre-approved document review process.

V. Permit Increased Incorporation by Reference in Pre-Approved Plan Documents - ASPPA recommends that the IRS expand the ability of pre-approved plans to incorporate statutory and regulatory provisions by reference, especially for provisions required by Code sections 401(a)(9), 401(k)(3) (for ADP testing), 401(m) (for ACP testing) and 415. Allowing plans to incorporate statutory provisions by reference would significantly reduce the time needed by the IRS to review plans.

VI. Allow ESOP Provisions in Pre-Approved Plans - ASPPA recommends that the IRS expand the Program to encompass employee stock ownership plan ("ESOP") provisions, which would reduce the burden on the IRS to review individually designed ESOPs.

VII. Combination of Profit Sharing and Money Purchase Plans - ASPPA recommends that the IRS allow the combination of basic, non-deferral profit sharing and money purchase plan provisions into a single adoption agreement, which would reduce the amount of time that the IRS would need to spend reviewing documents.

VIII. Extend the Current Cycle Filing Deadline to January 31, 2012 - ASPPA recommends that the IRS extend the mass submitter and large national provider filing deadline to January 31, 2012 in order to avoid the submission of "placeholder" filings in order to meet the current deadline. An extension would avoid the use of additional IRS and practitioner resources to update these filings.

Discussion

I. Reduce the Need for "Protective" Determination Letter Filings

Many plan sponsors and providers are confused about the record retention requirements for plan documents. Due to misunderstandings regarding the rules and changes in personnel and service

providers, some companies have difficulty locating prior versions of pre-approved plan documents. This is becoming less of a problem as a result of the ability to use electronic media which has facilitated the retention and production of old documents. Unfortunately, this is a relatively new trend (i.e., it wasn't widely available prior to GUST restatements).

When performing an audit or processing a determination letter request, it is our members' experience that most IRS agents will request copies of all required and optional plan amendments and/or restatements that have been adopted since the plan last received a favorable determination letter. If a pre-approved plan had not been submitted for an actual determination letter, IRS agents will typically ask for all documentation going back to its inception. In reaction to this practice, many practitioners submit "protective" determination letter filings in order to avoid maintaining an infinite archive of plan documents. In fact, some practitioners routinely file Voluntary Correction Program (VCP) applications under the Employee Plans Compliance Resolution System (EPCRS)[1] to address this issue due to the very large penalties that can be assessed if plan documents cannot be produced during an audit.

The IRS practice, and the practitioner reaction to it, has caused a significant increase in the number of determination letter (as well as VCP) filings, which results in an unnecessary drain on IRS and practitioner resources.

Procedures could be adopted to significantly reduce the need for these protective determination letter filings. For example, such procedures could include some combination of:

- An audit position by the IRS that it will request the plan documents only for open years forward unless it identifies a problem. This would provide relief for plan sponsors, while allowing the IRS to focus its resources on plans that pose the greatest likelihood for violations. It would also reduce the number of VCP filings, which would provide additional relief for IRS resources.

- A program for adopting employers to register their use of pre-approved documents with the IRS.

- Plan sponsors could include a letter serial number of their adopted pre-approved plan and certify that all required and optional amendments were timely executed on their Form 5500 filings.

- During an IRS audit, plan sponsors could demonstrate that they use a pre-approved document and then, if requested by the plan sponsor, the organizational sponsor of the pre-approved document would have the option of certifying to the IRS auditor that all required amendments were timely made.

ASPPA recommends that the IRS adopt procedures to prevent the need for protective determination letter filings, such as limited audit relief, a registration program, certification on

[1] *See*, Rev. Proc. 2008-50.

Form 5500 and/or certification of adoption of amendments by the pre-approved document sponsor. ASPPA would be pleased to work with the IRS on any of these approaches.

II. Modify Existing Program for Approval of Trust Documents

Certain trustees require employers adopting pre-approved documents to use custom trust language. Current IRS procedures require that each mass submitter file all custom trust documents that an employer may use with its pre-approved plans. As a result, the same trust document is filed numerous times by the different mass submitters, which results in duplicative reviews by the IRS and the inefficient use of limited IRS resources.

In order to avoid this duplication of effort by the IRS, the trustees could instead file their trust documents directly with IRS under the current Program rather than having mass submitters include trust provisions in their filings. After approval, any adopting employer could use the trust with any pre-approved document, provided the custom trust language is not in conflict with any other provision of the plan and would not cause the plan to fail to qualify under Code section 401(a). The IRS already uses this caveat with respect to adopting employer modifications to pre-approved trust or custodial language.[2]

The IRS may also want to consider whether it is necessary to review the trust provisions at all.

ASPPA would be pleased to work with the IRS and trustees in working out the details of a modified Program.

ASPPA recommends that the IRS modify its existing Program to approve trust documents separately in order to avoid reviewing the same trust document multiple times.

III. Reliance on Opinion and Advisory Letters in Bankruptcy

Many plan sponsors are concerned that an opinion or advisory letter will not have the same reliance status as a determination letter in bankruptcy proceedings. Although the IRS has clarified, in Rev. Proc. 2011-6 and Rev. Proc. 2008-50, that opinion and advisory letters should be given the same treatment as determination letters, the wording currently used in the actual letters does not clearly state that this degree of reliance applies.[3] This concern could be alleviated if opinion and advisory letters included the same language as Rev. Proc. 2011-6. For example, the letters for standardized M&P plans could be revised to include a statement that "This [opinion or advisory] letter shall be equivalent to a favorable determination letter as long as the employer has followed the terms of the plan, and the coverage and contributions or benefits under the plan are not more favorable for highly compensated employees (as defined in Internal Revenue Code § 414(q)) than for other employees, except as provided in Section 19 of Revenue Procedure 2005-16."[4] The letters for nonstandardized M&P and volume submitter plans could be

[2] *See*, Rev. Proc. 2005-16 §§ 5.09 and 14.04.
[3] *See*, Rev. Proc. 2011-6, § 8.02; Rev. Proc. 2008-50, § 5.01(4).
[4] This statement combines Rev. Proc. 2011-6, § 8.02 ("If an employer can rely on a favorable opinion or advisory letter pursuant to section 19 of Rev. Proc. 2005-16, the opinion or advisory letter shall be equivalent to a favorable determination letter. For example, the favorable opinion or advisory letter shall be treated as a favorable determination letter for purposes of section 21 of this revenue procedure, regarding the effect of a determination letter, and section 5.01(4) of Rev. Proc. 2008-50, 2008-35 I.R.B. 464, regarding the definition of 'favorable letter'

revised to include a statement that "This [opinion or advisory] letter shall be equivalent to a favorable determination letter as long as the employer's plan is identical to this plan, the employer has chosen only options permitted under the terms of the approved plan, and the employer has followed the terms of the plan, except as provided in Section 19 of Revenue Procedure 2005-16."[5]

Plan sponsors will be less likely to file for determination letters if they are comfortable that their participants will be protected in the event of a bankruptcy.

ASPPA recommends that the IRS clarify the language in its opinion and advisory letters regarding the reliance status of these letters based on the language in Rev. Proc. 2005-16 and Rev. Proc. 2011-6.

IV. Harmonize the Master & Prototype and the Volume Submitter Plan Programs

ASPPA applauds ongoing IRS efforts to reduce the differences between the M&P and volume submitter programs. By minimizing the distinctions between these programs, the IRS can increase its efficiency in reviewing plans (and reduce the time it takes to review them) by lessening the complexity involved in the review. That is, IRS professionals would not need to constantly refer to the rules to confirm which rules apply to an M&P plan versus a volume submitter plan. IRS professionals could also more easily be cross-trained to work on both types of plans. Additionally, harmonization of both programs may cause document sponsors to reduce the overall number of documents that they use, thereby reducing the time needed for the pre-approved document review process.

In order to harmonize the two document types, ASPPA recommends that the IRS eliminate the procedural and substantive distinctions between the "nonstandardized" M&P and volume submitter programs by incorporating the best current practices of both programs into each pre-approved plan program. This could be accomplished by:

- Allowing the volume submitter mass submitter program to include minor modification similar to what is currently available for M&P plans (e.g., making provisions similar to Rev. Proc. 2005-16, § 12.01(2) available to volume submitter mass submitters).

- Permitting employers to make minor, post-approval modifications to M&P documents in the same manner as allowed for volume submitter documents. Employers would be able to make minor, post-approval modifications and file for a determination letter using Form 5307 rather than Form 5300.

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for purposes of the Employee Plans Compliance Resolution System."); and Rev. Proc. 2005-16, § 19.01(1) ("An employer adopting a standardized M&P plan may rely on that plan's opinion letter, except as provided in (1) through (3) and section 19.03 below, if the sponsor of such plan or plans has a currently valid favorable opinion letter, the employer has followed the terms of the plan(s), and the coverage and contributions or benefits under the plan(s) are not more favorable for highly compensated employees (as defined in § 414(q)) than for other employees.").

[5] This statement combines Rev. Proc. 2011-6, § 8.02 and Rev. Proc. 2005-16, § 19.02(2) ("An employer adopting a nonstandardized M&P or volume submitter plan may rely on that plan's opinion or advisory letter as described below if the employer's plan is identical to an approved M&P or specimen plan with a currently valid favorable opinion or advisory letter, the employer has chosen only options permitted under the terms of the approved plan, and the employer has followed the terms of the plan.")

- Allowing both M&P and volume submitter sponsors who so elect, to adopt amendments on behalf of adopting employers, without regard to whether the pre-approved plan has obtained an individual determination letter. This would allow pre-approved document sponsors to make unilateral amendments to update for legislative or regulatory changes, which would assure greater document compliance.

- Permitting "flex" language in volume submitter documents in the same manner as allowed for M&P plans (e.g., similar to Rev. Proc. 2005-16, § 12.03(1)).

- Removing the requirement that the volume submitter practitioner be named on the Form 2848 if a plan submits a request for determination letter.[6] The Form 2848 will already contain the representative best able to represent the taxpayer.

- Eliminating the required provisions of LRM 94 restricting the use of cross-tested allocation rate groups in non-standardized M&P plans.

- Allowing multiple employer plan arrangements in all pre-approved plans.

- Allowing for non-safe harbor criteria for hardship distributions in all pre-approved plan documents. ASPPA does understand that IRS may wish to limit this item to non-standardized prototype documents.

- Retaining the special rules for standardized M&P plans.

ASPPA recommends that the IRS modify the Program to harmonize the "nonstandardized" M&P and volume submitter programs.

V. Permit Increased Incorporation by Reference in Pre-Approved Plan Documents

We have previously shared our thoughts on this topic in a comment letter dated December 11, 2003 and a discussion memorandum dated March 15, 1999.[7] Current procedures contain many restrictions on the ability to incorporate statutory and regulatory provisions by reference in a pre-approved plan document. Some, but not all, Code provisions may be incorporated by reference.[8] For Code provisions that cannot be incorporated by reference, many plans attempt to mirror the language in the statute or regulations due to the subtleties of interpretation of the Code's language. Allowing plans to incorporate statutory provisions by reference would permit plans to be reviewed by the IRS more quickly. Plans could also be updated for changes in regulations and other guidance more quickly, if not automatically.

ASPPA recommends that the IRS permit, but not require, pre-approved plans to incorporate more statutory and regulatory provisions by reference, particularly for provisions required by Code sections 401(a)(9), 401(k)(3) (for ADP testing), 401(m) (for ACP testing) and 415.

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[6] *See*, Rev. Proc. 2011-6, Section 9.02(2)(c) and (g).

[7] Copies of these documents are available at http://prod-pres.asppa.org/document-vault/pdfs/gac/2003/Incorporation-by-Reference.aspx .

[8] For example, plans can incorporate the controlled group and affiliated service group rules of Code §§ 414(b), (c) and (m) by reference.

VI. Allow ESOP Provisions in Pre-Approved Plans

We understand that ESOPs have been the primary source of delay in closing the Cycle A determination letter filings. If ESOP provisions were allowed to be included in pre-approved plans, the burden on the IRS to review individually designed ESOPs would be drastically reduced. ASPPA would support the imposition of restrictions on certain provisions that may be included in pre-approved ESOPs in order to alleviate concerns the IRS has regarding potentially abusive practices. In addition, ASPPA would support the implementation of a hybrid pre-approved approach whereby language is pre-approved but, in order to have reliance, an adopting employer would need to submit the plan for a determination letter using a streamlined process (e.g., using Form 5307). This would enable the IRS to monitor and prevent abusive situations but reduce the time needed to review plan documents.

ASPPA recommends that the IRS expand the Program to encompass ESOP provisions.

VII. Combination of Profit Sharing and Money Purchase Plans

Under current procedures, pre-approved plan adoption agreements cannot combine profit sharing plan language with money purchase plan language even though the provisions of each plan are very similar. Allowing plans to combine these provisions would result in a significant cost savings and reduce the amount of time that the IRS would need to spend reviewing documents.

ASPPA recommends that the IRS allow the combination of basic, non-deferral profit sharing and money purchase plan provisions into a single adoption agreement.

VIII. Extend the Current Cycle Filing Deadline to January 31, 2012

The IRS has not yet issued updated LRMs for next cycle of reviewing pre-approved defined contribution plans. ASPPA understands the LRMs are under review. In addition, the IRS has not yet updated Rev. Proc. 2005-16 or Rev. Proc. 2007-44. Current procedures require mass submitters and large national providers to submit their language for updating pre-approved defined contribution plans by October 31, 2011.

Without an extension, mass submitters and large national providers may be forced to submit "placeholder" filings in order to meet the current deadline. This will result in additional IRS and practitioner resources to update these filings.

ASPPA recommends that the IRS extend the mass submitter and large national provider filing deadline to January 31, 2012.

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These comments were prepared by ASPPA's Plan Documents Subcommittee of the Government Affairs Committee and primarily authored by Elizabeth Hallam, CPC, Chair of the Plan Documents Subcommittee. We welcome the opportunity to discuss these issues with the Department. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/
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Executive Director/CEO

/s/
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/s/
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