ASPPA
WORKING FOR AMERICA'S RETIREMENT

Comments on Announcement 2004-33

Draft of Revenue Procedure for Pre-Approved Plans

For electronic filing
notice.comments@irscounsel.treas.gov

Filed on: December 9, 2004

The American Society of Pension Professionals and Actuaries (ASPPA) offers these comments in response to IRS Announcement 2004-33.

ASPPA is a national society of retirement plan professionals. ASPPA's mission is to educate pension professionals and to preserve and enhance the private pension system. Its membership consists of more than 5,500 actuaries, plan administrators, attorneys, CPAs and other retirement plan experts who design, implement and maintain qualified retirement plans, especially for small to mid-size employers.

I. General Comments

ASPPA commends the IRS for soliciting comments regarding the Determination Letter (DL) program and the Master and Prototype (M&P) and Volume Submitter (VS) program (plans approved under these programs are collectively referred to as "pre-approved plans"). On September 20, 2002, ASPPA submitted detailed comments on the first White Paper, and on September 2, 2003, submitted its second White Paper comments. In addition, on December 11, 2003, ASPPA submitted comments regarding incorporation by reference. ASPPA appreciates the opportunity to provide these comments on IRS Announcement 2004-33.

ASPPA has detailed comments on the Announcement. However, certain issues are considerably more important to ASPPA than others, and are summarized below in order to emphasize their importance. The details of ASPPA's position on these issues are found in the body of this letter.

- **Reliance rules should be expanded for adopters of volume submitter plans (see Section A, below).**

Currently, the reliance rules for VS plans are more rigid than the rules that apply to M&P plans. Adopters of M&P plans are permitted to make certain modifications without affecting reliance on the unmodified provisions [*e.g.,* changes to trust or custodial provisions or the addition of coordinating language for Internal Revenue Code (IRC) §§415 and 416 when two plans are maintained]. Conversely, *any* change to a VS plan destroys reliance.

ASPPA recommends that the reliance rules applicable to VS plans should be expanded to be similar to the rules for M&P plans. ASPPA also recommends that the Service expand the reliance rules for VS plans to provide that whenever an employer modifies the specimen plan, the employer would continue to have reliance on the provisions of the plan other than the provisions that are affected by the modification.

- **Pre-approved plans with CODA provisions should not be limited to safe-harbor hardship distributions (see Section C, below).**

The Draft of the Revenue Procedure for Pre-Approved Plans (Draft) consolidated revenue procedure provides that, if a VS plan with CODA provisions permits hardship distributions, then the safe-harbor hardship standards must be used. This requirement is unduly restrictive and should be eliminated. There is no benefit to be gained by limiting some plans to the hardship safe harbor standard. If the goal of consolidating the programs is to make the M&P and VS programs

consistent, then there should be no detriment to using an M&P plan, as opposed to a VS plan.

ASPPA recommends that the facts and circumstances hardship determination be permitted in all pre-approved plans, without the application of any safe harbor standards.

- **A separate approval process for trust agreements should be implemented (see Section G, below).**

Currently, when a particular M&P plan will be used with more than one trust agreement, the review process for each trust is cumbersome, inefficient and costly. Many large financial providers have trust agreements that are unique to their business (commonly because of business needs or state banking regulations). If these providers have alliances with multiple M&P sponsors, then the trust agreements are being submitted and reviewed by the IRS in their entirety with each M&P submission. Furthermore, should the financial provider need to change its trust agreement, the review process must begin all over again.

ASPPA recommends that the Service establish an independent process for the submission and review of these trust agreements. Under such a program, once a trust agreement has been approved, it could be used with any pre-approved plan (M&P or VS).

II. Specific Comments

A. Expand the reliance rules to adopters of VS plans.

The reliance rules set forth in the Draft, which mirror the current reliance rules set forth in Rev. Proc. 2004-6, should be expanded to VS plans. Under the current and Draft procedures, the reliance rules for M&P plans are broader than the reliance rules for VS plans.

Section 8.04(5) of Rev. Proc. 2004-6 and §19 of the Draft set forth the extent to which adopters of pre-approved plans may rely on opinion or advisory letters. In general, an adopting employer may not rely on an opinion or advisory letter if any changes have been made to the pre-approved plan, other than choosing options permitted under the plan; however, the rules for M&P plans are more liberal because special exceptions apply to adopters of such plans. Certain modifications are permitted to be made to an approved M&P plan without affecting reliance on the qualification of the unmodified provisions of the plan (see §§5.06 and 5.09 of the Draft and §§5.07 and 5.11 of Rev. Proc. 2000-20). The permissible modifications that may be made to the pre-approved document without affecting reliance on the unchanged plan provisions include:

- The addition of overriding language to coordinate two plans for purposes of IRC §§415 and 416.
- The modification of the trust or custodial provisions of a non-standardized plan.
- The addition of a list of any IRC §411(d)(6) protected benefits.

These are important exceptions and should be retained.

ASPPA recommends that, at the very least, these same exceptions be applied to VS plans. In addition, ASPPA recommends that the reliance rules for VS plans be extended even further. ASPPA supports a rule whereby modifications to an approved VS plan do not result in the loss of reliance for the entire plan, but rather, only result in a loss with respect to the provisions of the plan that are affected by the modifications. This would permit practitioners to decide whether a particular plan should be submitted for a DL.

For example, under the current rules, if a practitioner modifies a VS by inserting a class of excludible employees (*i.e.,* a class that is not one of the options in the pre-approved plan), then the plan must be submitted for a DL for reliance. But, if the reliance rules were expanded as recommended by ASPPA, then the practitioner might decide that this change is permitted under the IRC and, since it does not affect the pre-approved portions of the document, a DL submission would not be warranted. This procedural modification would create no negative impact on the IRS, because it would be up to the practitioner to decide whether

there is questionable language that should be submitted for a DL. At best, adopting this proposal would reduce the number of plans that need to be submitted for determination letters, thereby decreasing the IRS's workload and reducing costs to adopting employers.

B. Provide for notice from M&P sponsors for relief of certain obligations.

The Draft and Rev. Proc. 2000-20 impose certain duties on M&P sponsors; however, there are no provisions that address how an M&P sponsor can be relieved of these obligations.

ASPPA recommends that a provision be included in the Rev. Proc. to clarify that a sponsoring organization can be relieved of its responsibilities with respect to a particular adopting employer by sending a notice to such employer.

C. Permit M&P or VS documents with CODA provisions to allow hardship distributions.

Sections 6.03(15) and 16.02 of the Draft provide that if an M&P or VS document with CODA provisions permits hardship distributions, then the safe harbor standards in the 401(k) regulations must be used. While this has been the case with M&P plans, this limitation has not applied historically to VS plans. A significant number of plans permit hardship distributions using the facts and circumstances standards. Imposing this new restriction on VS plans will result in an increase in the number of plans that will need to be submitted for DLs to have reliance. This is contrary to the purpose of the VS program and the goal of the IRS to manage its resources.

ASPPA recommends that all pre-approved plans should be permitted to allow hardship distributions using the facts and circumstances standards for consistency among the programs.

D. Permit transferable opinion and advisory letters upon sponsorship of pre-approved plans by another entity.

Consistent with current rules, the Draft provides that opinion and advisory letters are not transferable by a sponsor or practitioner to another entity; however, it is common to encounter a situation where a sponsor or practitioner wishes to assume the sponsorship of a pre-approved plan maintained by another entity (*e.g.,* when one firm buys another firm that sponsors a pre-approved plan). Neither the Draft nor Rev. Proc- 2000-20 contains guidance regarding the formal process for the assumption of sponsorship by another entity; however, §6.04(8) of Rev. Proc. 2004-8 provides an IRS user fee for the "assumption of sponsorship of an approved M&P plan, without any amendment to the plan document, by a new entity, as evidenced by a change of employer identification number." Therefore, it appears that an M&P sponsor may not sell or transfer its sponsorship to another practitioner, but it may register the name of a successor company or its own new name with the IRS for a fee.

ASPPA recommends that the Draft be modified to address the assumption of sponsorship of a pre-approved plan by another entity. The formal process for obtaining new opinion or advisory letters should be set forth. In addition, the consequences of the assumption of sponsorship should be set forth. For example, the Service should provide that when there has been an assumption of sponsorship, prior adopters of an M&P plan are not required to readopt the M&P plan or to take any other course of action to maintain reliance on the M&P document.

E. Lower the threshold for the qualifying number of adopting employers for money purchase plans.

The threshold to qualify as an M&P sponsor organization or VS practitioner is generally that the entity has at least thirty (30) adopting employers.

ASPPA recommends that the Service lower this threshold for money purchase plans (including target benefit plans). As a result of EGTRRA, the number of sponsors of money purchase plans has been drastically reduced. While the Service needs to ensure that there be a certain threshold for the pre-approved plan program due to expend its limited resources, it may be advisable to permit an appropriate number of adopting employers to be determined instead by

outside market forces (*i.e.,* a service provider will probably not go to the expense of sponsoring a pre-approved plan unless it has a sufficient number of adopting employers to make it economically feasible).

F. Simplify the process for amending an M&P or VS plan at the sponsor or practitioner level.

The process of amending an M&P or VS plan at the sponsor or practitioner level is not clear under the Draft (or under Rev. Proc. 2000-20). There are two issues that arise in this context: (1) the process of obtaining approval of an amendment at the sponsor or practitioner level and (2) the actions that must be taken by prior adopters of the pre-approved plan.

ASPPA recommends that the Draft be modified to address the following items:

1 . There should be a simplified and expedited process for obtaining approval of minor modifications to a pre-approved plan (regardless of whether the modification is intended to be adopted by the sponsor on behalf of all adopting employers). Currently, to make a change to a pre-approved plan, the entire submission and review process must be used.

2. Regardless of the process of obtaining approval of an amendment or modification to a pre-approved plan (at the sponsor or practitioner level), it is not clear what action would be needed by prior adopting employers once that amendment or modification has been approved.

For adopters of a VS plan, the new provisions would only apply to employers who adopt the plan after it has been resubmitted and approved. However, with respect to prior adopters who want to utilize the new provisions, it is not clear whether a restatement is needed or whether the new option can be added through some other method without affecting reliance (e.g., by a short amendment).

For adopters of M&P plans, it is not clear what impact the approval of a new plan will have for prior adopters. One position is that a prior adopter only needs to adopt the new plan if it wants to take advantage of the newly added provision. An alternative position is that, because the M&P plan has changed, all prior adopters are required to restate their plans to ensure that they are using the latest version of the M&P plan. Clarification is needed if a new option is added to an M&P adoption agreement. Do all prior adopters need to readopt the M&P plan with an execution date that is after the date of approval (even if they do not want to elect the new option)?

G. Implement an independent pre-approval process for trust agreements.

For a variety of business reasons, M&P sponsors (including mass submitters) and VS practitioners make available to adopting employers a number of financial service providers (*e.g.,* banks and trust companies) when delivering plan documents and investment and recordkeeping services. These financial service providers may have different business practices and be regulated by different state entities. As a result, a particular M&P sponsor (or mass submitter) or VS practitioner may need to accommodate a variety of different trust agreements. In addition, because business practices, laws and regulations affecting trustees constantly change, trustees must periodically amend their trust agreements.

Section 5.11 of Rev. Proc. 2000-20 and §5.09 of the Draft allow adopters of non-standardized plans to modify trust or custodial provisions. While not specifically stated, the position of the Service is that this allowance does not permit the wholesale replacement of the trust or custodial provisions (*i.e.,* it does not permit the use of a separate trust agreement unless the separate trust agreement has been approved specifically for use with the M&P plan).

There is no process for separately submitting a trust to be used with various M&P plans. Accordingly, if an existing M&P sponsor enters into a relationship with a financial institution that requires the use of its own separate trust agreement, the entire M&P plan must be submitted for a DL to have reliance on the plan's qualification. If the financial institution wants to modify such trust after it has been approved, the entire M&P plan needs to be resubmitted for a new Opinion Letter.

There are provisions in both Rev. Proc. 2000-20 (§4.05) and in the Draft (§4.05) permitting M&P mass submitters to include up to five trust agreements with the mass submitter plan. For mass submitters that utilize more than five trust agreements, multiple mass submitter documents would need to be maintained. Thus, placing a limit on the number of trust documents that may be used with a single plan document simply requires the submission, approval and maintenance of many more plan documents than should be necessary.

ASPPA recommends that the Service implement an independent pre-approval process for trust agreements. Under such a process, a financial institution could submit and obtain approval of a separate trust agreement that could then be used with any pre-approved M&P or VS plan. ASPPA is making this recommendation as part of its comments on Announcement 2004-33, but hopes the Service will consider implementing such a process as part of Rev. Proc. 2000-20. As well, this problem exists in the current M&P program and changing it as soon as possible (that is, prior to the implementation of the Draft) would be beneficial to the Service and practitioners.

ASPPA's recommendation would save all parties the time and expense currently spent drafting, submitting, reviewing, negotiating and amending plan documents, the costs of which are often passed along to employers. Furthermore, since the Service periodically changes its requirements with respect to plan content, M&P sponsors and mass submitters often have several documents containing different provisions, further complicating tracking and amendment processes and increasing the likelihood of error.

Compounding this problem is the fact that many mass submitters and M&P sponsors utilize the same separate trust agreements (*i.e.,* a financial institution's trust document is used in conjunction with several different pre-approved documents). As a result, it is common that the same trust agreement for a financial institution is subjected to complete review multiple times. This results in duplicate work on the part of the IRS and is cumbersome and expensive.

Example: Assume XYZ trust company decides to start up a new business venture today to provide directed trustee services for sponsors of 401(k) plans. As part of this venture, it enters into alliances with numerous existing M&P sponsors. XYZ has a separate trust agreement that must be used by any employer desiring to use its services. To retain pre-approved status, each of XYZ's alliance partners must resubmit its M&P plan to use the XYZ trust agreement.

The resubmission may be made in one of three ways: (1) if the alliance partner is a mass submitter, it can have the trust approved as part of its mass submitter (up to the five trust limit); (2) if the alliance partner is using a mass submitter, but the trust is not submitted as part of the mass submitter approval process, the M&P plan and trust can be resubmitted together as a minor modifier of the mass submitter (subject to an unstated but IRS enforced limit of three trust agreements to be treated as a minor modifier); or (3) the M&P plan and trust can be submitted together as a non-mass submitter.

Where multiple M&P sponsors are involved, the Service could end up with submissions under all three of the above options because the process will vary depending on the particular M&P sponsor. The result is that multiple submissions are made solely because of the addition of the *same* trust agreement.

To further complicate the process, there are no written guidelines akin to the LRMs to advise practitioners of the provisions the Service requires, or prohibits, in the separate trust. Based on experience, the areas examined are sections incorporating outside documents by reference and those requiring arbitration of disputes (alternative dispute resolution); however, without definitive guidelines, there can be inconsistencies in the review process. Furthermore, the lack of guidelines would presumably permit an adopting employer of a non-standardized plan to add one of these potentially problematic provisions (*e.g.,* an arbitration provision) after the M&P plan has been approved pursuant to §5.11 of Rev. Proc. 2000-20 and the corresponding provision in the Draft.

Lastly, there is confusion regarding the extent of reliance for the trust agreement once it has been received. There are two provisions in the Draft (and in Rev. Proc. 2000-20) that seem to conflict. Section 6.01 of the Draft provides that "opinion letters do not constitute rulings or determinations as to the exempt

status of related trusts or custodial accounts." Section 17 then provides that, upon request, the Service will rule on the form of any related trust or custodial account. As a result, it is not clear from these provisions what the scope of an opinion or advisory letter is.

ASPPA further recommends that the Service implement an independent approval process for trust agreements that are not incorporated into an M&P basic plan document or a VS specimen plan (*i.e.,* for separate trust agreements). Such a program could be applied to both M&P and VS plans. As part of the process, the Service should publish guidelines, such as LRMs, that set forth the required and prohibited trust provisions under the pre-approved plan program. A financial institution then could submit its own separate trust under the pre-approved plan program, and the trust, once approved, could be used by any pre-approved plan.

The Service should provide examples, in addition to those involving administrative provisions of a trust agreement, describing the extent to which a previously filed and approved trust agreement may be amended without requiring the resubmission of such agreement.

Finally, ASPPA recommends that the Service implement an abbreviated process for submitting minor changes to trust agreements that fall outside of the scope of those changes not requiring a subsequent filing.

It should be noted that one concern with the proposal is the approval of a separate trust that might conflict with the terms of a pre-approved plan that it is used with. A way to alleviate this concern would be to require that the trust agreement be limited to duties and powers of the trustee (or custodian). In addition, appropriate caveats could be included in the trust's approval letter.

A streamlined program, such as the one described above, would continue to promote the use of pre-approved plans, but would allow all parties involved, including the Service, to operate the program more efficiently.

H. Consider ASPPA's December 11, 2003, incorporation by reference **comments in finalizing the Draft.**

On December 11, 2003, ASPPA submitted its incorporation by reference comments.

ASPPA recommends that these comments, generally recommending a broadening of the IRC provisions that may be incorporated by reference, be considered in finalizing the Draft and in preparing updated LRMs. For example, item 13 of §6.03 and §16.03 of the Draft state that opinion and advisory letters will not be issued for plans under which the IRC §415 limitations are incorporated by reference.

I. Permit qualifying ESOPs to be approved under the VS program.

ASPPA recommends that the Service permit Employee Stock Ownership Plans (ESOPs) to be approved under the VS program. Although the Service has concerns about potential abusive situations involving ESOPs and wants to use the DL program to monitor the use of ESOPs, many ESOPs are drafted using language based on that found in VS plans. Therefore, the Service may save significant resources by permitting ESOPs to be approved under the VS program.

As an alternative, the Service could provide that there is no automatic reliance for ESOPs (*i.e.,* the reliance rules that applied prior to Announcement 2001-77 could be retained for such plans). Accordingly, ESOP VS plans would need to be submitted for DLs in order to have reliance, but the pre-approved nature of the plans would permit a faster, less detailed review of the document, saving IRS resources.

Furthermore, such an approach may actually improve the Service's ability to identify potentially abusive situations. Under the VS program, any modification made to the pre-approved language must be identified. There is no such requirement for plans that are not VS plans. Having changes highlighted may enable the Service to more readily identify potentially abusive situations.

These comments were prepared by ASPPA's Plan Documents subcommittee of the Government Affairs Committee, Michael J. Finch, CPC, Chair, and primarily authored by Robert M. Richter, Esq., APM. Please contact us if you have any comments or questions regarding the matters discussed above. We appreciate the opportunity to provide these comments and are available to discuss them with you further.

Sincerely,

Brian H. Graff, Esq. APM
Executive Director

Robert M. Richter, Esq., APM, Chair
Administrative Relations Committee

Teresa T. Bloom, Esq., APM, Co-chair
Gov't Affairs Committee

Ilene H. Ferenczy, Esq., CPC, Co-chair
Gov't Affairs Committee

George J. Taylor, MSPA, Co-chair
Gov't Affairs Committee

Sal L. Tripodi, Esq., APM, Co-chair
Gov't Affairs Committee