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Request for Guidance on the Ability to Make Restorative Payments to Defined Benefit Plans



April 30, 2003

Carol D. Gold, Director
Employee Plans Division
Internal Revenue Service (CP:E:EP)
1111 Constitution Ave., NW, Room 6526
Washington DC 20224

Re: Request for Guidance on the Ability to Make Restorative Payments to Defined Benefit Plans

Dear Ms. Gold:

The American Society of Pension Actuaries ("ASPPA") hereby requests that the guidance provided in Revenue Ruling 2002-45 ("Rev. Rul. 2002-45"), concerning restorative payments to defined contribution plans be expressly extended to restorative payments to defined benefit plans.

ASPPA is a national organization of over 5,000 members who provide actuarial, consulting, administrative, legal and other professional services for qualified retirement plans. ASPPA members and their clients are committed to compliance with the legal requirements affecting these plans.

In Rev. Rul. 2002-45 the Service formalized the restorative payment guidelines previously set forth in private letter rulings. The Service ruled that certain payments will be treated as restorative payments so long as they restore at least some of a plan's losses resulting from an action (or failure to act) that created a reasonable risk of liability for breach of fiduciary duty. The Service further ruled that payments made pursuant to DOL orders or court-approved settlements to restore losses to a defined contribution plan for breach of fiduciary duty meet the "reasonable risk of liability" requirement. Such payments would qualify as restorative payments. The Service concluded that restorative payments are not contributions pursuant to Code Sections 401(a)(4), 401(k)(3), 401(m), 404, 415(c) or 4972.

The Service's analysis in Rev. Rul. 2002-45 did not focus on the defined contribution nature of the plan at issue to any significant extent. Rather, the Service focused—as it has in all of its previous restorative payments guidance—on whether the payment was being made to restore some or all of the plan's losses due to an action (or a failure to act) that created a reasonable risk of liability for breach of fiduciary duty. Thus, payments made to a defined benefit plan under the same circumstances should be eligible for treatment as restorative payments and should not be treated as contributions pursuant to Code Sections 401(a)(4), 404 or 4972. However, because the facts in Rev. Rul. 2002-45 concern payments to defined contribution plans, plan sponsors would benefit from assurance that the guidance in Rev. Rul. 2002-45 applies to defined benefit plans.

The Service's guidance on correcting overpayments in defined benefit plans under EPCRS supports ASPPA's position. Section 2.05 of Appendix B to Revenue Procedure 2002-47 provides that "losses" to a defined benefit plan due to overpayments to plan participants may not be corrected as a matter of funding. Rather, the plan sponsor must seek repayment of the overpayment amount from the participant. If the participant does not return the overpayment, then the failure cannot be considered corrected until the plan sponsor, or a third party, makes a contribution to the plan of an amount equal to the overpayment amount, adjusted for related earnings.

The defined contribution plan restorative payment rationale of Rev. Rul. 2002-45, coupled with the defined benefit plan overpayment correction guidance provided in Revenue Procedure 2002-47, suggests that defined benefit plans are eligible to make restorative payments under circumstances similar to defined contribution plans. ASPPA respectfully requests that the Service issue further guidance that makes it clear that restorative payments to defined benefit plans can receive the treatment prescribed under Rev. Rul. 2002-45.

Respectfully submitted,

James C. Paul, Esq., APM, Chair
IRS Subcommittee

Brian H. Graff, Esq.
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