

May 4, 1999

Mr. James P. Flannery  
OP:E:EP:P:2 Room 6702  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224

Dear Jim,

We very much appreciated the opportunity to meet with you on April 12, 1999. As requested, we are following up with written comments on the redesign of the prototype program in light of the upcoming GUST amendment process. These comments are filed on behalf of The American Society of Pension Actuaries ("ASPPA"). ASPPA is a national organization of approximately 3,700 members who provide actuarial, consulting, administrative, legal and other professional services for about one-third of the qualified retirement plans in the United States, the majority of which are maintained by small businesses. ASPPA's mission is to educate pension actuaries, consultants, administrators and other benefits professionals and to preserve and enhance the private retirement system as part of the development of a cohesive and coherent national retirement income policy.

### **Summary of Comments**

1. We support consolidation of the Master and Prototype and Regional Prototype Plan Programs.
2. We believe that mandatory maintenance of a list of adopting employers should not be required. Rather, we believe that sponsors should be required to use diligent efforts to maintain contact with the adopting employers, but should not be held liable for those employers who fail to respond.
3. We believe that multi-tiered benefit structures should be permitted in defined contribution plan prototypes, and cross-testing should also be permitted.
4. Fail-safe provisions should be permitted.
5. With respect to 401(k) plans, we believe that: 1) separate elections with respect to prior year or current year testing should be permitted, at least for the GUST remedial amendment period; and 2) 401(k)(12) safe harbor contributions to another plan should also be permitted in prototypes.
6. It should not be required that in a prototype document, the 417(e) effective date and the Section 415 RPA '94 freeze date must be the same.

### **Discussion**

#### ***I. Consolidation of M&P and Regional Prototype Plan Programs***

ASPPA supports the consolidation of the M&P and Regional Prototype Plan Programs. We believe a single set of rules and reviewers will lead to faster turnarounds, more consistent reviews, and less confusion on the part of sponsors, adopting employers and practitioners.

#### ***II. Issues Arising from Consolidation – Sponsor Duties***

The one issue arising from consolidation that would be of great concern to ASPPA members is the sponsor's responsibility to adopting employers. Presently, sponsors of regional prototype plans are required to maintain a list of adopting employers who maintain the plan as well as satisfy an annual notification requirement. Sponsors of national office prototypes are not subject to these mandates. ASPPA believes that whatever rule is adopted, it should be applied equally to all sponsors. We do not believe that the entities eligible to sponsor regional prototypes are any less connected to their clients than the sponsors of national office prototypes. Hence any

reporting, notification or data collection obligations should be the same.

The problem with the present rules that apply to regional prototypes is that it is often difficult (and sometimes impossible) for the sponsor to know if the adopting employer is still using the sponsor's document as the plan document. Adopting employers change service providers, often without informing the prior provider. As a result, there is often confusion as to which employers should be on the "list" of adopting employers who maintain the plan.

We believe that the revised rules, as applied under the consolidated program, should not mandatorily require the maintenance of a list of adopting employers. Instead, sponsors should be required to use reasonable and diligent efforts to maintain contact, on an annual basis, with those employers who are reasonably believed to be presently adopting employers. In this way, the vast majority of adopting employers will receive the information necessary to keep their plans qualified without holding the plan sponsor liable for those who fail to maintain contact.

### ***III. Issues Regarding General M&P Requirements***

#### **A. Multi-Tiered Benefit Structures and Cross-Testing**

ASPPA believes that multi-tiered benefit structures should be permitted in prototype plan documents. A primary example of where this is needed is when several entities that are part of a controlled group all adopt the same profit sharing plan. However, in recognition of the various profit centers, each entity would like to have the flexibility to contribute at a different rate. Presently, this would not be permissible because of the multi-tiered benefit structure prohibition. We believe that prototype profit sharing plans should be permitted to accommodate this fairly common plan design.

We also feel that cross-testing should be permitted in prototype plans. Presently, cross-testing is permitted, in all its various forms, in the volume submitter program. ASPPA applauds this flexibility allowed for volume submitters and believes it should also be accorded the users of prototype documents.

At the meeting, it appeared that the main concern in permitting cross-testing in prototypes is that unsophisticated employers would be "sold" a plan and left to their own in properly administering the document. The fear was that employers would be unable to properly apply the general test for nondiscrimination on a cross-tested basis.

We would certainly agree that application of the nondiscrimination tests is not a simple task and requires the services of a competent professional. However, we believe that these tests are not significantly more complex than the myriad of other qualification requirements that must also be satisfied. In many respects, the 401(k) testing process is much more complex than cross-testing rules, yet 401(k) prototype documents are regularly adopted by employers of all levels of sophistication.

Perhaps a way to alleviate the concerns expressed at the meeting would be to permit cross-testing in prototypes only through a separate "cross-tested" adoption agreement. The adoption agreement could then be required to include wording which would advise the adopting employer that the plan is not a safe harbor plan, that it is designed to be tested on a cross-tested basis, and that a competent professional should be enlisted to ensure the plan is in compliance.

Many of ASPPA's members who are very experienced in applying the cross-testing rules regularly use prototype documents for their clients. They would like very much to use those documents for their cross-tested plans and don't understand the distinction in treatment between prototype and volume submitter plans. If cross-testing is not permitted in prototypes, they will simply make changes to their approved prototype documents to add cross-testing, and then file for approval as a volume submitter plan. We believe multiple filings such as this should not be necessary, and will only tend to make matters more complex for sponsors, adopting employers and governmental personnel.

#### **B. Possible Prohibition on Fail-Safe Provisions**

Many of ASPPA's members make use of fail-safe provisions in their plan documents, particularly for purposes of the coverage rules. At the meeting, it appeared that the concern was that fail-safe provisions may be written too broadly and that plan sponsors won't know to apply the rule. Needless to say, there are many complex rules included in the language of a prototype document which sponsors are expected to be cognizant of and apply when appropriate. We don't believe fail-safe provisions to be any more difficult to apply than the corrective options for ADP or ACP test failures. We also believe that fail-safe provisions can be written to comply with the "definitely determinable" requirements. For these reasons, we believe that fail-safe provisions should be permissible in prototype documents.

#### C. 401(k) Plan Issues

##### 1. ADP/ACP Testing

Presently, the LRMs require in a prototype plan that the employer make a consistent election with respect to current year or prior year testing for the ADP and ACP tests. We believe that a prohibition on disparate elections will force a significant number of employers out of the prototype program because of operational decisions made during the GUST remedial amendment period.

The LRM reference has been the only warning that this practice would be prohibited in prototypes. For some, the warning came too late after the 1997 testing was complete. For others, they are still unaware of the prohibition in prototypes because the LRMs are not widely read by practitioners and plan sponsors. For this reason, ASPPA believes that at the very least, transitional relief should be provided for the GUST remedial amendment period so that if independent elections were made, the employer will not be forced to update by using an individually drafted document.

##### 2. 401(k)(12) Safe Harbor Contributions

Although 401(k)(12) safe harbor plans are barely four months old, interest appears to be increasing among employers who already have either a 401(k) plan or traditional profit sharing plan. However, a problem for employers who want to make profit sharing and matching contributions in addition to employee elective contributions is the 15% of compensation deduction limit. Many employers solve this problem by sponsoring a money purchase pension plan. As a result, they would like to satisfy the safe harbor contribution obligation through the contribution to the money purchase pension plan. ASPPA believes that sufficient safeguards can be included in the prototype documents to permit this approach without fear that the safe harbor contribution will not be made, or that the rules will not otherwise be satisfied. We believe the separate plan option will be popular and its prohibition in a prototype document unnecessary.

#### D. Requirement that 417(e) Effective Date and 415 RPA Freeze Date be the Same

ASPPA believes that requiring the 417(e) effective date to be the same as the 415 freeze date is an unnecessary limitation on the prototype program. It appears that a fair number of employers are making independent elections and hence will be forced to use individually drafted documents to accommodate this approach.

Thank you for the opportunity to provide our comments on these issues. We believe that plan sponsors, participants and practitioners are all benefited by an "open door" policy. We have greatly appreciated the willingness of the Service to listen to the concerns of the ASPPA membership, and we look forward to working together in the future.

Sincerely,

Craig P. Hoffman

cc: Carol Gold