May 18, 2000

Ms. Carol D. Gold
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Re: Comments on Notice 2000-3

Dear Ms. Gold:

The American Society of Pension Actuaries (ASPA) 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. ASPA'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. Its large and broad based membership gives it unusual insight into current practical problems with ERISA and qualified retirement plans, with a particular focus on the issues faced by smaller employers.

We commend the Service for the additional flexibility provided to plan sponsors under the guidance. Many employers are finding the safe harbor design a desirable way to provide retirement benefits to their employees.

We specifically want to comment on two issues:

1. The ability of a plan sponsor to suspend its safe harbor nonelective contributions during 2000 even if notice was given to employees before the start of the plan year. This issue primarily affects calendar year plans.

2. Simplifying the limitation on multiple use.

Suspension of Safe Harbor Nonelective Contributions

Under Q&A-6 of the Notice, an employer may suspend safe harbor *matching* contributions on future elective and employee contributions during a plan year if certain requirements are met. However, an employer that properly notified its employees before the start of its 2000 plan year of its decision to make safe harbor *nonelective* contributions cannot suspend those safe harbor *nonelective* contributions in a similar fashion.

Unfortunately, the release of Notice 2000-3 was too late for sponsors of calendar year plans to take advantage of Q&A-1, which allows the sponsor to merely notify employees that it *may* decide to make safe harbor *nonelective* contributions, with subsequent notice at the start of the 12th month of the plan year regarding a final determination.

We believe a sponsor may experience business conditions that make it difficult or impossible to meet its future safe harbor contribution obligations, and that it is appropriate to provide such plan sponsors with the ability to suspend safe harbor status during 2000. Presumably, such relief will not be required beyond the 2000 plan year since sponsors can follow the rules of Q&A-1.

Simplifying the Limitation on Multiple Use

ASPA wrote to you in 1998 to request withdrawal of the regulations concerning the multiple use test “MUT” under Treas. Reg. §1.401(m)-2. ASPA continues to support the withdrawal of these regulations for the following reasons:

1. We believe that any attempt to modify the existing calculations associated with determining whether a plan satisfies multiple use will only lead to further confusion for plan sponsors and practitioners.

2. The current regulations are inadequate and do not reflect the new "leveling down" methodology based on the highest dollar under SBJPA '96. It is this two-step calculation of any refund (whether the refund is attributable to ADP, ACP, or MUT failures) that takes time and breeds confusion.

3. §401(m)(9) provides that the Secretary is to issue regulations as "*may* be necessary to prevent the multiple use of the alternative limitation with respect to any highly compensated employee." [emphasis added] Thus, Congress left it to the Secretary to devise rules if necessary to prevent abuse. As discussed below,we believe the complexity associated with applying MUT far out weighs its potential value in preventing abuse.

4. In approximately 8 years of working with these regulations, we have found that the multiple use test rarely comes into play, and, when it does, the corrections are very small. Mathematically, the table below demonstrates the possible range of corrections, taking into account the fact that multiple use generally does not matter if the sum of the NHCE ADP and ACP is less than 2.0% or more than 10.0%. The table below assumes that shifting has been done to reduce the ADP for NHCEs to 2.0%.

NHCE ADP	NHCE ACP	Maximum HCE Total	Multiple Use Limit	Difference (Correction %)
1	1	2	2.00	0.00
2	1	6	5.25	0.75
2	2	8	6.50	1.50
2	3	9	7.75	1.25
2	4	10	9.00	1.00
2	5	11	10.25	0.75
2	6	12	11.50	0.50
2	7	13	12.75	0.25
2	8	14	14.00	0.00
2	9	15.25	15.25	0.00
2	10	16.50	16.50	0.00

From this table, the maximum multiple use cutback is 1.5%, but more likely to be in the .5% to .75% range.

5. The effort involved in properly running the test and determining the appropriate refunds is disproportionate to the amount of corrections. In addition, the administrative expense is borne by participants in many plans and the expense associated with multiple use calculations is often more than the amount of any corrections.

6. Most plans correct MUT failures by refunding or forfeiting employer matching contributions. This decreases the incentive for employers to provide matching contributions at all, adversely impacting both non-highly and highly compensated employees.

7. Multiple use produces uneven results for similarly situated groups based on the correction method chosen. The attached exhibit presents three examples of methods to correct multiple use failures. This disparate result is inappropriate in light of the small adjustment that is produced by the most favorable of the tests, after taking into account reductions to satisfy the nondiscriminatory rate of match requirement.

We appreciate the opportunity to discuss the views of ASPA's membership. We welcome comments or questions. You may call Janice M. Wegesin, JMW Consulting, Inc. (Palatine, Illinois) at 847/705-3811, the chair of the 401(k) Subcommittee for ASPA's Government Affairs Committee to open avenues of discussion.

Sincerely,

Janice M. Wegesin, CPC, QPA, Chair
ASPA 401 (k) Committee

Brian H. Graff, Esq.
ASPA Executive Director

Bruce Ashton, APM, Co-Chair
ASPA Government Affairs Committee

Craig Hoffman, APM, Co-Chair
ASPA Government Affairs Committee

R. Bradford Huss, APM, Co-Chair
ASPA Government Affairs Committee

Theresa Lensander, CPC, QPA, Chair
ASPA Administration Relations Committee

Enclosures

CC: J. Mark Iwry
Alan Tawshunsky

Example: Multiple Use of the Alternative Limitation

Original Results and ADP/ACP Corrections: ADP for NHCEs is 5% and ACP is 2%:

Calculation of Excess Contributions and Refunds

	COMP	DEFERRAL	ADP	EXCESS CONTRIB	LEVEL DOWN	DEFERRAL AFTER REFUND
HCE #1	100,000.	9,000.00	9.00%	2,000	3,050	5,950
HCE #2*	70,000.	7,700.00	11.00%	2,800	1,750	5,950
		16,700.00		4,800	4,800	11,900

*Assume >5% owner

Calculation of Excess Aggregate Contributions and Refunds

	COMP	MATCH	ACP	EXC. AGG CONTRIB	LEVEL DOWN	MATCH AFT. REF.
HCE #1	100,000.	4,500.00	4.50%	500	1,100	3,400
HCE #2	70,000.	3,850.00	5.50%	1,050	450	3,400
		8,350.00		1,550	1,550	6,800

"Deemed" ADP and ACP

	ADP	**ACP**
HCEs	7.00%	4.00%
NHCEs	5.00%	2.00%

The **aggregate limit** is calculated as shown below:

(1)	Greater of the ADP or ACP for NHCEs	5.00%
(2)	1.25 X (1)	6.25%
(3)	Lesser of ADP or ACP for NHCEs	2.00%
(4)	(3) + 2%	4.00%
(5)	(2) + (4)	10.25%
(6)	1.25 X (3)	2.50%
(7)	(1) + 2%	7.00%
(8)	(6) + (7)	9.50%
(9)	Aggregate Limit: Greater of (5) or (8)	10.25%
	Sum of ADP and ACP for HCEs:	11.00%

The multiple use test is failed! Here are three examples of correction methods:
Correction Method #1: Reduce the ACP of the HCEs by additional .75%

Permitted ADP and ACP for MUT purposes

	ADP	**ACP**
HCEs	7.00 %	3.25 %
NHCEs	5.00 %	2.00 %

Revise Step #2. Determine the Dollar Amount of the Refund (combine with ACP refund)

HCE	**Maximum Match**	**Actual Match**	**Adjusted Excess**
#1	$ 3,250	$4,500	$ 1,250
#2	2,275	3,850	1,575
Totals			**$ 2,825**

Revise Step #3. Use the Leveling Process on Highest Dollar Basis

HCE	Match	Step 1 *ACP Refund*	Step 2 *MUT Refund*	Total Refund	Remaining Match	Rate of Match
#1	$4,500	$ (1,100)	$ (637.50)	$(1,737.50)	$ 2,762.50	46.4%
#2	3,850	(450)	(637.50)	(1,087.50)	2,762.50	46.4%
		$(1,550)	$(1,275.00)	**$(2,825.00)**		

Correction Method #2: Reduce the ADP and ACP of the HCEs proportionately.
[For every $1 of ADP, $.50 of ACP]

Permitted ADP and ACP for MUT purposes

	ADP	**ACP**
HCEs	6.50 %	3.75 %
NHCEs	5.00 %	2.00 %

Revise ADP Step #2. Determine the Dollar Amount of the Refund

HCE	Maximum Deferral	Actual Deferral	Adjusted Excess
#1	$ 6,500	$9,000	$ 2,500
#2	4,550	7,700	3,150
Totals			**$ 5,650**

Revise ADP Step #3. Use the Leveling Process on Highest Dollar Basis

HCE	Deferral	Step 1 *ADP Refund*	Step 2 *MUT Refund*	Total Refund	Remaining Deferral
#1	$9,000	$ (3,050)	$ (425.00)	$(3,475.00)	$ 5,525.00
#2	$7,700	(1,750)	(425.00)	(2,175.00)	5,525.00
		$(4,800)	$(850.00)	**$(5,650.00)**	

Revise ACP Step #2. Determine the Dollar Amount of the Refund

HCE	Maximum Match	Actual Match	Adjusted Excess
#1	$ 3,750	$4,500	$ 750
#2	2,625	3,850	1,225
Totals			**$ 1,975**

Revise ACP Step #3. Use the Leveling Process on Highest Dollar Basis

HCE	Match	Step 1 *ACP Refund*	Step 2 *MUT Refund*	Total Refund	Remaining Match	Net Rate of Match	50% Max. Match
#1	$4,500	$ (1,100)	$ (212.50)	$(1,312.50)	$ 3,187.50	57.6%	2,762.50
#2	$3,850	(450)	(212.50)	(662.50)	3,187.50	57.6%	2,762.50
		$(1,550)	$(425.00)	**$(1,975.00)**			

Correction Method #3: Reduce the ADP of the HCEs by .75%

Permitted ADP and ACP for MUT purposes

	ADP	**ACP**
HCEs	6.25 %	4.00 %
NHCEs	5.00 %	2.00 %

Revise ADP Step #2. Determine the Dollar Amount of the Refund

HCE	**Maximum Deferral**	**Actual Deferral**	**Adjusted Excess**
#1	$ 6,250	$9,000	$ 2,750
#2	4,375	7,700	3,325
Totals			**$ 6,075**

Revise ADP Step #3. Use the Leveling Process on Highest Dollar Basis

HCE	**Deferral**	**Step 1** *ADP Refund*	**Step 2** *MUT Refund*	**Total Refund**	**Remaining Deferral**
#1	$9,000	$ (3,050)	$ (637.50)	$(3,687.50)	$ 5,312.50
#2	$7,700	(1,750)	(637.50)	(2,387.50)	5,312.50
		$(4,800)	$(1,275.00)	**$(6,075.00)**	

Because no matching contribution corrections were made, we clearly have a discriminatory rate of match:

HCE	Net Deferral	Net Match	Rate of Match	50% Maximum Match
#1	5,312.50	3,400	64.0%	2,656.25
#2	5,312.50	3,400	64.0%	2,656.25

Comparing the 3 correction methods illustrated, we summarize the net deferrals and matching contributions remaining in the plan after multiple use corrections and corrections for discriminatory rates of match:

Without Multiple Use

	HCE #1	HCE #2	
Net Deferrals	5,950	5,950	
Net Matching	2,975	2,975	
Total			17,850

Correction Method #1

	HCE #1	HCE #2	
Net Deferrals	5,950.00	5,950.00	
Net Matching	2,762.50	2,762.50	
Total			17,425

Correction Method #2

	HCE #1	HCE #2	
Net Deferrals	5,525.00	5,525.00	
Net Matching	2,762.50	2,762.50	
Total			16,575

Correction Method #3

	HCE #1	HCE #2	
Net Deferrals	5,312.50	5,312.50	
Net Matching	2,656.25	2,656.25	
Total			15,937.50