

May 6, 1999

Ms. Carol Gold
Director, Employee Plans Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Walk-In CAP Compliance Correction Fees Under Revenue Procedure 98-22

Dear Ms. Gold:

On behalf of the American Society of Pension Actuaries (ASPPA), we are writing to formally request that the IRS reconsider its position on the deductibility of compliance correction fees under the Walk-In CAP Program. We believe that the goals of the Walk-In CAP Program would be furthered by allowing plan sponsors to deduct voluntary compliance correction fees. We also believe that this would make good sense from a tax policy perspective, as further discussed below. 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.

Allowing sponsors to deduct voluntary compliance fees paid under the Walk-In CAP Program would further encourage voluntary compliance and correction by plan sponsors. The cost of fixing plan defects and participating in the Walk-In CAP Program continues to be a significant factor for plan sponsors in deciding whether to voluntarily disclose and correct plan defects. It is important to recognize that, in many cases the costs of making required corrections under Walk-In CAP are substantial. Making voluntary compliance correction fees deductible would reduce the costs for sponsors to participate in Walk-In CAP and we believe it would provide a significant additional incentive for sponsors to use the Walk-In CAP Program.

We recognize that the original CAP sanctions based on the "maximum payment amount" were intended to be an approximation of the taxes that would become payable if a plan was disqualified and that these "sanctions" were not deductible because they were intended to penalize employers (albeit in a reduced amount) for noncompliance.

If the plan were truly disqualified and the participants incurred taxable income, they would have "basis" in their accounts. With the correction programs, participants get no credit for the "tax" paid on their behalf. If the Service does not permit compliance costs to be deducted, an after-tax evaluation of the disqualification alternative may weigh in favor of a poor result for non-highly compensated employees. If the business cost represented by the correction sanctions is deductible, employers will be less likely to be tempted by the alternative.

However, under Revenue Procedure 98-22, the voluntary compliance correction fees have been modified to make them much more like user fees than like sanctions or penalties. In general, IRS user fees are deductible as ordinary and necessary business expenses under Code sections 162 and 212, while penalties and excise taxes are generally not deductible. Given the fact that the voluntary compliance correction fees are now determined, for the most part, based on the application of a fixed schedule, it is appropriate to allow employers to deduct such fees. To the extent that the Walk-In CAP Program is intended to retain some "penalty" for noncompliance, the combined costs of the attorney fees and the "filing"--or compliance--fee will serve as a deterrent in most cases. The reality is that employers who will use the IRS' remedial programs are, virtually by definition, compliance oriented plan sponsors who have simply made a mistake.

As you know, ASPPA and its members are strong supporters of the voluntary correction programs implemented by the IRS in the employee plans area. We believe that making voluntary compliance correction fees deductible would provide a significant additional incentive for sponsors and would increase usage of the Walk-In CAP Program by plan sponsors.

These comments were prepared by James C. Paul and Jeffrey Chang of the IRS Enforcement Committee of the

ASPPA Government Affairs Committee, Chaired by Jeffrey C. Chang, Esq.

Please contact us if you have any questions regarding our comments.

Very truly yours,

Brian Graff, Esq.
Executive Director

George Taylor, MSPA, Co-Chair
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