



AMERICAN ACADEMY *of* ACTUARIES

August 3, 2009

Mr. Harry Schneiderman
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2009-43)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Use of Surplus Assets as Matching Contributions under 401(k) Replacement Plan

To Whom It May Concern:

On behalf of the American Academy of Actuaries¹ Pension Committee, I respectfully request your consideration of its comments regarding the use of surplus assets for matching contributions under 401(k) replacement plans.

In two recently released private letter rulings (200836034 and 200836035, both dated June 11, 2008), the IRS ruled that excess assets transferred from a terminated qualified defined benefit plan to a qualified replacement plan that was a 401(k) plan could not be used for funding employer matching contributions. The stated rationale was that the revised regulations (effective January 1, 2006), namely, 1.401(m)-1(a)(2)(iii) , states that

“Employer contributions are not matching contributions made on account of elective deferrals if they are contributed before the cash or deferred election is made or before the employees’ performance of services with respect to which the elective deferrals are made.....In addition, an employer contribution is not a matching contribution if it is contributed before the employee contribution..”

We understand that the circumstances of surplus assets being transferred to a qualified replacement plan that is a 401(k) plan and that are to be used as matching contributions would appear to fail to satisfy this provision of the regulation. However, such transfers were permissible prior to these regulations (e.g., see PLRs 200045031 and 9834036), and we are not aware of any change in law or policy that suggests this result was intentional.

¹ The American Academy of Actuaries is a professional association with over 16,000 members, whose mission is to assist public policymakers by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

Accordingly, we are requesting that the IRS place on its business plan for 2009-2010 a regulation project that would amend this provision to permit such a transfer of surplus assets made under code section 4980(d) and that it not be treated as violating regulation 1.401(m)-1(a)(2)(iii). If you have any specific questions or would like more information, please contact Jessica Thomas, the American Academy of Actuaries' pension policy analyst, at 202-785-7868. Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in cursive script that reads "Nadine Orloff".

Nadine Orloff, MAAA, EA, FCA, FSA
Chairperson, Pension Committee
American Academy of Actuaries