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May 28, 2021

By Electronic Mail

www.regulations.gov (2021-28)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: 2021-2022 Priority Guidance Plan Recommendation

Dear Sir/Madam:

We again write to recommend that Treasury and IRS publish official guidance confirming that the 100% excise tax on reversions under section 4976 of the Internal Revenue Code of 1986 ("Code") does not apply when an employer "repurposes" surplus retiree benefit assets in a welfare benefit fund to provide health and other welfare benefits to active employees. We have advocated for such confirmation for an extended period of time and first wrote in support of this guidance almost a year ago, but we are not aware that any action has occurred. (Please see the enclosed letter on this subject dated July 22, 2020.)

The ongoing lack of guidance has been detrimental to key stakeholders (including employees and their families) – and the US economy – in critical ways:

- As the US equity markets continue to set new records, the already large pool of surplus assets continues to grow – on a tax-free basis.
- Employers have continued to dedicate substantial amounts of their current assets (which are currently deductible) to meet active employee health benefit expectations rather than making efficient use of surplus welfare benefit assets (which have already been deducted) to cover these major costs.
- While the employee benefit priorities of workers has changed during the pandemic, the ability of employers to meet those priorities and support employees through challenging times has been hampered by uncertainty as to the permissible uses of these locked-in financial resources.

We respectfully submit that there are no compelling policy or legal reasons for continuing to place billions of dollars of tax-deferred assets in "tax limbo." More than five years ago, the IRS began to issue private letter rulings confirming that, consistent with the legislative

history, the draconian 100% excise tax would not apply when an employer repurposes retiree medical assets to pay active medical benefits, *i.e.*, such an appropriate use of plan assets for employees should not be treated as a "reversion." Indeed, such use of surplus assets provides additional funding for benefits consistent with public policy – and can also help reduce employees' direct costs through lower premiums and out-of-pocket costs.

Accordingly, we reiterate our request for a revenue ruling or proposed regulations confirming that the 100% excise tax on reversions does not apply to repurposing transactions involving the use of surplus retiree medical assets to pay active medical and other welfare benefits. Such guidance would encourage employers to continue providing meaningful benefits to their employees and beneficiaries through the efficient use of assets, and would meet the relevant criteria listed in Notice 2021-28, including that the recommended guidance:

- resolves significant issues relevant to a broad class of taxpayers;
- reduces controversy and lessens the burden on taxpayers or the IRS; and
- promotes sound tax administration.

We appreciate your consideration of this recommendation and would be pleased to discuss it with you at your convenience.

Sincerely,

Louis T. Mazawey

Kathryn Bjornstad Amin

Enclosure

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July 22, 2020

By Electronic Mail

www.regulations.gov (2020-0015)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: 2020-2021 Priority Guidance Plan Recommendation

Dear Sir/Madam:

We write to recommend that Treasury and IRS publish official guidance confirming that the 100% excise tax under section 4976 of the Internal Revenue Code of 1986 ("Code") does not apply when an employer reallocates or repurposes surplus retiree benefit assets in a welfare benefit fund to provide health and other welfare benefits to active employees. Such guidance could take the form of regulations or a revenue ruling.

We provide relevant background information below, along with rationale on why such guidance is necessary and appropriate and consistent with the goals of sound tax policy and administration.

Background

Since 1986, section 4976 of the Code has imposed a 100% excise tax on an "employer reversion" of assets from a voluntary employee's beneficiary association ("VEBA") or other welfare benefit fund. There has never been any published IRS guidance on the scope of this provision with respect to the repurposing of VEBA/welfare benefit fund assets, including for the provision (or funding) of other employee welfare benefits.

Welfare benefit funds often hold surplus assets that were set aside over the years to fund post-retirement medical benefits. Employers holding such assets wish to repurpose them to pay for other welfare benefits, such as active medical benefits, but employers are concerned that such transactions could be deemed to involve a "reversion." The surpluses have arisen, in part, because of employer desires to provide strong funding for the post-retirement medical benefits and for various other reasons, including changes in benefit programs, changes in participant demographics, strong investment performance, etc. that necessarily change (sometimes significantly) over time. For many employers, these assets can amount to tens of millions or sometimes hundreds of millions of dollars that could be used to provide meaningful ongoing

welfare benefits for employees and beneficiaries, but are currently without use because of the lack of applicable IRS guidance.

Employers were pleased when, in 2015, the IRS issued a private letter ruling stating that repurposing a portion of surplus retiree medical assets to pay active employee medical benefits would not be a reversion, and thus, the 100% excise tax would not apply. PLR 201530022. A subsequent ruling (PLR 201702029) to the same effect involved substantially identical facts. Altogether, the IRS issued six substantially similar PLRs, the most recent one being PLR 201927001 (Mar. 29, 2019).

But in mid-2019, employers with pending requests for PLRs were unexpectedly told that the IRS would not issue any further PLRs pending further study of certain issues, including the potential applicability of a 90-year Supreme Court case, *Old Colony Trust Co. v. Comm'r.*, 279 US 716. We believe that case has no application to the situation described above.

Then, in January 2020, the IRS officially added to its "no ruling" list an item regarding whether a transfer of assets between welfare benefit funds (including VEBAs), or a new or different use of assets of a welfare benefit fund (including a VEBA), results in a reversion to the employer. Rev. Proc. 2020-3 § 3.01(128).

Why Guidance is Needed

Employers affected by the IRS' "no rule" position now face the potential for years (and perhaps indefinitely) during which they will be unable to use available assets to fund ongoing welfare benefits that are critical for their employees and beneficiaries. This is due to the risk that any repurposing of assets would be subject to 100% excise tax, even though the penalty was only designed to prevent employers from transferring welfare benefit fund assets to be used for corporate purposes instead. Indeed, any action on the part of employers to efficiently use substantial surplus assets for welfare benefit plans of employees risks confiscatory excise taxes, which is contrary to the sound public policy of encouraging employers to continue to provide and fund meaningful benefits for their employees and beneficiaries.

At a time when employer-plan sponsors continue to review all potential options to provide meaningful employee benefits that are highly valued by plan participants (not only medical benefits, but across their entire benefit offerings), the IRS' position restricts, without any fundamental rationale, use of a significant avenue that can directly benefit plan participants. We respectfully submit that sound tax administration requires that taxpayers, including benefit plan participants and employer-plan sponsors, not continue to be placed in such an untenable position.

The legislative history of section 4976 of the Code clearly states that transfers of assets between welfare benefit funds (including VEBAs) do not involve "reversions" as long as the assets are used to pay welfare benefits to employees. GCM 39774 (1989) follows that history, but that position is not considered official IRS guidance and is not directed at repurposing assets

within a VEBA. While several PLRs have properly allowed the current and more effective use of surplus assets for the direct benefit of employees who primarily rely on their employer to provide their health and welfare benefits, those PLRs do not directly apply to other taxpayers (even those with similar circumstances). Clearly, the use of surplus assets provides additional funding consistent with public policy, including that the assets can help reduce employees' direct costs through lower premiums and out-of-pocket amounts.

Current IRS policy to deny employer-plan sponsors assurance that the confiscatory 100% excise tax does not apply in such circumstances undermines the integrity of the tax system to the detriment of employer-plan sponsors and to the employees and their family members who directly benefit from and rely on the efficient use of existing surplus welfare benefit fund assets.

Recommendation

We respectfully request the issuance of a revenue ruling or proposed regulations confirming that the 100% excise tax of section 4976 of the Code does not apply to specified transactions. These repurposing transactions involving the use of surplus retiree medical assets to pay active medical and other welfare benefits would meet the relevant criteria listed in Notice 2020-47, including that the recommended guidance

- resolves significant issues relevant to a broad class of taxpayers;
- reduces controversy and lessens the burden on taxpayers or the IRS; and
- promotes sound tax administration.

The requested ruling or proposed regulations is consistent with the legislative history and purpose of the statute, the PLRs the IRS previously issued, and sound public policy that discourages a transfer of welfare benefit fund assets for company purposes, but encourages employers to continue to fund and provide meaningful benefits to their employees and beneficiaries through the efficient use of assets. We appreciate your consideration of this recommendation and would be pleased to discuss it.

Sincerely,

Louis T. Mazawey

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