November 13, 2014

**BY CERTIFIED MAIL; RETURN RECEIPT REQUESTED**

ERISA Appeal Committee

The Goodyear Tire & Rubber Company

200 Innovation Way

Akron, OH 44316-0001

 Re: Helena Smith

 \_\_\_\_\_\_\_\_\_\_\_\_ Street

Soc. Sec. No.: XXX-XX-6281

D/O/B:

 \_\_\_\_\_\_\_\_\_\_\_\_, MA

**Post-Hearing Memorandum**

Dear Appeals Committee:

 This memorandum is submitted on behalf of Ms. Smith to clarify and delineate certain points raised during the telephone hearing of November 5, 2014.

 **Scope of Review**

 As stated in the plan’s own Appeal Exhibit 1, the issue before the Appeals Committee at its hearing on November 5, 2014, was :

 “**Should Mr. Smith’s appeal for a survivor pension be granted without offset for previous overpayments of pension amounts made during Mr. Smith’s life?”**

 The issue of whether the plan had complied with ERISA in the Smiths’ benefit election process is not before the Committee, as that issue was already determined at the initial claim level, and it was not appealed. For this precise reason, the Appeal Exhibit 1 compiled by Goodyear, accurately characterizes the matter before the Board as a “**Partial Denial** at Review Level”, and states:

 After researching Ms. Smith’s request and considering the facts and finding certain files could not be found to support the Pension department’s position that procedures and policies were followed regarding delivery of certain forms and documents, the Benefits review Committee determined that Ms. Smith should be allowed the 50% Joint and Survivor (J&S) option because the election form did not have the spousal rights prescribed”.

 Issues regarding the validity of the spousal waiver are not before the Appeals Committee, as that issue has been determined, and it has been found that, due to deficiencies in the election process, Ms. Smith should be paid the 50% Joint and Survivor benefit. The only issue before this Committee is whether the benefit payable to her may be properly offset by overpayments made to the late Mr. Smith during his lifetime.

**. Applicability of Employee Plans Compliance Resolution System**

The Plan contends that the Employee Plans Compliance Resolution System (hereinafter “EPCRS”) is not applicable because the Plan is “not making a correction of operational defects”. The Plan’s contention that the EPCRS correction procedures do not apply to this Plan failure is incorrect. EPCRS correction procedures govern all corrections to all Plan failures.

EPCRS correction procedures define a Plan failure as “any failure,” including failures in Plan operation or in following the terms of the Plan Document.[[1]](#footnote-1) Here, the Plan’s failure to properly advise the Smiths of their election options, coupled with the lack of evidence to support an inference that the Plan properly advised the Smiths of their election options, constitutes a Plan failure in following the terms of the Plan and, more importantly, ERISA procedures.

The fact that failure to obtain valid spousal consent constitutes a plan failure subject to EPCRS correction could not be more obvious, as it is a specifically-enumerated and discussed failure throughout Rev. Proc. 2013 -12. See Section 6.04, “ Correction of a failure to obtain spousal consent”. The plan’s position that this could be anything other than a “plan failure” requiring correction pursuant to EPCRS defies logic.

 The defective nature of the Plan’s Election Form along with the Plan’s failure to properly advise the Smiths of their election options requires that the Plan’s actions be correctly classified as a Plan failure. Because this is plainly a Plan failure, EPCRS correction procedures apply. Section 6.02 explains that “a failure is not corrected unless full correction is made with respect to all participants and beneficiaries.”[[2]](#footnote-2) Section 6.02(1) further provides that corrections include the “restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred.”[[3]](#footnote-3) Section 6.02(2) provides that these corrections should be “reasonable and appropriate for the failure” and should, “to the extent possible, resemble one already provided for in the Code, regulations, or other guidance or general applicability.”[[4]](#footnote-4)

Section 6.06 would require the Plan to properly follow correction procedures by remitting to Helena Smith a lump sum retroactive payment with interest of her entitled benefits to the date on which she should have begun receiving her QJSA.[[5]](#footnote-5) This correction would restore Ms. Smith, the current participant, with the benefits and rights she would have had if the Plan failure had not occurred. This correction is “reasonable and appropriate for the failure” because Ms. Smith has gone without her survivor benefits since her husband’s passing through no fault of her own.

The specific nature of the plan’s failure in this case is also directly discussed at paragraph .07 of Appendix A of the EPCRS.[[6]](#footnote-6) This section pertains to procedures Plans may follow in order to correct operational defects. This provision explicitly states that, “the portion of the qualified joint and survivor annuity payable to the spouse upon the death of the participant may not be actuarially reduced to take into account prior distributions to the participant.”[[7]](#footnote-7) (emphasis added). If the Plan should attempt offset any amount payable to Helena Smith by amounts by which her husband was overpaid, the Plan would be acting in contravention of clear IRS procedures and could face plan disqualification.[[8]](#footnote-8)

**Proposed Resolution**

 It is clear from the preceding discussion that the Plan has no authority to unilaterally lower or withhold Ms. Smith’s survivor benefit.

 During the telephone hearing, certain committee members inquired about Mr. Smith’s probate estate. As an accommodation to the Committee, we contacted the attorney who handled that matter, Michelle Beneski, of Suprenant and Beneski. Her office informed us that there were no assets to be probated upon Mr. Smith’s death, and no action was filed.

 In light of these factors, Ms. Smith proposes that she would agree to a voluntary reduction of $25 per month in her survivor annuity to restore to the plan some amount of the payments made to Mr. Smith during his lifetime.

Sincerely,

 Jeanne M. Medeiros, Esq.

 Managing Attorney

1. Rev. Proc. 2013-12, Section 1.02 [↑](#footnote-ref-1)
2. Rev. Proc. 2013-12, Section 6.02 [↑](#footnote-ref-2)
3. Rev. Proc. 2013-12, Section 6.02 (1). [↑](#footnote-ref-3)
4. Rev. Proc. 2013-12, Section 6.02 (2). [↑](#footnote-ref-4)
5. Rev. Proc. 2013-12, Section 6.06, relating to failures in distributing before the required minimum distribution date. [↑](#footnote-ref-5)
6. Rev. Proc. 2013-12, Appendix A, Paragraph .07. [↑](#footnote-ref-6)
7. Id. Emphasis added. [↑](#footnote-ref-7)
8. Id. [↑](#footnote-ref-8)