



4245 North Fairfax Drive
Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org



October 8, 2010

Mr. John J. Canary
Deputy Director of Regulations and Interpretations
200 Constitution Ave NW Room N5669
Washington, DC 20210-0001

Re: Relief for 403(b) arrangements

Dear Joe,

ASPPA appreciated the opportunity to speak with you and your staff this week to follow-up on our earlier discussions regarding potential transitional relief for certain 403(b) arrangements that may have inadvertently become subject to ERISA coverage. In addition, thank you for allowing us to raise the current challenges being faced by ERISA plans attempting to file compliant Form 5500s on a timely basis. This letter is intended to provide further input relevant to both of these topics.

ASPPA is a national organization of more than 7,300 members who provide consulting and administrative services for retirement plans covering millions of American workers. ASPPA's membership includes the members of the National Tax Sheltered Accounts Association ("NTSAA"), a nonprofit organization that recently became part of ASPPA in order to expand both organizations' strengths in serving the §403(b) marketplace. ASPPA and NTSAA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA a unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Form 5500s and Audits

The most time sensitive topic on which we would like to provide further input relates to the problems we are seeing with respect to the filing of 2009 5500 Forms and the associated independent audits that are required for large plans. Our members are reporting that a number of problems have been uncovered as the data collection process has unfolded. The problems relate to the following:

- A. Additional investment providers (vendors) are being uncovered that were not anticipated as the process began. This not only complicates data collection but delays the completion of the associated independent audit. One example of this occurrence is when the “vendor” is a broker-dealer and an underlying investment company is identified during the data collection process that previously was undisclosed.
- B. Vendors were not required to maintain extensive data that could be easily correlated prior to the final 403(b) regulations being issued. Some do not currently, and have not in the past, maintained the source data which in some cases goes back 40 years or more. Vendors, recordkeepers, and administrators are building the files to accommodate the tracking and delivery of this data, but time is running out. Since 2007, many providers in this industry have spent billions of dollars to address these issues, and some progress has been made, but most still need time to be able to produce accurate reports and data which will ensure that the audits will be accurate.
- C. We have heard from many plan sponsors and their advisors that in order to avoid penalties “something” will be filed and later amended. But most of the reports will need to be filed late, resulting in additional cost to these employers.
- D. Due to many factors, another problem is the lack of understanding by various service providers of how 403(b) plans differ markedly from 401(k) plans. In 2007, many plan sponsors first realized that plan documents were needed; vendors were required to share data; and interaction with an auditor was necessary.
- E. Reports from the vendors do not reconcile, and the time frame to compose the revised data and prepare a new report is a minimum of 10 or more days.
- F. It is difficult to reach a responsible individual in a large company that truly understands the audit process and the information needed to conduct an audit.
- G. In many cases, these problems were not anticipated and there is insufficient allocation of resources within the vendors themselves to meet the filing deadline.

ASPPA recommends the following potential options to serve as transitional relief to ameliorate the current audit situation for the short term as well as the long term:

1. In the short term, Form 5500s and the associated audits are due in one week. It is our opinion that the only option that will work at this late date is a transitional rule that would provide additional time for new procedures to be instituted. The additional time will also serve to educate plan sponsors, administrators, auditors, and investment companies about the unique audit requirements for 403(b) plans and the type of information that needs to be gathered for the audit and completion of the Form 5500. The Department of Labor can use this delay to gather information to come up with a viable solution that will ensure the protection of participants and beneficiaries. We believe that a one (1) year transitional relief period should be enough time to prepare an alternative audit methodology. The Department should also consider some kind of modified criteria (to be determined by a committee of industry experts as described in #4 below) for the collection of

the data needed since many vendors do not presently have the data readily available that is required for audits.

2. An alternative (in lieu of a blanket extension) would be to permit the incomplete filings to occur and grant waivers of any late or incomplete filing penalties for plans that have made a “good faith effort” to collect data. The 5500 help line is suggesting plan sponsors file in this way, but only those plan sponsors that have actually called the help line are aware of this suggestion.
3. On a long term basis, the definition of “active participant” for 403(b) plans should be changed to “eligible employees that make or receive a contribution during the plan year,” rather the 401(k) definition currently in use. This would recognize the significant effect the “universal availability” requirement (that only applies to 403(b) plans) has on the independent audit requirement under ERISA. Many more 403(b) plans would qualify for the small plan exception from audits than under current rules. This would help to alleviate many concerns.
4. Also in the long term, we believe a committee of industry experts should be set up to suggest, review and modify the existing audit guidelines for 403(b)s taking the following into consideration:
 - a. The differences between group annuities, individual contracts, and individual custodial agreement and potentially set up different audit requirements for each;
 - b. Specific clarification that beginning balances as of 1/1/2009 are absolute for all purposes, and relief to auditors so that they may modify their standard procedures and accept data provided as of 1/1/2010;
 - c. Produce a model “Audit Checklist” for 403(b) Plans that is specific to 403(b)s and does not contain qualified plan requirements;
 - d. Coordinate the DOL rules with the IRS compliance rules by creating educational communications and training materials specifically focusing on 403(b) plans for employers, vendors, auditors and administrators.
5. Finally, if any relief is to be provided for 2009 plan year filings, an announcement needs to be issued as soon as possible in order to avoid unnecessary expenses caused by the difficulties we have described.

ERISA Exemption-Transitional Relief

We understand and respect the challenges that the Department faces in offering additional guidance and relief beyond that provided by the previously issued Field Assistance Bulletins (FABs). However, we respectfully request that the Department consider our previous comments issued in this regard. We continue to believe that there should be relief for the small 501(c)(3) employers who cannot afford to maintain ERISA 403(b) arrangements if subjected to regulation under ERISA.

The presence of other marketplace legacy issues complicate the availability of the “safe harbor” exemption from ERISA coverage found in ERISA Regulation §2510.3-2(f). Some employers have considered moving in the direction of a single vendor so as to avoid the tax code compliance problems associated with multiple vendors, but then realize that it could subject them to ERISA coverage. Others have tried to meet their compliance responsibilities by utilizing services of a third party administrator only to be advised that under the “clarification” of FAB 2010-01, a similar result occurs.

403(b) plans were originally intended to be simple, payroll based savings plans for public schools and certain non-profit organizations exempt from the expense associated with burdensome regulation. As we stated in our previous letters and testimony to the ERISA Advisory Council, we believe the unintended result for small employers will be plan terminations. Unfortunately, this will be necessary in order for smaller non-profits and charities to survive in these challenging economic conditions.

We would be happy to address any questions you may have and also be prepared to participate in any additional committees or assist in any way we can with input, training and educational materials, and/or assistance in developing alternative reporting models.

These comments were prepared by ASPPA’s Tax Exempt and Governmental Plans Subcommittee of the Government Affairs Committee, Robert Toth, APM Chair. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at ASPPA, at (703) 516-9300 ext. 128, if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of this request.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/
Craig P. Hoffman, Esq., APM
General Counsel

/s/
David M. Lipkin, MSPA, Co-chair
Government Affairs Committee

/s/
Robert M. Richter, Esq., APM, Co-chair
Government Affairs Committee

/s/
Robert Toth, Chair, Tax Exempt and
Government Plans Subcommittee

/s/
James C. Paul, Esq., APM, Co-chair
Government Affairs Committee

Courtesy Copies:

Ms. Phyllis C. Borzi
Assistant Secretary/EBSA
US Department of Labor
200 Constitution Avenue, NW, Ste S-2524
Washington, DC 20210

Michael Davis
Deputy Assistant Secretary
200 Constitution Ave, NW
Room S2524
Washington, DC 20210

Alan Lebowitz
Deputy Assistant Secretary for Program Operations
200 Constitution Ave NW
Room N-5677
Washington, DC 20210-0001

Robert Doyle
Director, Office of Regulations & Interpretations
200 Constitution Avenue NW Room N5665, P-420
Washington, DC 20210

Ian Dingwall
Chief Accountant
200 Constitution Avenue NW, Ste 400
Washington, DC 20210