ASPPA Request for Further Guidance on Issues Affecting 403(b) Plans

June 15, 2009

Submitted to the U.S. Department of Labor

The American Society of Pension Professionals & Actuaries (ASPPA) submits this request for additional guidance on issues affecting 403(b) plans for consideration by the Employee Benefits Security Administration of the U.S. Department of Labor (the "Department"). We believe further guidance is needed to allow plan sponsors and service providers to implement new rules for 403(b) plans and to operate these plans going forward.

ASPPA is a national organization of more than 6,500 members who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA 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. ASPPA has formed an informal strategic alliance with the National Tax Sheltered Accounts Association ("NTSAA"), a nonprofit organization representing the §403(b) and §457(b) marketplace, in order to expand both organizations' strengths in serving the §403(b) marketplace. NTSAA has read and concurs in these comments.

Summary of Recommendations

Recommendations

Final regulations under Internal Revenue Code section 403(b) have placed additional responsibility for compliance with tax requirements on employers whose employees participate in annuity and custodial account arrangements. For non-church and/or nongovernmental, 501(c)(3) tax-exempt employers, the final 403(b) regulations present additional concerns about the application of, and compliance with, ERISA.

1. **Safe Harbor.** The Department addressed some of these concerns in Field Assistance Bulletin ("FAB") 2007-2, which was intended to interpret the Department's "safe harbor" exemption from ERISA coverage provided in DOL Reg §2510.3-2(f) in light of the new tax regulations. However, practical experience with application of the new regulations suggests that additional guidance is needed to help employers determine whether a plan is subject to ERISA.

A. One requirement of the safe harbor is that all rights under an annuity contract or custodial account must be enforceable solely by the employee or beneficiary. This requirement presents problems for employers who wish to make changes in a 403(b) program, a situation that is more likely to occur under the new tax regulations. For example, the FAB specifies that an employer may retain the right to terminate a 403(b) program in accordance with the tax regulations without losing safe harbor protection. However, it is not clear whether, in the case of a safe harbor plan where investments are held in a pooled 403(b)(7) custodial account which contains no provision for distribution in the form of paid-up annuities, the employer wishing to terminate the plan may retain the right to force a distribution in order to complete the plan termination.

ASPPA recommends: We recommend that the Department expand on the guidance contained in the FAB by clarifying that upon termination of a safe harbor plan, the employer may direct distributions from a pooled custodial account to IRA rollover accounts established for the benefit of employees who do not otherwise authorize distributions.

B. Guidance is also needed on the application of the safe harbor rules to changes in vendors and investment vehicles, which are likely to be more frequent, given employers' increased responsibility for compliance under the final section 403(b) regulations. For example, if investments in a safe harbor plan are held in a pooled 403(b)(7) account or group annuity contract with one vendor, may the employer authorize the liquidation and transfer of accounts to a new vendor if the employer is concerned about the current vendor's 403(b) compliance efforts?

ASPPA recommends: We recommend that the Department provide guidance on the extent to which an employer may authorize transfers of existing accounts from one vendor to another in a safe harbor plan.

C. Another safe harbor requirement is that the involvement of the employer must be limited to certain specified administrative activities. According to the FAB, it would be inconsistent with the safe harbor for an employer to make certain discretionary decisions about plan administration, such as authorization of hardship distributions or loans. However, such decisions must be made in order for the plan to comply with the requirements of section 403(b). Many employers would welcome the opportunity to engage third party administrators to make such discretionary decisions, particularly in the case of plans with multiple investment vendors. The FAB provides that a safe harbor plan may delegate discretionary authority to a provider, a participant[1] or to a "third party selected by the provider or participant." However, the FAB does not provide guidance to employers on whether, or the extent to which, the employer may arrange for a third party to perform administrative functions without causing a plan to lose its safe harbor status.

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[1] The FAB appears to conflict on this point with the final Treasury regulations, which do not permit such authority to be delegated to a participant.

ASPPA Recommends: We recommend that the Department clarify that an employer may make arrangements for a third party to undertake discretionary administrative activities with respect to a safe harbor plan if the written plan so provides.

D. The employer may limit the available funding media and products in a safe harbor plan to a number and selection designed to afford employees a reasonable choice in light of all relevant circumstances. If the employer offers one 403(b) investment platform from a single provider that gives employees access to several mutual funds from multiple fund families (whether in a variable annuity, or a custodial account) would the safe harbor investment requirement be satisfied? Would the investment requirement be satisfied if a diversified selection of funds from a single fund family were offered? Are there a minimum number of mutual fund or insurance companies and/or funds that would meet this requirement? Does the safe harbor permit an employer to offer only 403(b)(7) custodial accounts (and no annuity contracts) as investment choices? Does the safe harbor permit an employer to offer annuity contracts (and no custodial accounts) as investment choices?

ASPPA recommends: We recommend that the Department clarify that a single investment platform from one provider is acceptable for a safe harbor plan, provided that a "reasonable choice" of investment products is offered under that platform, whether from an insurance company offering multiple fund families within a variable annuity; or multiple fund families within the custodial account platform, or from a single fund product line. It would be helpful to have some specific guidance on the number and investment style of such products that would provide a "reasonable choice," analogous to the guidance the Department provided in the section 404(c) regulations.

E. The final 403(b) regulations require that the written plan contain all the material terms and conditions for eligibility, benefit amounts, distributions and similar provisions, as well as the material terms and conditions for optional features such as loans and hardship withdrawals. The FAB confirms that the employer's adoption of a written plan in accordance with the tax regulations would not cause a safe harbor plan to become subject to ERISA. However, difficulties and uncertainties about the application of the "written plan" rule to safe harbor plans remain.

The terms and conditions of a plan may be embodied in multiple documents (such as annuity contracts) and may be incorporated by reference into a "wraparound" document. However, the preamble to the 403(b) regulations indicates that the employer must ensure that there are no conflicts between the wraparound document (if any) and the annuity and custodial contracts or among the investment contracts themselves. In addition, it is important for tax code compliance that employers ensure that investment providers are abiding by the requirements of the plan. It may be difficult for an employer to avoid conflicts among investment contracts without negotiating with vendors about the terms of certain plan features, which is prohibited under the safe harbor regulation.

> The FAB requires that documents that compose the plan describe the employer's limited role and assign responsibility for discretionary determinations to the investment vendor provider or participant, but the employer may not negotiate with annuity providers or account custodians to change the terms of their products for purposes other than tax compliance, such as the conditions for hardship withdrawals. Some employers have found that vendors are unwilling to take on this responsibility of authorizing loans and withdrawals and look to the employer to make such determinations, which would, according to the FAB, cause the plan to become subject to ERISA. To avoid this outcome, an employer may wish to add provisions to its wraparound document that prohibit loans and hardship withdrawals, even if they are permitted under the annuity contracts and custodial agreements issued by the vendor.

ASPPA recommends: We recommend that the Department provide guidance clarifying that employers may negotiate with vendors for a safe harbor plan about the terms of annuity and custodial contracts as necessary to comply with the "written plan" requirement of the final regulations and avoid conflicting provisions among the documents that compose the written plan. We also recommend that the Department clarify that the employer's wraparound document for a safe harbor plan may prohibit loans, hardship withdrawals and other features that could require the employer to make discretionary determinations.

2. **Procedure for ERISA Determinations.** The determination of whether a 403(b) arrangement is subject to ERISA has become even more significant in light of the new Form 5500 requirements for 403(b) plans. Although the Department has a procedure for requesting advisory opinions on ERISA coverage, we believe that this procedure may not be the most efficient method for providing employers with the information they need in a timely manner, as it requires a substantial expenditure of Department time and resources. We recommend that the Department develop a simple, concise, inexpensive and quick method for a plan sponsor to request and obtain such a determination of a plan's ERISA status.

ASPPA recommends: The Department should adopt a program, similar to the VFC format, under which an employer could submit a statement of facts in a format developed by the Department for a ruling on whether the arrangement is subject to ERISA coverage.

3. **Financial Data for Individually-Owned Contracts.** For a plan that is subject to ERISA, the employer cannot prepare an accurate and complete Form 5500 without certainty about the plan's assets. It may, however, be impossible to make this determination for certain accounts and contracts established in the past. In particular, owing to the way transfers were handled before the final regulations were issued, the employer may not be able to determine which employees and former employees have undistributed accounts/contracts in a 403(b) plan. In many cases, employees made the decision to transfer their contracts to vendors that were not selected by the employer and with whom the employer had no other relationship. In these cases, the employer may not even be able to identify the vendors, much less obtain accurate information about the number of participants and the total plan assets. Acknowledging the reality that, until quite recently, many such individually-owned contracts were not assumed by

employers, vendors or employees to be part of the plan, the IRS issued Revenue Procedure 2007-71 which provides some guidance on what contracts are included in (or excluded from) the plan for IRS purposes. We recommend that the Department adopt a similar approach so that employers may know what information they must collect to satisfy the Form 5500 filing requirements.

ASPPA recommends: The Department should adopt rules similar to those set forth in Section 8 of Revenue Procedure 2007-71. Specifically, the Department should provide guidance that: (i) accounts held by providers that did not receive any contributions after December 31, 2004 are not considered to be part of the assets of the plan for reporting purposes; and (ii) reporting with respect to assets held by providers that did not receive any contributions after December 31, 2008 may be based upon a reasonable good faith effort to obtain beginning account balances and other necessary information from the providers.

4. **Vendor Cooperation in Form 5500 Preparation.** Most 403(b) plans have investments with multiple vendors and a large proportion of those investments are held in individual accounts/contracts, owned by the employees. Because the employers are not parties to these agreements, the vendors may not be willing to provide financial data that the employers need to satisfy their Form 5500 reporting requirements as the vendors' agreements do not allow for sharing this information. The Department should provide a way for employers to report their good faith efforts to obtain the information and permit employers to avoid liability for vendors' unwillingness or inability to provide necessary financial information.

ASPPA recommends: The Form 5500 should provide an opportunity for employers to report their inability to obtain needed financial information (after a good faith effort to do so). The Department should make it clear that employers are not liable for failure to report financial information that vendors did not or were not able to provide when requested.

5. **Missing Information on Transferred Contracts.** It is fairly likely that additional financial information will emerge in the next few years regarding transferred and "orphan" accounts that sponsors were unable to obtain in time to properly prepare the financial statement for the 2009 Form 5500. Employers need guidance about how to include these assets on the Form 5500 if the additional information is later discovered.

ASPPA recommends: The Department should establish a transitional period of 5 to 10 years during which the assets can be added to the Form 5500 for the year in which they are identified as plan assets instead of requiring that the Form 5500s from prior years be amended. The Department should also adopt a policy that no penalties for late filing or failure to file will be levied during these transitional years with respect to these later-identified plan assets.

These comments were prepared by the Tax Exempt and Governmental Plans Subcommittee of the ASPPA Government Affairs Committee, and were primarily authored by Kathleen Meagher, and Theresa Leiker. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Very truly yours,

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