



2011 NTSAA 403(b) Compliance Resolution Summit  
May 9-11, 2011; Dallas, Texas

The third annual NTSAA 403(b) Compliance Resolution Summit attracted a large gathering of product providers, third party administrators, and resource people from the Department of Labor, Internal Revenue Service, American Institute of Certified Public Accountants, the Association of School Business Officials, the 501(c)(3) community, and legal firms for open dialogue on best practices to contribute to the operation of compliant 403(b) plans.

All three of the Summits have contributed greatly to the resolution of what were systemic problems through the adoption of best practices that most in the industry can follow. The result has been the standardization of processes and procedures that most can utilize for a smoothly operating 403(b) plan. One example is the development of a loan calculation worksheet (and detailed information on the regulations for loans from the retirement plans of each employer) that should put both product providers and third party administrators on the same page in the correct calculation and processing of loans under Code Section 72(p) and the final regulations. There are many other tools, including check lists, agreements, and other forms now available in the 2<sup>nd</sup> edition of the *NTSAA 403(b) Compliance Resolution Summit Best Practices Manual* available for order at [www.asppa.org/bookstore](http://www.asppa.org/bookstore). Clearly, everyone involved in the sponsorship or management of a 403(b) plan should have this valuable manual.

The third annual Summit included five important topics addressed in five separate breakout sessions where attendees were given the option of changing topics and moving to a different breakout session in the afternoon of the full day of dialogue. The reports from the team leaders of each of the topics (many of which were suggested by NTSAA members in answer to a brief appeal to gather ideas), as well as any tools suggested by the groups at each session appear in the report, along with the names of the team leaders for each session. It is important to acknowledge the roles played by the team leaders, without whom the discussions could not have taken place. In fact, both of the co-chairs of the Summit Task Force believe that the three Summits to date would not have been as successful without the dedication of those individuals. The 403(b) industry owes them sincere gratitude.

2011 Summit Support and Resources:

- Kristi Cook, JD, TGPC, and Ellie Lowder, TGPC: Summit co-chairs, co-moderators of the general sessions, and expert resources to the leaders of the five breakout sessions
- Melody Douglass, former President of ASBO, representing the K-14 employer population for the Association of School Business Officials International
- Craig Hoffman, APM, ASPPA General Council/Director of Regulatory Affairs, who kicked off the 2011 Summit with a Washington regulatory update with Andy Zuckerman, Director, Internal Revenue Service, participating
- Sherri M. Edelman, Tax Law Specialist, Internal Revenue Service

- Susan Rees, Senior Law Specialist, EBSA of the Department of Labor
- Bob Lavenberg and Alice Wunderlich, representing the American Institute of Public Accountants
- David Powell, JD, Groom Law Group, serving as legal resource to the team leaders
- Darlene M. Rue, LMSW, RG, Chief Operations Officer, Health Services of North Texas, representing the 501(c)(3) employer population

In addition, we thank Joanne Lawrence Smith and Erin Stewart from ASPPA, who so ably handled the location, services at the facility during the Summit, and follow-up activity. We most assuredly could not have held this Summit without the support of Joanne and Erin.

#### Executive Summary:

Full reports of each of the five topics addressed are included in the report. Clearly, the third Summit picked up on the cooperative spirit of the two prior Summits as the industry and employer attendees continued to work on helping plan sponsors manage the compliance responsibility for employers altogether exempt from Title I of ERISA for their retirement plans *and* employers not exempt from ERISA coverage. For those sponsoring 403(b) ERISA plans, the AICPA entered into open dialogue about resolving issues relative to the audits (for the 2009 and 2010 plan year) of those 403(b) plans requiring an independent audit.

While it is true that not every product provider and not every third party administrator will adopt every best practice agreed to in all three Summits, the majority will do so, and the developed best practices (outlined in both this report and the new edition of the *NTSAA 403(b) Compliance Resolution Summit Best Practices Manual*), will be widely used for a final result that benefits everyone (product providers, service providers, employers and the participants in those plans).

#### WORKSHOP AND GENERAL SESSION REPORTS:

##### General Session #1: 403(b) Regulatory Update

*Craig Hoffman, APM, ASPPA General Counsel/Director of Regulatory Affairs*  
*Andrew Zuckerman, Director of Rulings and Agreements, IRS Employee Plans*

The 2011 NTSAA 403(b) Compliance Resolution Summit began with a “403(b) Regulatory Update” presented by Andy Zuckerman, Director of Rulings and Agreements, IRS Employee Plans, and Craig Hoffman, General Counsel/Director of Regulatory Affairs for ASPPA. Needless to say, the design and operation of 403(b) plans is greatly influenced by what comes out of Washington, D.C., and this session gave attendees a flavor of what to expect in the months ahead.

As Director of the Employee Plans Rulings and Agreements Branch, Andy Zuckerman is intimately involved with IRS guidance that impacts 403(b) plans. He mentioned several guidance projects that the IRS has been working on that should be released shortly. In this category is the revenue procedure

detailing how the pre-approved 403(b) plan program will work. This guidance is anxiously awaited because the “remedial amendment period” to fix recently adopted 403(b) plan documents is tied to the roll-out of this new program. Zuckerman indicated that a new version of the IRS correction program for plan defects known as “EPCRS” (Employee Plans Compliance Resolution System) would also be out soon. This latest iteration is expected to have new correction options specific to 403(b) plans including the correction of failure to timely adopt and conform to a written plan. The latest word on 403(b) terminations as described in Revenue Ruling 2011-7 was also discussed.

Another important initiative covered by Mr. Zuckerman that is being spearheaded by the IRS Employee Plans Compliance Unit (EPCU) is a “compliance contact letter” that is being sent to approximately 330 randomly picked public and private higher education 403(b) plan sponsors. The letter asks 21 detailed questions about the 403(b) plan’s eligibility and deferral procedures. Responses to the contact letter will be evaluated and a determination made as to whether the plan appears to be meeting the requirements. Compliant plans will get a closing letter and the IRS will follow up where there appears to be a problem.

Craig Hoffman provided an update on issues that are relevant to 403(b) plans that are subject to ERISA and Department of Labor regulation. He discussed the ongoing difficulties that 403(b) plans subject to ERISA have had with the expanded Form 5500 reporting requirements, and in particular the independent audit mandate that typically applies to large 403(b) plans. The 2009 plan year was the first year these new rules applied, and there have been difficulties in transitioning into this new regime. Nevertheless, thanks to the participation of members of the AICPA in sessions at the Summit, a dialogue has begun with the goal of educating all concerned of the unique issues for 403(b) plans in this area.

Mr. Hoffman also gave an overview of several other DOL regulatory projects that will impact ERISA 403(b) plans. Included in this discussion were the soon to be effective “fee transparency and disclosure” regulations. These new rules will require many service providers to provide detailed information to plan fiduciaries about the services they perform and the fees they receive as a result. In addition, plan sponsors will be required to provide participants with new information on plan investments and plan costs. Hoffman also mentioned that he was hopeful the DOL would provide relief for certain non-governmental 403(b) plans, where there is some question as to whether certain arrangements will continue to qualify for exemption from ERISA coverage. This hoped for relief is in response to an ASPPA/NTSAA comment letter to the DOL in which it was pointed out that there is a great deal of confusion among employers and practitioners as to the exemption requirements.

As the opening session aptly demonstrated, 403(b) plans are very much affected by what goes on in Washington. ASPPA and NTSAA are very appreciative of Mr. Zuckerman and the other members of the IRS and DOL who participated in the Summit and gave all attendees the benefit of their insights into this very important subject.

### **Workshop #1: Fee Disclosure Guidance; Sample Checklist for ERISA Plans**

## Fee Disclosure Guidance

*Christopher M. Guanciale, Esq., APM, Plan Member Financial*

*Mark W. Heisler, ADMIN Partners LLC*

*Teresa Ward, TGPC, Oppenheimer Funds, Inc.*

## Session Objectives

The two objectives for the fee disclosure session were to: (1) identify issues unique to the 403(b) market when implementing 408(b)(2) and 404(a)(5) compliance requirements and (2) identify best practices to assist advisors, TPAs, product providers and plan sponsors in meeting their respective obligations under the new Department of Labor rules.

## Effective Dates

Beginning April 1, 2012, new DOL regulations under 408(b)(2) will require “covered service providers” (CSPs) to disclose information about fees and services to plan sponsors of ERISA retirement plans. As for 404(a)(5), plan sponsors have 60 days from the effective date of the 408(b)(2) plan sponsor disclosure rules to comply.

## Background

Since the final interim regulations were published by the DOL last year, industry experts have published an extensive number of white papers, special reports and extensive examinations on the new disclosure requirements. For those interested in reading additional background material on 408(b)(2) and 404(a)(5), we suggest the following materials:

- ✚ The Department of Labor (EBSA) website has a wide range of materials and tools on fee disclosure geared to plan sponsors: [www.dol.gov/ebsa](http://www.dol.gov/ebsa).
- ✚ For NTSAA/ASPPA members, subject matter materials can be found by logging into the Publication portal at: [www.asppa.org/document-vault/pdfs/asaps/2010/10-36.aspx](http://www.asppa.org/document-vault/pdfs/asaps/2010/10-36.aspx).
- ✚ Suggested reports that provide a nice overview on the impact of both 408(b)(2) and 404(a)(5) include: [www.reish.com/publications/pdf/408\(b\)\(2\)regoverview.pdf](http://www.reish.com/publications/pdf/408(b)(2)regoverview.pdf), <https://groups.valic.com/DocumentServices/retrieveDocument.aspx?ss=oyfRQps7F2IYNxUiWN3JQnIRnKZhi3EB0BKmlrFDq4Cpt0sxAM3UryOZmTrkeND4IV8QLr01aSv1P4ZETQCgnw%3d%3d>, and [www.oppenheimerfunds.com/digitalAssets/More-Fee-Disclosure-White-Paper-8807be32-2daf-4e4c-bc52-cd10aebebc33.pdf](http://www.oppenheimerfunds.com/digitalAssets/More-Fee-Disclosure-White-Paper-8807be32-2daf-4e4c-bc52-cd10aebebc33.pdf).

## Workshop Issues

During both meetings, the participants discussed the 408(b)(2) and 404(a)(5) rules with an emphasis on the unique challenges faced in the 403(b) marketplace. Both groups acknowledged that fee disclosure reporting and communication were complicated when plans maintained multiple investment providers—and even more so when legacy vendors raised questions on orphan and grandfathered accounts. Participants also expressed concerns when dealing with plans that contained individual contracts and/or custodial arrangements. To make matters even more interesting, both groups held lively discussions around disclosure obligations when the plan sponsor did not know whether their plan was subject to ERISA.

In addition to the operational challenges noted above, a consensus view emerged among session participants that many constituencies were uncertain about their obligations under the new rules. For example:

- ✚ Plan sponsors don't understand the scope of their participant disclosure obligations under 404(a) or their fiduciary obligations under 408(b)(2).
- ✚ Advisors are unaware of their disclosure obligations under 408(b)(2) and have not embraced their role as a covered service provider.
- ✚ Service providers are focused on their own obligations; no one is focused on the broader issues of disclosure coordination.

While most of the discussion focused on plans subject to ERISA, each group was surveyed about whether participants are seeing the fee disclosure issue creeping into 403(b) plans that are not subject to ERISA. A fair number of participants from both sessions indicated that they have responded to RFPs where the fee disclosure information was modeled on the DOL rules. Some of the participants stated that a few existing clients recently have also requested more comprehensive fee disclosure information. The general consensus of both groups was that service providers working with 403(b) plans exempt from ERISA should expect to see requests from more and more plan sponsors on fees modeled on the DOL rules.

Participants developed a number of proposed solutions and recommendations to address key issues discussed during the sessions.

**Issue:** Plan sponsors do not understand their obligations under 408(b)(2) and 404(a)(5).

**Recommendation:** Those parties with closer relationships with plan sponsors (primarily advisors and third party administrators) should educate plan sponsors on disclosure obligations.

1. To assist advisors, a Fee Disclosure Checklist has been developed to define the scope of a plan sponsor's obligations and a process for soliciting information from service providers. (See the Sample Checklist at the end of this breakout session report.)
2. A wealth of information on fee disclosure is available to advisors and third party administrators to assist with plan sponsor education (e.g., see [www.metlife.com/assets/mlr/403b-resource-center/FiduciaryGuide.pdf](http://www.metlife.com/assets/mlr/403b-resource-center/FiduciaryGuide.pdf)).

**Issue:** Outline Roles and Responsibilities.

**Recommendations:**

1. Investment providers should communicate with plan sponsors the fee information they can disclose (prior to formally disclosing the information).
2. Contracts between plan sponsors and service providers should include language that reflects disclosure obligations.
3. Employers have an obligation to determine how to coordinate disclosure material and to deliver material to plan participants.

**Issues:** 408(b)(2) compliance efforts have been top-down—many individual advisors are unaware of obligations. There are open questions concerning indirect compensation for both broker dealers and their advisors.

**Recommendation:** All service providers need to evaluate their respective books of business to determine obligations under 408(b)(2) by answering the following questions:

1. Is the company a covered service provider?
2. If yes, under what category does the company fall (*i.e.*, recordkeeper, plan fiduciary, etc.)?
3. What are the company’s disclosure obligations in each respective category?

[www.reish.com/publications/pdf/408\(b\)\(2\)impactonRIAs.pdf](http://www.reish.com/publications/pdf/408(b)(2)impactonRIAs.pdf)

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**Issue:** Many service providers have outdated plan contact information. Who is the “responsible plan fiduciary?”

**Recommendation:** Service providers should implement a process to update plan sponsor contact information for all covered plans.

**Issue:** Are there other ideas for dealing with the unique complexities involved with 403(b) plans as they relate to the new fee disclosure rules?

**Recommendation:** Ask NTSAA/ASPPA to request a delay in the effective date and relaxed enforcement for 403(b) plans.

**Update:** Apparently heeding the feedback from NTSAA/ASPPA and others in the industry, on Thursday, July 14, 2011, the DOL extended the effective date of 408(b)(2) to April 1, 2012. The final rule also amended the effective date for participant-level fee disclosure under Section 404(a)(5) by adopting a 60-day transition period following the April 1 effective date of the 408(b)(2) regulation. The transition period will ensure that compliance with the Section 408(b)(2) regulation is in force before plans are required to disclose service provider fees to participants.

### **Sample 403(b) Compliance Checklist ERISA 408(b)(2) & 404(a)(5) Disclosure Rules**

#### **Introduction**

The Department of Labor (DOL) has issued new rules designed to make retirement plan fees more transparent to ERISA plan sponsors and participants. The new plan sponsor disclosure rules are designed to assist plan fiduciaries in making more informed plan decisions on behalf of their employees. Likewise, the new participant disclosure rules will provide employees, participants and their beneficiaries with important information about plan fees to help them make educated choices for funding their retirement.

## **Plan Sponsor Fee Disclosure Under 408(b)(2)**

Beginning April 1, 2012, new DOL regulations under 408(b)(2) will require “covered service providers” (CSPs) to disclose information about fees and services to plan sponsors of ERISA retirement plans. For more information on what entities may be a CSP, please visit [www.dol.gov/ebsa](http://www.dol.gov/ebsa).

In general, the rule requires:

- CSPs to disclose the services they provide and the fees they receive in connection with ERISA plans;
- Pre-sale disclosures “reasonably” in advance of entering into an arrangement and ongoing disclosures within 60 days of a change; and
- Initial disclosure report must be delivered in advance of the 4/1/12 effective date.

ERISA plan fiduciaries are required to ensure the fees and expenses the plan incurs are reasonable and appropriate. In fact, causing the plan to pay more than “reasonable” fees and expenses could result in a breach of ERISA fiduciary duty and a “prohibited transaction” under ERISA.

A critical aspect of carrying out duties as a responsible plan fiduciary is to understand the services being offered by the various service providers and to understand the compensation they receive for furnishing those services. The new fee disclosure will assist in determining if the services are necessary for the operation of the plan and if the compensation is reasonable.

## **Participant Disclosure Rules Under 404(a)(5)**

The new participant disclosure rules under DOL regulation 404(a)(5) require plan sponsors of ERISA participant-directed individual account plans to disclose information about plan fees to eligible employees, participants and beneficiaries. Plan sponsors have 60 days from the effective date of the 408(b)(2) plan sponsor disclosure rules to comply.

There are two main categories of information that must be disclosed:

1. Plan related information
  - General plan information
  - Individual expense information
  - Administrative expense information
2. Investment related information that is
  - Automatically furnished before investment and periodically thereafter
  - Automatically furnished (if applicable)
  - Furnished upon request

A model comparative fee chart is available through the DOL at [www.dol.gov/ebsa](http://www.dol.gov/ebsa).

The task of complying with these rules takes on added complexity for 403(b) plan sponsors who work with multiple service providers. It is important that plan sponsors understand their obligations and have

a thorough inventory of all impacted plans, employees and service providers to ensure compliance with them.

**Special Note:** The NTSAA Fee Transparency Task Force is in the final stages of the development of a fee disclosure document patterned after the DOL model comparative fee chart. The document will be available for non-ERISA employer plans in the firm belief that employers and participants will benefit from total transparency as they exercise their freedom to choose their own investment options, and financial advisors. It is expected that the Task Force will launch the new document in the first quarter of 2012.

### **Workshop #2: Fiduciary Issues and Participant Advice**

*Don Harris, Sr. Vice President, National Education Markets, VALIC*

*Roxanne Marvesti JD, VP Legal Affairs and Chief Compliance Officer; PenServ Plan Services, Inc.*

*Edie Russo, Vice President, AXA Equitable*

### **The Topic**

The Department of Labor (DOL) has proposed regulations to expand the definition of the term “fiduciary” (Proposal) with respect to an individual who provides investment advice to an employee benefit plan or to plan participants under the Employee Retirement Income Security Act of 1974 (ERISA).

### **Status of the Proposal**

So far, the Proposal has proven controversial, with diverse responses from the industry. The Proposal has yet to reach a definitive stage. However, a DOL spokesperson has commented recently that the comment period will be ended in order to expedite finalization of the guidance.

### **Best Practices**

Given that the future of the Proposal remains unsettled, specific recommendations for best practices cannot be made at this time. However, regardless of whether the definition of fiduciary remains as it has been for the last 35 years, or in the alternative may be expanded, it is always a best practice for employers and participants to select advisors who are competent and helpful, and who will provide full disclosures as to fees and any potential conflicts as it may affect the plan or the participant(s).

### **Who/What Would The Proposal Affect?**

## **ERISA Plans**

The Proposal in its current form would impact all investment professionals dealing with ERISA plans, their fiduciary responsibilities and obligations, their disclosures on fees and any potential conflicts of interests.

### **Best Practices**

Until the Proposal has achieved definitive status, a recommended best practice for plan sponsors and participants would be to select advisors who are competent and helpful, and who will provide full disclosures as to fees and any potential conflicts as it may affect the plan or the participant(s).

## **Non-ERISA Plans**

All governmental plans and many not for profit and church retirement plans that are exempted from ERISA will not be affected by the Proposal.

### **Best Practices**

Plan sponsors should be aware of their state laws where fiduciary obligations may be imposed, with respect to choice of advisors to the plan, investments selected for the plan, etc. Both plan sponsors and participants should exercise care in the selection of advisors to provide competent service and full disclosures as to fees and any potential conflicts as it may affect the plan or the participant(s).

### **Current Regulation**

Section 3(21)(A) of ERISA provides that a person is a fiduciary with respect to a plan to the extent he or she renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so. Under the current regulation, a person is deemed to provide investment advice if he or she:

1. renders advice on the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property,
2. on a regular basis,
3. pursuant to a mutual agreement, arrangement or understanding between the person and the plan or a plan fiduciary that,
4. this advice will serve as a primary basis for investment decisions with respect to plan assets, and that
5. this advice will be individualized based on the particular needs of the plan.

This is known as the “five part test.” In order to be deemed a fiduciary by reason of providing investment advice, a person must meet all five requirements of this test.

## Proposed Regulation

### The New Test

The proposed regulations suggest a new test in lieu of the existing five part test. The intent behind the new test according to the DOL is to shift the focus away from establishing each part of the five part test, and more to the precise misconduct at issue in particular cases. The new test includes elements of the old test; however, it expands the concept of a fiduciary. Under the proposed regulations the types of activities related to providing advice that could result in fiduciary status include:

- i. Providing advice, appraisals or fairness opinions as to the value of investments, recommendations as to buying, selling or holding assets, or recommendations as to the management of securities or other property. The test is intended to establish fiduciary responsibility on parties who provide valuations of closely held employer securities and other hard to value plan assets.
- ii. Acknowledging fiduciary status for purposes of providing advice. This provision is important because acknowledgment would be sufficient for fiduciary status. Under the five part test, one could acknowledge having been a fiduciary, but not meet all five prongs of the test, and hence not be held liable.
- iii. Is an investment advisor under Section 202(a)(11) of the Investment Advisors Act of 1940.
- iv. Providing advice or making recommendations pursuant to an agreement, arrangement or understanding, written or otherwise, with the plan, a plan fiduciary or a plan participant or beneficiary, where the advice may be considered in making investment or management decisions with respect to plan assets, and the advice will be individualized to the needs of the plan, a plan fiduciary or a participant or beneficiary. Under the proposed regulations the requirements that investment advice be provided on a *regular basis*, and serve as *primary basis* for investment decisions, no longer exist.

Meeting any one of the criteria above could result in fiduciary status. The proposed regulations also suggest that rendering investment advice for a fee includes any direct or indirect fees received by the advisor or an affiliate from any source including transaction-based fees such as brokerage, mutual fund or insurance sales commissions.

### Issues Identified with Respect to the Proposal and Recommendations

**1. Issue: Old Laws, Newer Practices.** The law on fiduciary is 35 years old. The world of investments, investment advice, and education along with technology have moved forward, but still relying on a definition that may not fit as well as it used to.

**Recommendation:** The updated definition of fiduciary reflects current practices in the investment world. The Proposal offers an updated definition that is more in line with such practices. For example, the Proposal has dispensed with the part of the test that requires

“regular basis advice.” The Proposal supports today’s practices in that plan sponsors rely on professional advice without focus on the frequency of it being provided.

**2. Issue: Lack of Clarity.** There are various sections of the Proposal that could benefit from further clarity.

**Recommendation:**

- **Plan Level Advice Limitation.** Plan level investment advice given to fiduciaries, the limitation set forth in § 2510.3-(21)(c)(2)(i) of the Proposal should require that explicit disclosure of the seller/purchaser’s conflict of interest be made in writing or electronically, in clear and conspicuous language, and that it be acknowledged in writing or electronically by a plan fiduciary.
- **Applicability to RIAs.** The Proposal should be clarified to provide such that § 2510.3-21(c)(1)(ii)(C) applies only to an individual who has actually registered as an investment advisor with the U.S. Securities and Exchange Commission (SEC) or a state agency of appropriate jurisdiction.
- **Definition of Investment Advice.** The Proposal should be clarified to provide that investment advice does not include information regarding the relative value and financial effect of optional forms of benefit available to participants, valuations related to lump sum distributions or the division of property pursuant to qualified domestic relations orders (QDROs), or the offering of 403(b) investment products, and should clarify that the provision of recommendations or advice regarding the selection of fiduciaries would not, without additional action, cause a person to be considered a fiduciary.
- **Small Business Retirement Plans.** Various reports and studies demonstrate that small business plan fiduciaries and participants often lack the sophistication to appreciate whether or not the advice they are receiving is ERISA-protected advice. ASPPA has noted that a large percentage of fiduciaries of small retirement plans believe that the recommendations that they are receiving are intended as “investment advice” even though the vast majority of these small businesses are receiving investment education, rather than investment advice. It is important that fiduciaries of such retirement plans be able to rely on the guidance that they reasonably believe is being provided as investment advice or be clearly informed that they are not receiving investment advice.

**3. Issue: Disclosure.** The lack of proper disclosures to plan fiduciaries and participants is a concern.

**Recommendation:** The practical effect of the Proposal would be to require plan fiduciaries to receive a disclosure in those cases in which advisors choose not to assume fiduciary responsibility as an ERISA investment advisor.

One of the most significant limitations contained in the Proposal is directed at individuals who give conflicted investment advice under certain circumstances (the “Conflicted Advice Limitation”). In order to rely on this limitation, the individual must not have represented or acknowledged that he or she was acting as a fiduciary. Additionally, it must be demonstrated that the recipient of the advice knew, or reasonably should have known, that: (1) the advice or recommendation was made by the individual as a purchaser or seller of a security or other property (or as an agent of or appraiser for the purchaser or seller); (2) the individual had interests that are adverse to the plan or its participants; and (3) the individual was not endeavoring to provide impartial advice. The Proposal does not prohibit individuals who have a conflict of interest from providing advice, but instead merely requires that they disclose such information to the person receiving the advice in order to avoid fiduciary status.

**4. Issue: Added Costs.** Certain aspects of the Proposal may result in added costs to plan sponsors and participants by inclusion of appraisers in the Proposal.

**Recommendation:** Appraisals and fairness opinions should be exempt from the Proposal due to the likelihood of added costs to plans and plan participants and the potential chilling effect on the availability of these services. Compelling independent appraisers to be fiduciaries will likely increase the costs associated with appraisals and fairness opinions. Appraisers may be taking on additional responsibilities and liability by virtue of becoming a fiduciary. They may have to increase their fees to compensate for their additional expenses such as additional insurance for their new potential fiduciary liability. Further, there are a limited number of experienced independent appraisers who value employer securities and other hard-to-value assets. If persons are considered fiduciaries as a result of providing appraisals and fairness opinions, potentially many of these experienced independent appraisers may stop providing such services. As a result, plans would have fewer choices for service providers, which would likely increase the costs for these services.

**5. Issue: Uncoordinated Efforts between DOL and SEC on Fiduciary.** There is an overlap between the two agencies on the concept of fiduciary. The agencies so far have not collaborated. For example, section (c)(1)(ii)(C) of the Proposal addresses individuals who are investment advisers as defined in the Investment Advisers Act of 1940. The DOL notes in the preamble that this reference to the Investment Advisers Act definition also includes the various exclusions from that definition. However, an entity that is exempt under the Investment Advisers Act may still be a fiduciary under one of the other alternative definitions in the Proposal.

**Recommendation:** Ideally, the agencies should work together to create a coordinated fiduciary standard. Different sets of rules applicable to the same assets may lead to additional costs and complications for the participants, as well as to inconsistent practices by the industry professionals. However, in the interest of moving forward it may be appropriate that persons providing advice to retirement plans be subject to rules that are specifically designed for these arrangements.

The recommendations have been shared with the Tax-Exempt & Governmental Plan Subcommittee of ASPPA/NTSAA through Edie Russo, a team leader for this session and co-chair of that subcommittee. The best practices have been or will be reflected with contacts and discussions with the Department of Labor during the comment period.

### **Workshop 3: Deselected Service Providers and the Audit Requirements for ERISA 403(b) Plans**

*Susan Diehl, PenServ Plan Services*

*Richard A. Turner, Esq, VALIC*

*Robert A. Lavenberg, CPA, JD, LL.M, BDO USA, LLP*

#### **1. Issue Identified: Deselected providers – The importance of distinguishing generally among: tax requirements, ERISA requirements, and Form 5500 filing requirements with the independent audit.**

It is evident that there is much confusion over the general rules involved with the 403(b) plan and which contracts/accounts are included for what purpose. With the new Form 5500 filing requirements for ERISA plans that began for tax year 2009, coupled with the new audit requirement for 403(b) plans, it became evident that some contracts were used for some purposes and not for others. Confusion has loomed in this area with respect to vendors, TPAs, employers and auditors. These rules are compounded by a portion of the auditor community that has determined that they need to receive data for some contracts that DOL has determined may be excluded from the reporting requirements.

#### **1. Recommended Solutions**

NTSAA should provide educational material for vendors, TPAs and employers to assist with the issue of inclusion/exclusion of deselected vendors and active vendors with respect to the tax code and ERISA.

#### **1. Recommendations to the NTSAA Best Practices Task Force**

During the first Summit in 2009, it was recommended that a chart be developed to assist in the tracking of deselected vendors under IRS Revenue Ruling 2007-71. This chart was a tool that is still today widely used by the 403(b) industry. It was further

recommended at the Summit that the chart be updated to reflect the ERISA status as well as other effects of the various contracts/accounts. It was agreed by the IRS and Department of Labor representatives at the Summit that they would review the updated chart in an effort to establish agreement with the treatment of these contracts. Once this chart has been reviewed and agreed upon by the two agencies, a copy will be posted to the NTSAA website and announced at that time.

## **2. Issue Identified: ERISA vs. non-ERISA and the proper identifying of each plan**

Education and outreach material needs to be developed to assist employers in identifying the types of plans that they maintain and determining which are, or are not, subject to ERISA. Auditors have indicated that one of the problems contracting with a new employer that is subject to the audit of the plan is that the employer does not understand that there may be interaction between the plan subjected to the audit and other plans that the employer maintains.

It is known that government and non-electing churches are exempt from ERISA. Other tax-exempt employers have three possibilities that exist:

- Plan has always been subject to ERISA;
- Plan has always been non-ERISA safe harbor; or
- Plan was once non-ERISA safe harbor, now ERISA.

This determination is crucial for each plan that the employer maintains. The proper categorization of the plan(s) of the employer will prevent costly errors and increases in the auditor's fee. It will also prevent the vendors from providing incorrect or incomplete data to the auditor or TPA.

## **2. Recommended Solutions**

Education and outreach needs to be accessible to these employers.

NTSAA should develop an explanation of the ability to maintain multiple plans and the effect of such multiple plans, including explanations for the potential interactions between plans (*e.g.*, contribution to Plan A as match to deferral in Plan B; effect on Plan B's ERISA status).

Employers need to understand the legal structure for each plan: who is covered, what contributions, what providers, and any unique features of their plans. A better understanding of the features will come as the 403(b) prototype final language evolves and employers better understand if they will meet the prototype requirements or fall outside of the permitted options and become subject to the custom requirements.

Department of Labor has stated in public hearings that the ERISA or non-ERISA status of multiple plans by an employer is determined on a facts and circumstance basis. The DOL suggests employers submit for an Advisory Opinion Letter for such determination.

Materials will be developed by NTSAA to assist employers in all of these categories. A sample draft letter for the employer to “fill in” for a request for an Advisory Opinion will be included in the sample forms.

## **2. Recommendations to the NTSAA Best Practices Task Force**

NTSAA will develop for the membership educational materials to assist employers in identifying all plans that exist, potential interactions between the plans, and the legal structure as developed by the employers. The availability of the materials will be announced once completed.

## **3. Issue Identified: Form 5500; Independent Audits**

Issues: Where do we start? The Summit attendees identified many issues that arose during the 2009 audits, the first year that these requirements applied to a 403(b) plan. The questions that arose from the group included the following items:

- How to select an experienced auditor
- How to identify the plan(s): each one
- How to identify responsible parties to provide various pieces of information, plan history
- How to establish opening balances: important challenge for first-time audit of the plan
- How to demonstrate plan controls
- How to qualify for a limited scope audit
  - Obtaining certifications: and from whom?
  - What if you can't get a certification?

## **3. Recommended Solutions**

Recommendations: Based on the above issues identified at the Summit the following solutions were suggested as far as developing written materials for distribution to employers, vendors and TPAs.

- Selecting an auditor: Provide links for employers to third party resources, for example the Department of Labor website and AICPA resources.
- Identifying the plan(s), responsible parties: Request documents for review (plan documents, all amendments made since the inception of the plan, and where applicable: Summary Plan Descriptions; Summary of Material Modifications; HR department information (employee benefits booklets); plan highlight sheets; and any other materials that have been provided to the employees. Employer should build a timeline with this information so that the plan(s) compliance is ensured.
- Create a standardized list of minimum standard data elements for audit. AICPA has agreed to assist the NTSAA subgroup to come up with a standard audit checklist that all auditors can use.
- Identifying financial data elements, including opening balances. This can be accomplished by creating a standardized list of 5500 data elements. The SPARK Institute should be included in this discussion since at the present time the

required data by auditors is more extensive than SPARK data that is being gathered.

- Demonstration of plan controls: SAS 70 level II, other auditor reports. Part of the problem in demonstrating these controls is the lack of understanding by the investment and service providers of what a SAS 70 is and the value of it when dealing with a large audited 403(b) plan. There are some investment providers that can neither provide a SAS 70 audit nor can they provide the certification as outlined under ERISA (a typical problem in broker-dealer organizations). Educational material needs to be developed for plan sponsors, investment and service providers and TPAs on the limited scope audit and obtaining qualified certifications.
- Description of who can certify including insurance company, bank, trust company, IRS-approved non-bank custodian. What happens to the audit if the certification cannot be made or is not available; if limited scope audit is not available, then what is the impact; and what are the next steps as dictated by the auditor? There should be more consistency built into the request and impact by different auditors.
- Employers need to identify those providers that can provide the needed information. Those that have an inability to comply should be deselected from the employer's plan.
- Determine a list of helpful information to assist the parties involved with plan audits, such as:
  - Common pitfalls in independent audits
  - Common plan failures
  - IRS 403(b) checklist
  - Current EPCRS solutions
  - Future solutions: Update of Revenue Procedure 2008-50

### **3. Recommendations to the NTSAA Best Practices Task Force**

NTSAA, along with members of the industry and AICPA, will work together to craft a checklist specific to 403(b) that can (1) assist auditors not familiar with 403(b) plans; and (2) assist in the rest of the 403(b) compliance world. When available, the checklist will be incorporated in this report, and an announcement will be made so that interested parties can access an updated copy of the report. The Task Force (Susan Diehl, Bob Lavenberg, and Richard Turner) expect that additional information on this topic will be available in the first half of 2012.

#### **Workshop 4: Plan Terminations; Individual Contracts; Provider Disclosure**

*Suzanne Baldino Jones, ADMIN Partners, LLC*

*Carol Gransee, OppenheimerFunds*

*Barbara Webb, PenServ Plan Services, Inc.*

#### **1. Issue Identified: What does the plan sponsor need to evaluate for plan termination?**

Plan termination is a process that is both complex and difficult to achieve in the 403(b) world. There are many facets to the law and regulations and the vendors products that

impact the ability to complete a plan termination. The working sessions concretely identified that the number one question a plan sponsor must answer is why they are terminating the plan. The plan sponsor should carefully review the reason(s) and determine if the plan termination will solve the issue or actually create more problems.

**1. Recommended Solutions**

Create a checklist that the plan sponsor should utilize to evaluate why, what is needed, and the impacts and process itself.

**1. Recommendations to the NTSAA Best Practices Task Force**

See checklist immediately following this section of the report.

**2. Issue Identified: Identify the characteristics involved with plan termination**

In order to effectively pursue a plan termination, all the parties involved need to be speaking the same language. This does not seem to be the case at this point as providers may often use internal phrases that will differ from another provider, TPAs may use other terminology and the same will occur with plan sponsors. Even if we are using the same words, the definitions may be different. For example, use of the term 403(b) account holder to mean participant, employee and shareholder. If you don't use the same language, you may miss important phases, dates or even entities that need to be part of the process.

**2. Recommended Solutions**

Develop a plan termination glossary that will be an industry standard.

**2. Recommendations to the NTSAA Best Practices Task Force**

See glossary following this break out session report.

**3. Issue Identified: How do you successfully execute a plan termination?**

Once a plan sponsor reaches the conclusion that plan termination is necessary, they need to ensure they understand the entire process. Plan termination is complex, detailed and time consuming. If a plan sponsor misses one part of the puzzle it will never be a valid plan termination. For example, missing the requirement that all assets must be distributed within 12 months from the date of termination will invalidate the plan termination and potentially impact the tax deferred status of money that was distributed.

**3. Recommended Solutions**

Identify all the documentation, notices and communication necessary for a complete and valid plan termination. Create a step-by-step process that satisfies both 403(b) and DOL regulations.

**3. Recommendations to the NTSAA Best Practices Task Force**

See the process following this break out session report.

**4. Issue Identified: How do you handle 403(b) custodial accounts?**

403(b) custodial accounts are individually owned accounts that are neither part of a group contract nor annuity contracts. This causes problems if participants use this investment vehicle and the employer is attempting to terminate the plan. When the final regulations were issued, they included rules on how to terminate a plan. However, many questions regarding how to actually complete a plan termination arose. The industry requested clarification and guidance from Treasury. In March 2011, Treasury issued Revenue Ruling 2011-7 which confirmed that the regulation's identified process was valid and provided additional guidance. It clearly spelled out that annuity contracts can be paid out as "fully paid individual insurance contracts." These values are not taxable as distributions. Unfortunately, the ruling still did not address the issue of custodial accounts. Employers cannot force a redemption from the individually owned custodial accounts.

#### **4. Recommended Solutions**

The NTSAA, ASPPA and the ICI have all been working diligently with Treasury to try and resolve this situation. Until Treasury issues clear guidance regarding custodial accounts, a plan that includes these investments will most likely not be able to complete a plan termination.

#### **4. Recommendations to the NTSAA Best Practices Task Force**

No recommendations at this time. Await additional guidance.

#### **Steps Needed to Terminate a Plan**

Included in the new 403(b) regulations is the rule allowing plan terminations as a distributable event. Here are the steps that should be followed for the proper termination of a 403(b) plan:

1. Review your current plan document to determine if plan terminations are allowable. For taxable years after December 31, 2008, the plan would need to contain provisions permitting termination. *Please note: Even though your plan may permit a termination, it does not allow the employer to force a participant with an individual annuity contract or custodial agreement to take a distribution.* If your current plan is silent on plan terminations, you must amend your document to include the appropriate plan termination provisions.
2. Adopt a binding resolution that establishes a plan termination date, that future contributions will cease, that all benefits will be fully vested to the participant on the termination date, and authorizes the distribution of all assets to each participant as soon as administratively practical after the termination. *Please note: You cannot make contributions to any other 403(b) plan for the period beginning on the date of plan termination and ending 12 months after distribution of all assets from the terminated plan.*
3. Submit the resolution to your Board for approval.
4. Notify all:
  - a. plan participants, (*Please note: You may have to locate missing participants who are still in the plan.*)
  - b. beneficiaries,

- c. appropriate product providers and
  - d. TPAs.
5. Provide a 402(f) rollover notice to participants that provides an explanation of the rollover options and applicable tax consequences.
  6. Work with the appropriate product providers to distribute all plan assets within 12 months of the plan termination date to participants and beneficiaries. Consider the following issues:
    - a. All participants must agree to the distribution and you must have written notice of this agreement. (You may wish to hold distribution requests until you have received all of them.)
    - b. Are there any penalties (such as surrender charges that may be charged to the participant)?
  7. Distributions of a fully paid annuity contract are considered a distributable event by the IRS; however, mutual fund individual custodial accounts are still not eligible for a distribution without the direct authorization of each participant. Therefore, you must be assured that the mutual fund company can still maintain the individual custodial accounts as under the 403(b) retirement plan regulations.

### **Checklist for Plan Termination**

Plan termination is a process that is both complex and difficult to achieve in the 403(b) world. There are many facets to the law, regulations and vendor products that impact the ability to successfully terminate a plan. The decision to terminate your plan should be weighed carefully. The checklist below can be used to guide a plan sponsor through this decision making process.

Things to consider before you terminate your plan:

1. Why do you want to terminate the plan?
2. What is the reason for terminating the plan?
3. Are there other ways to solve the concern without termination?
4. Is a 403(b) an important benefit to your employees? If you terminate the plan, is there another avenue available for employees to save for retirement?
5. Is your 403(b) plan an important recruitment tool?
6. Are there budgetary items to consider?
7. If you terminate the plan you cannot establish a new 403(b) plan for 12 months. Do you have another plan you want to establish in place of the 403(b)?

8. Do you know that employers no longer will be able to use post-employment vacation and sick days as employer contributions to the plan?
9. What will be the cost to terminate the plan?
10. Do you know all the providers that your participants have used?
11. Are you able to locate all the participants within the plan?
  - a. In order to successfully terminate your plan, all plan assets must be distributed within 12 months of the plan's termination date.
  - b. Participants who terminated service prior to 2009 may not need to be included. *Please refer to the Orphan and Grandfathered Rules in the glossary.*
  - c. Will participants agree to the distribution?
  - d. Do the underlying investments have any penalties associated with a distribution?
  - e. Could you hold onto all the distributions requests until you receive all of them? You may need to do this in order to ensure all participants agree to the distribution.
  - f. If you cannot hold on to the distributions and all of them are not completed within the 12-month time period, some of them may be ineligible distributions and may result in ineligible rollovers.
12. Is your plan document up-to-date?
  - a. Your plan documents must have all amendments and restatements up-to-date in order to terminate.
    - i. Check with your document provider to see if they offer a Termination Amendment and to assure that all required amendments have been made through the date of the termination.
13. Are all contributions current and invested in the plan?
  - a. You must have all contributions invested before you are able to terminate your plan.
    - i. Unused vacation and sick pay must be paid into the plan prior to termination. This task may be difficult if the total amount due to unpaid vacation or sick pay exceeds the maximum annual contribution limit.
14. Are there any vesting schedules?
  - a. All participant assets must become immediately vested.
  - b. You must also notify participants of their ability to roll these assets over.
15. Which union contracts might be affected?
  - a. These plans are employee benefits; would there be any re-negotiation needed within the union contracts?
16. Are there any state laws to consider?
17. Do the underlying contracts (annuity or custodial) allow for distribution upon plan termination?
  - a. Some contracts have surrender charges that a participant is not willing to incur.
    - i. If they are not willing to distribute, you must ensure the contract permits a force out distribution.

- b. Some contracts may not have a provision to permit a distribution due to plan termination.
- c. If it is an annuity contract, will the provider accept the responsibility to maintain these accounts under the 403(b) rules and regulations?

### **DEFINITIONS OF TERMS FOR PLAN TERMINATION**

#### **Active Plan**

A plan is considered an active plan for purposes of the written plan document requirement if ongoing contributions, elective deferrals and/or employer contributions are received into the plan on or after January 1, 2009.

#### **Contract Exchange**

A contract exchange occurs when a 403(b) plan participant reassigns all or part of an existing contract or custodial account to another contract or custodial account held within the same employer's plan. The purpose of such an exchange is to change an investment selection to an option available under the plan.

Changes in investment will only be valid if:

1. the value of the participant's account after the exchange is not less than the value of the account before the exchange;
2. the product receiving the exchange has distribution restrictions at least as restrictive as the product sending the exchange; and
3. the employer and the vendor receiving the exchange enter into an information sharing agreement for compliance purposes and the employer ratifies exchanges.

#### **Distribution**

Distribution occurs when a participant takes constructive receipt of plan assets (except in the case of a loan), or when the assets are directed to another (unlike) retirement plan—non-403(b)—in the form of a direct rollover. The movement of assets due to contract exchanges or plan-to-plan transfers is not considered to be a reportable distribution.

In a terminated §403(b) plan, all assets must be paid out to the participants and beneficiaries under the plan as soon as administratively feasible, but not more than 12 months after the date of termination according to Rev. Rul. 2011-7.

#### **Frozen Plan**

As an alternative to terminating a plan, a §403(b) plan may be amended to create a "frozen" plan. This means that no future contributions will be made to the plan, and plan assets will be held until eligible for distribution. The compliance responsibilities continue to apply until all assets have been distributed.

Even if a plan is frozen of future contributions, the employer must comply with the final 403(b) regulations with regard to, for example, the plan document requirement and, in the case of ERISA plans, all reporting and disclosure requirements such as filing Form 5500 and providing a Summary Plan Description.

Normal maintenance also remains an issue for the employer (*e.g.*, required minimum distribution calculations), and to the extent that certain optional plan provisions are not discontinued, that activity must be monitored as well (*e.g.*, loans and hardship distributions).

#### Grandfathered Account

Certain contracts or custodial accounts are not to be considered in the process of terminating a 403(b) plan. Information is not required to be collected for issuers that ceased to receive contributions before January 1, 2005. These contracts or accounts would be governed by the rules of the underlying product.

The final §403(b) regulations will not be imposed upon a contract (or account) that was successfully exchanged before September 24, 2007. Furthermore, a plan that holds only these types of grandfathered accounts is not required to comply with the plan document requirement.

#### Orphan Plan

Revenue Procedure 2007-71 states that a contract issued after December 31, 2004 and before January 1, 2009 by an issuer that did not receive contributions under the plan in a year after the contract was issued will not fail to comply with §403(b) so long as the employer makes a good faith effort to collect data regarding the issuer and notifies the issuer of the administrator's contact information.

If no contributions were made to a plan after December 31, 2008, but 403(b) account holders are still associated with a particular plan, that account/contract is considered to be an orphan account/contract and would therefore be relieved of the written plan document requirement. In fact, a plan termination can only occur with regard to a plan that has received ongoing contributions after December 31, 2009 with the exception of a plan that had been frozen until actually terminated.

#### Participant

Any person who is eligible to receive a benefit under the terms of an employee benefit plan is considered a participant, even though the individual may choose to not contribute to the plan, according to IRS definition.

Plan participation for other purposes, such as fee collection for example, may be specific to a particular contract or agreement (*e.g.*, active or inactive). Therefore, the definition of a plan participant may be subjective according to the individual plan provisions.

#### Participant Notification

Plan participants and beneficiaries must be formally notified of an employer's intention to terminate a 403(b) plan. The ensuing tax ramifications must be disclosed by way of a written explanation in a sufficient amount of time for participants to make an informed decision as to the placement of their vested benefit.

IRS §402(f) describes the manner in which participants must be informed of their distribution options. A form of this notice must be provided to all participants ahead of receiving a distribution that is eligible to be rolled over to another tax qualified plan. In addition, the distributions forms used must indicate the withholding notices and elections, if applicable.

#### Plan Sponsor

The employer, having responsibility for an organization's retirement benefits and the authority to establish a retirement plan, is the plan sponsor. Additionally, if the 403(b) plan is a multiple employer plan [participating employers are governmental entities, 501(c)(3) organizations or churches], the plan sponsor is the entity "sponsoring" the plan on behalf of the participating employers.

Sponsors of §403(b) plans can only be governmental entities and §501(c)(3) organizations, and must comply with Federal and state law and fiduciary responsibility.

#### Plan-to-plan Transfer

It is possible to transfer all or part of your retirement benefit from the 403(b) plan of one employer to the 403(b) plan of another employer, so long as the plan document of both employers permits plan-to-plan transfers.

In order to qualify as a transfer, all assets of the relinquishing plan must end up in the plan to which the transfer is intended, and the distribution provisions of the receiving plan must be at least as restrictive as those of the relinquishing plan. In most cases this translates to mapping the "sources" of assets to the new plan (*i.e.*, elective deferrals, employer contributions, etc.).

#### Termination

The IRS has stated that if permitted by the terms of the plan, the employer may resolve to terminate a 403(b) plan, but that all of the following conditions must be satisfied:

1. The plan sponsor must adopt a binding resolution to terminate the plan that establishes an effective date of termination, cease plan contributions, fully vest all benefits as of the termination date, and authorize the distribution of all benefits as soon as administratively practicable after the termination date.
2. The benefits of plan participants and other liabilities under the plan must be determined with respect to the effective date of plan termination.
3. Plan termination distributions may only be made if the employer does not establish another §403(b) plan for the 12 months after distribution of all of the assets in the terminated plan. If during the 12 months before termination and 12 months after the final termination distribution, less than 2% of the employees from the terminated plan are eligible to participate in the new §403(b) plan, then the 12-month rule will not apply.
4. The participants must be notified that the plan is terminating.

5. The special tax notice under §402(f) must be provided to all participants and beneficiaries outlining the tax implications and rollover options.
6. All plan assets must be distributed as soon as administratively feasible, but not more than 12 months after the date of termination.

#### Vendor

A vendor is the provider of an annuity contract or custodial account chosen by the plan sponsor, who is qualified to provide 403(b) investment products through a salary reduction agreement.

In recognizing the DOL's "reasonable choice" guidelines, it is important to offer plan participants a range of investment choices for employers not exempt from the requirements of ERISA. These selections should be made based on an evaluation considering such factors as local representation, historical performance, financial strength, customer service, reputation and fees.

Vendors should be willing to sign a "hold-harmless" agreement with the plan sponsor and to enter into information-sharing arrangements with the plan sponsor and their designees so that participants can change their 403(b) investments.

Vendors can agree to be responsible for administering those provisions of the plan that they exercise control over, including distributions, loans, hardship withdrawals, exchanges, transfers and correction of excess deferrals and contributions. In addition, vendors should also provide required rollover notices and required minimum distribution notices.

#### **Workshop #5: Written Plan and Following Its Terms**

**Robert Architect, Vice President, VALIC**

**Steve Banks, Founder, TSA Consulting Group, Inc.**

With the advent of the new 403(b) regulations in 2007, and the time period allowed in the design and implementation of a written plan, it is surprising that nationally there is not the commonality that one would think in the design or the actual adoption of a written plan by employers. The design ranges from utilization of the model language provided by the IRS without modification to plans that use very little of the 403(b) model language and utilize wording more commonly found in plans subject to ERISA. With this said, it is just as surprising that many employers have not adopted a written plan to date.

This situation leads to the realization that specific issues are common to employers that need addressing and the establishment of best practices governing the adoption and maintenance of a written plan by all 403(b) employers.

There are six areas of concern voiced by the participants of the compliance summit in 2011. They are addressed herein with suggested best practices.

1. Timely Adoption of the written plan; Memorialization of the adoption of the plan signed by the proper authority.

- It is more common to find no current written plan with smaller 503(c)(3) employers and some smaller K-12 employers.
- There appears to be no one at the employer level given the responsibility and the authority to complete the process.
- When there is a change of responsible parties at the employer staff level, many times the new staff cannot find prior documents.
- Usually those employers with these issues do not have a TPA.

A. Recommended Solutions: Timely Adoption

- A binder for the plan should be developed and reviewed annually.
- There must be a realization by the employer that it is their plan and that, after adoption, the terms of the plan must be followed.
- A transition continuity plan should be established by the employer.

B. Recommended Best Practices: Timely Adoption

- Investment Providers should require a copy of plan document in order to continue under the plan.
- If a document has not been timely adopted, one should be adopted immediately. The plan sponsor should wait the issuance of correction procedures for failure to adopt timely prior to submission under VCP for correction of the failure.

2. Coordination with Investment Products

- Investment product documents are not being evaluated even though part of the plan.

A. Recommended Solutions: Coordination with Investment Products

- The investment provider selling the product should inform the employer that they are part of the plan and that their products conform to IRS guidelines.

B. Recommended Best Practices: Coordination with Investment Products

- Investment providers, TPAs or plan sponsors should evaluate product conformity with plan provisions in the document. This includes the administrative forms and procedures for transactions, including loans, hardship distributions and QDROs. These documents must be reviewed annually for compliance.

3. Issue Identified: Lack of a central decision maker

- Some plan sponsors are disengaged as they were pre-regulations.

A. Recommended Solutions: Lack of a central decision maker

- Create a matrix of responsibility throughout the employer organization and in conjunction with the TPA (if being used). (Note: when the 403(b) prototype documents and language are finalized, this matrix will be a part of the plan documents. In the draft LRMs (Listing of Required Modifications) this new document is referred to as a “Memorandum of Understanding” (MOU). This MOU will outline the various parties under the plan and their specific responsibilities under the plan.

B. Recommended Best Practices: Lack of a central decision maker

- Create a formal decision making process at the plan sponsor level and document in a procedures manual. Also refer to the explanation of MOU above.

#### 4. Eligibility - Universal Availability

Sometimes violated by excluding part-timers and/or specific job categories.

How can the 20-hour rule be effectively applied, especially in K-12?

Providing the effective opportunity to enroll seems to be the most difficult to accomplish with small staffs and numerous tasks.

##### A. Recommended Solutions: Eligibility

- Include everyone and explore using the plan sponsor payroll system to allow percentage salary reductions only for part-time or substitute employees.
- Provide notice of opportunity in multiple formats.
  - Printed items distributed at work locations once each year.
  - Electronic: email and intranet communications. Consider using the new social media for younger employees.
  - Benefit meetings: use these meetings to make sure everyone knows where to get required information.

##### B. Recommended Best Practices: Eligibility

- Adopt a multi-media approach—reaches young and old.
- Establish written guidelines for communications.

#### 5. Contribution Limits

- 15 Year Service Based Catch-up: This poses the largest logistical problem for plan sponsors due to the complex nature and amount of data that is required.

Plan sponsor's lack of historical information that goes back far enough to make the calculations reliable and accurate.

Annual monitoring is required because of coordination issues with Age 50 Catch-up.

##### A. Recommended Solutions: Contribution Limits

- Don't allow the special 15 year catch-up in the plan; or,
- Use a competent TPA or provider who has experience in monitoring these limits accurately, and,
- Make it clear that the 15 year catch-up can be used ONLY if prior contribution data for all years is available, and ONLY if a calculation is submitted with the salary reduction agreement.

##### B. Recommended Best Practices: Contribution Limits

- Use with caution and assure up front that historical information is readily accessible.

#### 6. Optional Provisions: to have or not to have

- In-service distributions
  - In-service Contract exchanges
  - Hardship distributions
  - Loans
- A. Recommended Solutions: Optional Provisions: to have or not to have
- In-service distributions
    - Allow at 59 ½
  - In-service contract exchanges
    - Permit but assure no 1099 is issued from the sending company.
  - Hardship distributions
    - Permit but assure formal certification by responsible party and the monitoring of the 6-month suspension period under all plans of the employer.
  - Loans
    - Allow only if data is accessible on an ongoing basis. If data is not being shared regularly, do not allow.
- B. Recommended Best Practices: Optional Provisions: to have or not to have
- Assure that you are able to obtain proper data that is supportive of the chosen options. (If you don't have it, don't do it.)
  - Encourage uniformity among provider to ensure proper handling of 1099s for contract exchanges.

In summary, the written plan in its present state ranges from very good to non-existent. The following of the written plan also covers this same spectrum. This begs for standardization through a prototype or volume submitter process. Currently there is only a draft of the 403(b) Prototype program available. Many comments were sent to the IRS when this was released. The IRS has verbally indicated that it will add certain items that were requested, such as a volume submitter program, vesting and employer contributions in the standardized form of the prototype. The final updated revenue procedure has not been released as of this writing. It was recommended that all plan sponsors review the provisions of the new IRS prototype/volume submitter program, once released, and determine if it fits their needs. If it does not, consider applying for a determination letter ruling on a custom designed plan when available. Standardization of the written plan would go a long way toward standardization of adhering to it.