

## **ASPPA Comments Relating to Announcement 2009-34 and the §403(b) Prototype Plan Program**

June 1, 2009

### **Submitted to the Internal Revenue Service**

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the Proposed Revenue Procedure for the pre-approved §403(b) plans as well as the draft sample plan language for use in drafting §403(b) prototype plans as stated in Announcement 2009-34.

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. Accordingly, ASPPA's comments primarily focus on the revenue procedure and the prototype process and the NTSAA's comments primarily focus on the Listing of Required Modifications ("LRMs").

### **Summary of Recommendations**

Under Announcement 2009-34, the Internal Revenue Service (the "Service") announced its intention to establish a program for the pre-approval of prototype plans under §403(b) of the Internal Revenue Code (the "Code"). The announcement includes a draft revenue procedure that contains the proposed procedures for issuing opinion letters as to the acceptability under Code §403(b) of the form of prototype plans. The Service simultaneously issued draft sample language, the LRMs, for use in drafting §403(b) prototype plans. ASPPA's comments and recommendations in this letter pertain to both the draft revenue procedure and the LRMs.

As stated in Announcement 2009-34 and the draft revenue procedure, the §403(b) prototype program generally is based on the M&P/volume submitter plan program for plans qualified under Code §401(a). Based on this experience, the Service believes that the proposed prototype program for §403(b) plans “offers most employers a lower-cost way to satisfy the written plan requirement and obtain assurance from the Service that a plan meets the requirements of Code §403(b) than an individual determination letter.” Further, one of the goals for the §403(b) prototype plan program is “to ensure that §403(b) prototype plans will be broadly suitable for the majority of eligible employers.” We have kept these commendable goals in mind in preparing the comments below.

APPSA appreciates the Service’s intent to introduce a pre-approved prototype plan program for §403(b) plans. Such a program will greatly benefit plan sponsors and practitioners in their efforts to comply with the written plan document requirements under the Code §403(b) regulations. We agree that basing the §403(b) prototype program on the successful M&P/volume submitter program for Code §401(a) plans is the best approach. This is especially true as §403(b) plans become more like §401(k) plans. In fact, we believe that the proposed program should much more closely mirror the current M&P/volume submitter program. Accordingly, we believe that the §403(b) prototype program needs significant modification from its proposed form. Such changes will assist practitioners (many of whom work in both the §403(b) and §401(a) plan markets) by having consistent procedures and requirements. This consistency will also help the Service staff in reviewing the §403(b) plans since the requirements will be similar to the §401(a) program.

Although we appreciate the goal of keeping the §403(b) program simple, the quest for simplicity under the draft revenue procedure will undermine the functionality of the program. To achieve the goal of making the program available to the majority of eligible employers, the Service must greatly expand the §403(b) prototype program. Our detailed recommendations in this regard follow. However, at a minimum, the expanded program should include the following:

- Incorporate the flexibility permitted under the current M&P/volume submitter program, including the ability to have “minor modifiers” and either allowing plan sponsors to make minor changes to the approved language in the prototype plans (similar to the volume submitter program, where changes simply require the filing of a Form 5307 identifying the change) or creating a separate §403(b) volume submitter program allowing for more flexible designs, as now exists in the qualified plan arena.
- Utilize the same LRM language, where possible, for prototype §403(b) and §401(a) plans.

- Allow prototype plans to include vesting schedules. It is our experience that the majority of plan sponsors that make employer contributions to §403(b) plans use vesting schedules and we cannot overemphasize the need for this change.
- Open the program more broadly to churches and church-related organizations.

## Recommendations

### A Determination Letter Program

The Service intends to establish a determination letter program for §403(b) plans that is similar to the determination letter program available to 401(a) plans. The Service will announce the specifics of the §403(b) determination letter program at a later date.

*ASPPA recommends* that the Service move forward with its plans to establish a determination letter program for §403(b) plans. However, we believe that it would be best for employers, practitioners and the Service to accommodate as many plans as possible under the pre-approved program. This includes the previously mentioned expansion to open the prototype program to more plan designs and more employers and the possible introduction of a volume submitter program.

We also believe that it would be helpful to practitioners and employers to announce the specifics of the determination letter program concurrently with the pre-approved plan program. This includes specifying the costs of programs, the ability to submit prototype plans for determination letters using Form 5307, and the need to indicate the intention to adopt a prototype plan (e.g., using a form similar to Form 8905). The information on costs will be needed as soon as possible since decisions in this area will have to be made quickly by organizations deciding between sponsoring a prototype or using individually drafted plans. In addition, procedures and systems will need to be developed to ensure compliance with remedial amendment deadlines and the availability of a “Form 8905” approach and how it will work will impact this process.

### B. “Prototype” Program

Under the current draft procedures, the §403(b) prototype program is similar to the §401(a) prototype program in that it requires plans to use basic plan documents and adoption agreements. Similarly, a plan sponsor generally loses reliance on the terms of the plan if the pre-approved language is modified.

*ASPPA recommends* that the §403(b) prototype program utilize the best features of the current M&P/volume submitter program. While we understand the pre-approved plan program cannot accommodate every plan design or employer, the goal of the prototype program is to establish as broad a program as possible to allow the majority of eligible employers to fit within the program. Among the modifications we recommend are:

- Allowing minor modifiers. Many financial organizations need special and unique language in their pre-approved plan documents. Without this modification, many financial organizations will require individually designed plans, which would then require a determination letter application, which would be much less efficient for both the plan sponsor and the Service.
- Allowing minor plan language changes from the pre-approved language with the ability to receive a determination letter using Form 5307. This would be similar to the current volume submitter program and provide a cost effective means of making minor changes to the pre-approved language. Accordingly, this should not be deemed the submission of an individually designed plan requiring the incorporation of additional unrelated amendments similar to what is now required for prototype qualified plans, which due to an amendment are deemed to have become individually designed.

### **C. “Volume Submitter” Program**

ASPPA believes that in order for the pre-approved §403(b) program to be effective for both the industry and the Service, flexibility is needed in plan design and document language. As currently proposed, the prototype program does not offer the necessary flexibility. ASPPA believes that with respect to qualified plans, the volume submitter approach has provided the degree of flexibility that the system requires. The existing program for qualified plans has been very successful in moving employers from individually designed documents to pre-approved documents. That model should be followed for the §403(b) marketplace. Part of what has made the shift possible is the flexibility offered by the volume submitter and non-standardized prototype programs. While we understand the §403(b) program is new and the IRS wants to move cautiously, it would be a waste of its efforts and a major disappointment to all if the program is significantly underutilized. A program offering enough flexibility to encourage its use will provide a higher return to all the parties involved, especially the IRS.

*ASPPA recommends* that the Service consider the addition of a second-tier program, similar to the volume submitter approach used for qualified plans. Those not needing the flexibility can stay with the prototype program, while more sophisticated employers and their advisers can make the necessary adjustments with a volume submitter approach, allowing for language modifications that would be specifically approved by the IRS without going through a full Form 5300 type submission. ASPPA would gladly work with the IRS to help determine the appropriate parameters for a volume submitter program.

#### **D. Clarification of Plan Status for 2009 and Prior Years**

The draft procedure addresses the retroactive correction of plans for years after 2009. It further states that plans must meet the requirements of Notice 2009-3 to ensure compliance with the written plan document requirements for 2009. There is considerable uncertainty as to the potential adverse tax consequences for employers and participants if the Service finds that a plan did not satisfy the written plan document requirements for 2009.

*ASPPA recommends* that the Service apply a “good faith” standard for the written plan requirement for the 2009 plan year (and all prior plan years). This will alleviate some of the concerns that employers and practitioners have relating to plan documents. In other words, as long as an employer made a reasonable *best effort* attempt to incorporate all the necessary language and terms in its document when drafted in 2008 or 2009, then it would be deemed in compliance with the written plan requirement, even if it had to make a retroactive corrective amendment.

#### **E. Exclusion of Certain Plan Designs and Plan Types from the Prototype Program**

Section 3.06 of Announcement 2009-34 states the following: “One of the Service’s goals in establishing the § 403(b) prototype plan program is to ensure that § 403(b) prototype plans will be broadly suitable for the majority of eligible employers. The Service does not intend that prototype plans be suitable for every eligible employer or every circumstance. Thus, the revenue procedure does not permit § 403(b) prototype plans to include certain provisions that the Service believes do not apply to most eligible employers, such as vesting schedules and provisions applicable only to churches and organizations described in § 3121(w)(3).”

ASPPA strongly believes that there are many eligible employers who will want or need vesting schedules and that there are a significant number of eligible employers who are churches. These two exclusions will exclude a large number of eligible employers from the program, forcing them to use individually designed plans. This is inconsistent with the goal of making the §403(b) program “broadly suitable for the majority of eligible employers.” Forcing large numbers of employers to use individually designed plans will be a huge cost to plan sponsors, and if these plans are submitted to the IRS for favorable determination letters, it will consume considerable resources at the Service. Even more significantly, it could cause some employers to decide to not to maintain a plan at all.

***ASPPA recommends*** that the Service significantly broaden the program by eliminating these exclusionary categories:

- Vesting – The large majority of §403(b) plans that include employer contributions include a vesting schedule. Vesting schedules are recognized as acceptable under the §403(b) regulations. Furthermore, as §403(b) plans become more similar to §401(k) plans, vesting schedules will become even more commonplace in §403(b) plans. This is one of the most significant shortfalls of the current draft procedures and must be changed to ensure the viability of the §403(b) prototype program.
- Churches and organizations described in Code §3121(w)(3) – We believe that precluding these organizations from taking advantage of the §403(b) pre-approved program is contrary to the Service’s stated goals. These organizations need the cost savings and compliance assurances afforded by the §403(b) prototype program at least as much as other eligible employers. The special statutory provisions applicable to these organizations (e.g., retirement income accounts, universal availability, nondiscrimination testing, the compensation limit, Code §415) are not extensive or too difficult to appropriately address. ASPPA would be glad to suggest specific approaches, including providing the Service with sample LRM language, for these types of plans.

## **F. Adoption Agreement Formats**

The draft revenue procedure and the LRM contain descriptive provisions of the prototype format, including adoption agreements. However, it is not clear what restrictions will be imposed in drafting the adoption agreements. For example, qualified defined benefit plans do not permit an adoption agreement to include both permitted disparity (integration) and non-permitted disparity benefit formulas.

*ASPPA recommends* that the Service clarify the procedures regarding the permissible formats of the adoption agreements, including:

- Standardized vs. nonstandardized adoption agreements. Are separate adoption agreements necessary?
- Adoption by different eligible employers. May all eligible types of employers be listed in a single adoption agreement?
- Contribution and allocation formulas in nonstandardized plans. May all permissible contribution and allocation formulas be provided under the adoption agreement?

## **G. Contribution/Allocation Formulas in Nonstandardized Plans**

While the draft revenue procedure specifically states that standardized plans must use one of the design-based safe harbor allocation methods under the Code §401(a)(4) regulations if the plan allows for nonelective employer contributions, it is less clear with respect to the permissible formulas under a nonstandardized plan. As previously stated, §403(b) plans have become very similar to §401(k) plans. This includes designing plans using a variety of contribution and allocation formulas that are permissible under Code §401(a)(4). These formulas include permitted disparity formulas and cross-testing formulas. Failure to provide a broad base of available contribution and allocation options will cause many employers to use individually designed plans, which is contrary to the stated purpose of the §403(b) prototype program.

*ASPPA recommends* that the procedures be clarified to provide that nonstandardized plans are permitted to include the same contribution and allocation formulas that are permitted under the §401(a) pre-approval program. If the Service is concerned about providing all the formulas under the prototype program then the development of a second program along the lines of the qualified plan volume submitter should be considered.

## **H. Minor Modifications and Language Changes**

Section 7 of the draft revenue procedure describes who can sponsor a §403(b) prototype plan. Mass submitters must submit applications for at least 30 sponsors on a word-for-word identical basis. There is no provision for minor modification or minor language modifications.

*ASPPA recommends* that the §403(b) prototype program allow “minor modifiers” similar to the M&P program for §401(a) plans. Many financial organizations need special and unique language in their pre-approved plan

documents. Without this modification, many financial organizations will require either individually designed plans or the submission of a separate prototype that is based substantially on another prototype (e.g., the mass submitter). This would unnecessarily use valuable IRS resources. We also recommend allowing minor plan language changes from the pre-approved language with the ability of employers to receive a determination letter using Form 5307. This would be similar to the current volume submitter program and provide a cost effective means of making minor changes to the pre-approved language. Again it is ASPPA's position that for the pre-approved §403(b) program to be viable and effective for both employers and the IRS, either the prototype program has to provide the necessary flexibility for minor modifications of plan language or a volume submitter program needs to be created to allow for the same flexibility now provided by the volume program for qualified plans.

## I. Duties of a Prototype Sponsor

Section 8 of the draft revenue procedure sets forth the duties of a prototype sponsor. Section 8.04 states ... "The prototype sponsor must have a procedure for adopting eligible employers to acknowledge receipt of plan amendments when an adopting eligible employer is not required to complete a new adoption agreement. The prototype sponsor must notify any adopting eligible employers that fail to acknowledge receipt of a plan amendment that failure to take the amendment into account in the operation of the plan could result in adverse tax consequences to participants."

ASPPA understands the need to ensure that adopting employers receive all relevant plan amendments. However, imposing the requirement for the sponsor to have a procedure to acknowledge *receipt* of plan amendments from the adopting employers places a tremendous burden on the sponsors. Many sponsors have thousands of employers who may adopt a prototype §403(b) plan. The administrative burden of tracking the receipt of the plan amendments will cause these sponsors to incur substantial costs in time and resources. This is particularly true where interim amendments are adopted at a sponsor level and no employer action is needed in order to adopt such amendments.

**ASPPA recommends** that prototype sponsors only be required to show that the amendments were delivered on a timely basis.

## J. Scope of Opinion Letters

Section 9 of the draft revenue procedure describes the scope of the opinion letters that sponsors receive under the §403(b) prototype program and the area for which

opinion letters will not be issued. The exclusions include provisions applicable to churches or qualified church-controlled organizations, ministers, and retirement income accounts. Section 9.04(5) also precludes prototype plans from incorporating by reference the limitations of Code §415 or the ACP test of Code §401(m)(2). ASPPA has commented to the Service with respect to qualified plans that the inability to incorporate these provisions by reference wastes valuable resources, can only result in errors as plan drafters attempt to recreate the regulations, and it will not foster compliance as it substantially increases the size of the document thereby minimizing the impact of all provisions in the plan.

*ASPPA recommends* that §403(b) prototypes be permitted to include provisions applicable to churches and church-controlled organizations and ministers. These organizations need the cost savings and compliance assurances afforded by the §403(b) pre-approved program at least as much as other eligible employers. The special statutory provisions applicable to these organizations (e.g., retirement income accounts, universal availability, nondiscrimination testing, the compensation limit, Code §415) are not extensive or difficult to address. ASPPA would be glad to suggest specific approaches, including providing the Service with sample LRM language, for these types of plans.

*ASPPA also recommends* that the Service allow prototype plans to incorporate by reference the provisions of plans of Code §415 and the ACP test of Code §401(m)(2).

## **K. Employer Reliance on Opinion Letters**

Section 10 of the draft revenue procedure describes the reliance afforded eligible employers who adopt standardized and nonstandardized plans.

*ASPPA Recommends* that the Service clarify the extent of reliance on the adoption of a prototype plan, especially for standardized plans. We believe that the reliance rules for §403(b) prototype plans should be the same as the reliance rules under the M&P/volume submitter program for qualified plans. Specifically, employers should be able to rely on the opinion letter for a standardized plan with respect to Code §401(a)(4) and Code §410(b). The procedures should specifically state this so that adopters do not feel compelled to submit for a determination letter.

## **L. Maintenance of Approved Status**

Section 11.02 of the draft revenue procedure requires that: “If a prototype sponsor determines that a § 403(b) prototype plan as adopted by an eligible

employer may no longer satisfy the requirements of §403(b) and the prototype sponsor does not or cannot submit a request to correct under the Voluntary Correction Program (VCP) component of the Employee Plans Compliance Resolution System (EPCRS), the prototype sponsor must notify the eligible employer that the plan may no longer satisfy §403(b), advise the eligible employer that adverse tax consequences to participants may ensue, and inform the eligible employer about the availability of EPCRS."

The preparation of plan documents is done by practitioners that fulfill many different roles on behalf of the employer clients. Not all the practitioners, who intend to sponsor pre-approved plans, are necessarily in the position to know the adopting employer's compliance status. Accordingly, ASPPA strongly disagrees that all prototype plan sponsors should have the burden of monitoring the compliance status of §403(b) plans of their adopting employers. This places impossible burdens on some of the plan sponsors and is beyond the scope of responsibilities for practitioners.

*ASPPA recommends* that Section 11.02 be removed from the procedure. However, if the Service retains such provision, then it should be moved to Section 8.

## **M. The Opinion Letter Application Process**

Section 12 of the draft revenue procedure describes the process for submitting an application for an opinion letter. New Forms 8929 and 8929-A will be used for this purpose and these forms must be "typed."

*ASPPA Recommends* that the Service solicit comments on Forms 8929 and 8929-A prior to their publication. Also, if the Service is requiring that the forms be typed, the Service should ensure that the downloadable forms are available in the "fill-in-the-blank" format.

## **N. Transferring Prototype Sponsorship**

Section 12.10 states ... "An opinion letter issued to a prototype sponsor is not transferable to any other entity. For this purpose, a change of employer identification number is deemed to be a change of entity."

In the economic environments in which practitioners often find themselves, businesses are bought and sold on a routine basis. The inability to sell one's block of business and the associated client relationships is a major impediment to doing business. The adopting employers may find themselves without proper

support if their providers are prohibited from providing for the continuation of their business relationship. If a consultant dies or retires, should all of the employers utilizing his or her services be forced to go find new providers on their own? We believe this to be an unreasonable restriction which will hamper normal business transactions. Is the IRS going to allow submissions by pre-approved sponsors after the close of the initial submission period so that adopting employers can retain proper reliance on documents? This relates to the underlying issue which resulted in the necessity of the Service to issue Revenue Procedure 2008-56. With even fewer mass submitters likely existing in the §403(b) arena, there is going to be a problem for adopting employers to find replacement providers to support their documents on an on-going basis. If no one can step into a provider's role, who will provide the adopting employers with the necessary "interim amendments"?

*ASPPA recommends*, at a minimum, that the Service include the following language in Section 12.10: "Another entity may, however, assume the sponsorship of the pre-approved plan by filing for new opinion letters. As part of the assumption of the sponsorship, the new entity assumes all obligations and rights that the original entity had. For example, the new entity may adopt amendments on behalf of all employers who had adopted the plan while it was sponsored by the original entity."

## **O. Notification of Intent to Submit Opinion Letters Applications**

The Service has requested that entities that expect to sponsor (or be a mass submitter of) a §403(b) prototype plan to so advise the Service in writing by June 1, 2009. We appreciate the Service's desire to anticipate its workload. However, given the status of the draft procedures and LRMs, it will be difficult for many entities to determine at this time whether to sponsor a prototype. If the Service expands the §403(b) program in manners consistent with this comment letter, we believe the number of potential sponsors will increase substantially.

The ASPPA Government Affairs Plan Document Sub-Committee includes representatives from many of the qualified plan document vendors. Most of the large mass submitters in the §401(a) arena fully intend to be mass submitters for §403(b) plans. However, without the added flexibility and other changes we have recommended, there is concern that it might be difficult or impossible to sign up the requisite 30 word-for-word adopters. In that §401(a) arena, the IRS will allow a mass-submitter profit-sharing sponsor to be a mass submitter for target benefit or money purchase pension plans even though they may be unable to secure 30 identical adopters on those documents.

**ASPPA recommends** that if the Service wants a more accurate forecast of the number of prototype plans expected to be submitted, then the Service should ask the question again after the final revenue procedure has been issued. We also recommend that for purposes of qualifying as a §403(b) prototype plan mass submitter, if the sponsor has already qualified as a mass-submitter on §401(a) documents, they should be allowed for this first round of the 403(b) program to be considered a mass-submitter without regard to the “30 identical adopters” requirement.

## **P. Comments Relating to LRM Provisions**

*ASPPA recommends* that the Service make the following modifications to the LRMs:

LRM #11: For the reasons outlined above, Retirement Income Accounts should be added to the permissible funding vehicles.

LRM #13: The LRM should state the potential conflict with Title I of ERISA if an employer elects to exclude “employees who normally work fewer than 20 hours per week.”

LRM #20: The language should clarify the definition of “full-time” and “part-time” employees.

LRM #21: The language should allow for modification of the “Allocation of Duties” provisions without requiring a plan amendment.

LRM # 22: The provision should allow for reasonable administrative procedures for plan entry for making elective deferrals.

LRM #31: The LRM should allow plans to incorporate by reference the provisions of Code §415.

LRM #33: The LRM should be clarified to state that the \$5,000 threshold is not mandatory and that lower amounts can be used.

LRM #42: The provision should state that the 15-year limit on residential loans is suggested, but not mandatory. Also, the provision should allow for the use of outside loan policies to establish applicable restrictions.

LRM #48: This provision should be expanded to clarify the Service's position on the ability to terminate a §403(b) plan.

LRM # 60: The LRM should allow for the use of the elapsed time method for determining service.

LRM # 62: The LRM should clarify the permissible contribution and allocation formulas under a nonstandardized plan, including the use of permitted disparity and cross-testing formulas.

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These comments were prepared by ASPPA's Plan Document Subcommittee of the Government Affairs Committee, and were primarily authored by John Griffin, Elizabeth Hallam and Richard Hochman. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

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