ASPPA®
WORKING FOR AMERICA'S RETIREMENT

February 3, 2010

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

Re: 403(b) Arrangements - Title I Exemption

Dear Ms. Borzi:

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

ASPPA is a national organization of more than 7,000 members who provide consulting and administrative services for retirement plans covering millions of American workers. ASPPA's membership includes the members of the National Tax Sheltered Accounts Association ("NTSAA"), a nonprofit organization that recently became part of ASPPA in order to expand both organizations' strengths in serving the §403(b) marketplace. ASPPA and NTSAA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA a unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Background

When ERISA was enacted, many charitable organizations offered 403(b) savings arrangements to their employees because of the favorable tax treatment available under the Internal Revenue Code. ERISA Regulation §2510.3-2(f) recognized that under certain circumstances, these arrangements were an accommodation offered to employees and

should not be subjected to ERISA coverage. However, to be exempt from ERISA, the arrangement must afford employees a "reasonable choice" of funding media, funding products and annuity contractors. At the time the regulation was written, investment providers typically sold propriety products from the single company they represented. As a result, the "reasonable choice" requirement usually required that multiple providers be included in the arrangement in order to fit within the exemption.

At the time the regulation was written, open architecture investment platforms (which allow for multiple investment providers to be accessed through a single source) simply did not exist. The recently developed open architecture technology and the cost savings it affords, dramatically changed practices. It is now possible for a single party to offer to an employer a wide range of unrelated investment products through a single variable annuity or custodial account. The language in the existing regulation on this issue emphasizes that all relevant circumstances must be considered and provides a list of potential factors that are meant to be illustrative but NOT all inclusive. As a result, the existing regulation is very accommodative to these newer practices when today's cost effective technology is considered.

Discussion

Regulation §2510.3-2(f) was intended to accommodate common practices that had developed with regard to charitable entities offering 403(b) type savings arrangements to their employees. Under the regulation, an employer will not run afoul of the exemption by "limiting the funding media or products available to employees, or the annuity contractors who may approach employees, to a number and selection which is designed to afford employees a reasonable choice in light of all relevant circumstances," While the preamble refers to a choice of "annuity contractors," it does not address how those "contactors" may be accessed and made available to employees. We believe that this "choice" language is fairly read as a reference to the number of investment providers (e.g., insurance companies, mutual fund companies, etc.) and investment options available to participants. It should not be read as requiring a "choice" of sales agents, consultants or registered representatives if employees can access those same products through the single "portal" or "payroll slot" of an open architecture investment platform.

At the time the regulation was issued, it was commonly understood that "limiting the funding media or products available," was synonymous (in 1977) with limiting the number of investment options and custodial arrangements (and the inherent associated risks) available to employees purchasing their 403(b) investments. Purchasing an annuity

contract from an insurance company meant investing in that insurance company's "fixed account," together with no more than two or three variable investment accounts, also managed and custodied by that insurance company. Purchasing mutual funds (which had just become available for 403(b) investment in 1974) meant merely purchasing investments managed by a single investment manager.

The newly developed open architecture platforms, whether they are based on custodial or annuity arrangements, mimic the 1977 market-with enhancements. They all offer three things: the investment in a large number of fixed and variable investment funds managed by companies unrelated to the "underwriter" or "sponsor" of the platform; the ability to daily trade between those unrelated funds without transactional costs and without administrative delay (something unheard of in 1977); and the custody of the contributions directed to the equity options being physically outside of the control of these companies. The platforms are merely portals to a diverse range of investments held and managed by a wide array of unrelated managers, serving as a conduit of funds to be held elsewhere, and traded through a national clearinghouse unrelated to the company offering the program.

These multi-manager programs today are often offered without a competing "portal." This is because the employer is offering a large number investment fund families through that single portal. It sees little use in allowing similar fund families to be made available through another "portal," where the only difference may be the distribution channel which is used.

These single source offerings must be able to survive under the safe harbor because it makes little policy sense to force higher compliance and transactional costs on the employer and employee without offering any material increase in choice or reduction in risk. While it is true that these platforms may be designed in such a way as to cause the 403(b) arrangement to fall outside of a safe harbor exemption, many are designed in such a way as to comply. A well designed "single portal" program not only comes within the spirit of Regulation §2510.3-2(f), but also falls within a reasonable application of the "limited contractor" rule. This is so, regardless of the size of the employer.

Recommendation

ASPPA recommends that in light of advances in technology since Regulation §2510.3-2(f) was first issued, DOL release "informal" guidance to clarify that an additional relevant circumstance to be considered in applying the "reasonable choice" requirement

is recognition that an open architecture platform be judged by looking through the "portal" to the funding media, funding products and annuity contractors available to employees on the platform

We also respectfully request that the DOL representatives acknowledge that open architecture platforms with a single portal can be designed to meet both the letter and the spirit of the safe harbor.

* * * * * *

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

Courtesy Copies:

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

Robert Doyle
Director, Office of Regulations & Interpretations
200 Constitution Avenue NW
Room N5669
P-420
Washington, DC 20210

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

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