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NTSAA

June 22, 2010

Mr. Andrew Zuckerman
Acting Director, Employee Plans
Internal Revenue Service
1750 Pennsylvania Ave., NW
Washington, DC 20006

Re: Request for Guidance on IRC §403(b) Plan Terminations

Dear Andy:

The American Society of Pension Professionals & Actuaries ("ASPPA") and the National Tax Sheltered Accounts Association ("NTSAA") submit this request for guidance with respect to the termination of a 403(b) plan. We believe there is much confusion with respect to the manner in which a liquidating distribution is made when a 403(b) plan is terminated. It is for this reason that we respectfully request that the Service provide guidance as requested below.

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 NTSAA, a nonprofit organization that recently became part of ASPPA in order to expand both organizations' strengths in serving the IRC §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 the rules affecting tax sheltered annuities under section 403(b), 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

Over the last few years, many employers have decided to terminate their 403(b) plans. There been various reasons for these terminations, including the increased cost of compliance associated with changes made by the final regulations. Our members have done their best to assist these employers in handling these terminations. However, this has been difficult because of some unanswered questions regarding the requirements to complete a plan termination.

One of the hurdles to get over is the legal control of the funding vehicle. Under state contract laws and federal securities laws, the participants are the legal owners of these individual contracts and custodial accounts and only participants may determine whether

distributions will be made from the contracts/accounts. Accordingly, employers may act to terminate a 403(b) plan, but may not be able to force participants to take distributions. Unfortunately, it is not clear when an individual contract or custodial account is considered "distributed" for plan termination purposes. As a result, many plans are in limbo.

The final 403(b) regulations permit the non-taxable distribution of "fully paid annuity contracts" upon the termination of a 403(b) plan. However, informal comments made by government speakers at various conferences over the last few years have resulted in widespread confusion over the manner in which this rule is to be applied. This, in turn, has virtually frozen the ability of employers to terminate their plans.

The confusion relates to what qualifies as a "termination distribution" following the employer termination of a 403(b) plan. The following examples are illustrative of where the confusion lies:

- The 403(b) plan is invested in individually owned annuity contracts. Ideally, the employer would notify the issuer of the individually owned annuity contracts that the plan has been terminated, to remove the employer from the issuer's records, and to deal directly with the former plan participants as the owners of the "distributed" contracts.

- The 403(b) plan is invested in individually owned custodial accounts. Ideally, the employer would notify the sponsor/custodian of the individually owned custodial accounts that the plan has been terminated, to remove the employer from the sponsor/custodian's records, and to deal directly with the former plan participants as the owners of the "distributed" custodial accounts.

- The 403(b) plan is invested in a group annuity contract. Ideally, the employer would notify the issuer of the group annuity contract of the plan termination and further direct the issuer to issue individual annuity certificates to the former plan participants as owners of the "distributed" annuity contracts upon the termination of a plan.

Recommendations

ASPPA believes that each of the above fact patterns should be recognized as non-taxable termination distributions of a fully paid annuity contract. Accounts deemed distributed in this manner would no longer be included under the employer's plan, could be treated like "grandfathered" accounts for operational purposes and would not be taxable until withdrawn**,** if the following conditions are met:

1. The employer properly adopts a resolution that terminates the plan, deems all individually owned contracts/accounts to be distributed to the employees and former employees and delegates all administrative and compliance responsibilities

to the issuers (or the sponsor/custodians) of the accounts /contracts. (If necessary, the resolution would authorize a plan amendment to permit distribution on termination.) The employer would engage in a good faith effort to promptly notify the issuers of contracts and/or account custodians of this action and provide them with a copy of the resolution and the form of notice to participants referenced in paragraph 5 below.

2. In the case of a group annuity contract, the employer would take the above steps and instruct the issuer(s) of the group contract(s) to distribute individual annuities or certificates under the group contract to the individual participants.

3. The contracts or accounts would continue to qualify as 403(b) contracts and not be materially different from the terms of the contracts as they existed under the plan, and be administered in accordance with the contracts' terms. The issuer (or the sponsor/custodian) would then become the "administrator" of the contract with responsibility for maintaining the contracts terms in accordance with 403(b), as well as managing 403(b) distributions in a compliant manner.

4. The amounts in all accounts and contracts would be fully vested upon termination of the plan.

5. The accounts and contracts would be deemed distributed for purposes of satisfying the 403(b) plan termination requirements. This treatment would be conditioned upon a showing of "good faith" effort by the employer to provide written notification to every known current and former participant that the plan is being terminated. The notice would inform each individual that his or her entire interest under the terminating plan is being distributed and advise the participant of the consequences of plan termination, as well as the information otherwise required under IRC §402(f). The notice could then be used by the participant as a basis to authorize a rollover of his or her 403(b) account or contract under the terminating plan, to take a distribution, or to transfer to another employer's 403(b) plan (subject to the terms of the recipient plan) without requiring the employer's oversight (for ease of administration and vendor support on accounts no longer attached to a plan).

6. If the 403(b) contract includes life insurance, the procedures outlined above would not change.

Individually owned custodial accounts should be treated in the same manner as individually owned annuity contracts, consistent with the language under IRC §403(b)(7)(A).

In addition, in an effort to effectuate the termination of the 403(b) plan where there are outstanding loans, we request that the guidance also address the need to permit any outstanding loan to be included in the definition of a "fully paid annuity contract." In

other words, since this is merely a deemed distribution of the plan assets to individual annuity contracts/custodial accounts, the loan should be moved intact to the individual annuity/custodial account. In the context of a 403(b) plan, we are requesting that all of the assets (including an outstanding loan) be part of the "movement" to the "fully paid annuity contract/custodial account."

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.

Respectfully submitted,

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