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January 23, 2012

Mr. Joseph H. Grant  
Acting Commissioner  
Tax Exempt & Governmental Entities Division  
Internal Revenue Service  
1750 Pennsylvania Avenue, NW  
Washington, D.C. 20006-4508

**RE: 403(b) Prototype Plans**

Dear Commissioner Grant:

The National Tax Sheltered Accounts Association (NTSAA) and the American Society of Pension Professionals & Actuaries (ASPPA) are writing to support the inclusion of 403(b) plans in the prototype program for pre-approved plan documents. We understand from informal comments made by Internal Revenue Service (the “Service” or “IRS”) officials that budget concerns have resulted in a reexamination of whether to include 403(b) plan documents in the pre-approved plan program. For the reasons outlined below, we believe that a prototype program for 403(b) plans is essential for the proper administration of the tax laws. After the issuance of so much guidance related to the written plan requirements, we believe it would be a mistake to abandon an integral component of 403(b) compliance. We therefore urge the Service to proceed with implementation.

ASPPA is a national organization of more than 8,500 members who provide consulting and administrative services for retirement plans covering millions of American workers. ASPPA’s membership includes the members of 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-based retirement plan system.

**Background**

In 2007, the Department of the Treasury and IRS finalized regulations under Internal Revenue Code (“Code”) section 403(b). One new mandate in the final regulation is that 403(b) arrangements be evidenced by a written plan. To assist in meeting this new requirement,

Treasury and IRS officials issued various pieces of guidance confirming that 403(b) arrangements must have a compliant document and describing the remedial amendment and prototype programs that would soon be available.<sup>1</sup>

In addition to the formal guidance, IRS officials have stressed repeatedly at conferences and in other forums the importance of the written plan requirement and that the Service's audit and enforcement agenda for 403(b) arrangements will be checking to ensure compliance. Those admonitions were often followed by the promise of an upcoming 403(b) prototype program which would make compliance possible at a cost that is reasonable. IRS officials have also informally indicated that the next iteration of the Employee Plans Compliance Resolution System (EPCRS)<sup>2</sup> is expected to include provisions to assist 403(b) arrangements in correcting a failure to meet the requirements of the 403(b) regulation, including the written plan requirement. The IRS has stated in the Employee Plan News, as well as in the 403(b) plan FAQs on the IRS website, that employers should not submit any 403(b) plan document failures under EPCRS until the EPCRS Revenue Procedure has been updated.<sup>3</sup> We also understand that the ultimate release of the EPCRS Revenue Procedure is dependent, in part, on decisions relating to the 403(b) plan prototype program.

## Discussion

Many plan sponsors and their advisors have followed the new 403(b) plan document mandate closely over the last few years and anticipated the 403(b) prototype plans would be available by now. If 403(b) pre-approved plans are ultimately not included in the prototype program, it will put plan sponsors, such as charities and public schools, in a potentially untenable position. They are required to have a compliant written plan under the final regulation. IRS enforcement agents will be actively auditing whether their plan documentation is correct. Yet the Service has indicated that it may not be willing to provide for a cost-effective pre-approved 403(b) plan document program, as they do for the private sector. In effect, the failure to add 403(b) plans to the prototype program would put 403(b) plan sponsors -- for which the written plan is commonly a new requirement -- at a significant disadvantage compared to 401(k) plan sponsors. This cost and uncertainty will cause a percentage of current plan sponsors to terminate their programs and discourage other nonprofit employers from adopting new plans.

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<sup>1</sup> See, e.g., IRS Rev. Proc. 2007-71 (providing model language for public schools to use to adopt or amend 403(b) plans); IRS Notice 2009-3 (providing relief during 2009 from the written plan requirement); IRS Announcement 2009-34 (containing a draft procedure for a prototype program for 403(b) plans); and IRS Announcement 2009-98 (providing a remedial amendment period to correct form defects in 403(b) plans).

<sup>2</sup> The current version is contained at IRS Revenue Procedure 2008-50.

<sup>3</sup> See, Internal Revenue Service, *Some 403(b) Plan Errors are Ineligible for Voluntary Correction Program*, Employee Plans News (March 23, 2011), available at <http://www.irs.gov/retirement/article/0,,id=237495,00.html> (stating "Recently, we have received several Voluntary Correction Program submissions for 403(b) retirement plan failures that are currently ineligible for correction through VCP....We will return all VCP submissions (including fees) containing ineligible failures....We are in the process of updating Revenue Procedure 2008-50 to expand EPCRS to include post-December 31, 2008 failures."); Internal Revenue Service, *Retirement Plans FAQs regarding 403(b) Tax-Sheltered Annuity Plans*, available at <http://www.irs.gov/retirement/article/0,,id=172433,00.html> (explaining under "Do 403(b) plans have to amend their plan documents to comply with changes in the law?" that "Reliance for employers who establish a 403(b) plan on or after January 1, 2010, is retroactive to the plan's effective date if the employers either: timely adopts a pre-approved plan with a favorable opinion letter, or timely applies for an individual determination letter and corrects any form defects retroactive to the plan's effective date once these programs are available.").

In urging the Service to include 403(b) plans in the prototype program, NTSAA and ASPPA offer these additional comments:

- The sponsors of 403(b) plans are public schools (including public K-12, community colleges, colleges and universities) and Code section 501(c)(3) charitable organizations. Many of these plans are exempt from Title I of ERISA and its written plan requirement. For ERISA-exempt 403(b) plans, the written plan requirement represents a new mandate that is unique to the 403(b) regulations. While many of the larger plan sponsors can afford to seek the assistance of competent and knowledgeable counsel to draft individually designed plans, for smaller employers, this is cost prohibitive. The availability of IRS preapproved documents provides an important cost savings and safety net for both the plan sponsor and their participants, particularly for smaller tax-exempt organizations that cannot otherwise afford the cost of hiring counsel to draft a compliant plan document.
- Even if a plan sponsor can afford to obtain an attorney-drafted 403(b) plan, there is no certainty that the document will be found on audit to be sufficient. Including 403(b) plans in the prototype program would provide plan sponsors with certainty that the form is acceptable to the IRS. While 403(b) plan sponsors want to be fully compliant with the form and operational requirements of the Code, the complexity of these requirements will make it extremely difficult to achieve this goal without an approved plan document.
- Recent IRS compliance initiatives have been premised on the assumption that 403(b) plan sponsors would soon have the benefit of a cost effective pre-approved plan program. For example, the extension of the existing 403(b) plan remedial amendment period is tied to the release of a 403(b) preapproved plan. A delay in implementing this program also delays the final updating process for written plans, leading to further confusion, all to the possible detriment of plan participants.
- Public schools and charitable organizations need approved plan documents as the foundation for voluntary compliance with very complicated tax laws. This document approval procedure has been in place for 401(a) plans for many years, even predating ERISA.<sup>4</sup> Although the model plan language that the Service provided for public schools continues to be very helpful, it provides no reliance to other employers. Additionally, the model language for public employers does not address some common plan provisions, such as employer contributions and vesting. Finally, the IRS also benefits from having a plan preapproval process. The pre-approved plan program for 401(a) plans more efficiently leverages the Service's resources that would otherwise be involved in reviewing individually drafted plan documents. Those same efficiencies would be available for prototype 403(b) plan documents.<sup>5</sup> Having a relatively small number of IRS

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<sup>4</sup> See, e.g., IRS Rev. Proc. 68-45, (permitting the issuance of opinion letters for master and prototype plan documents).

<sup>5</sup> One logical response for plan sponsors seeking certainty with regard to their new 403(b) plan documents may be to form a long queue of letter ruling requests (assuming that the Service is willing to accept such requests), which could significantly tax the Service's resources and result in long delays for plan sponsors. In that regard, it is our understanding that the IRS currently rejects all letter ruling requests that are submitted in a format similar to a prototype plan, which combines a basic plan document with a plan-specific adoption agreement. If that is the case,

reviewers ensuring that the 403(b) preapproved documents qualify means that countless plan sponsor plan documents may be presumed on audit to be compliant. Eliminating this turgid plan review on audit will ease the audit process and free up Service personnel for other important priorities.

- A prototype program also could provide helpful insights into the Service’s perspective on some important drafting considerations, including (1) plans that use multiple funding vehicles (annuities and custodial accounts), (2) required content of funding vehicles that form a part of a plan, and (3) plan termination provisions

In our view, if the Service does not follow through on its promise to add 403(b) arrangements to the pre-approved plan program, it will do a serious disservice to the 403(b) community and the goal of compliance with the tax laws.

***NTSAA and ASPPA strongly urge*** the Service to proceed with all deliberate speed to include 403(b) arrangements in the pre-approved prototype program for the reasons outlined herein.



These comments were prepared by the ASPPA/NTSAA Governmental Affairs Committee’s Tax Exempt and Governmental Plans Subcommittee, Robert J. Toth and Edie H. Russo, Co-Chairs and were primarily authored by Bruce L. Ashton, Esq., APM. We welcome the opportunity to discuss these issues with the Service. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/  
Brian H. Graff, Esq., APM  
Executive Director/CEO

/s/  
Judy A. Miller, MSPA  
Chief of Actuarial Issues

/s/  
Craig P. Hoffman, Esq., APM  
General Counsel

/s/  
Mark Dunbar, MSPA, Co-Chair  
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then without a prototype program, governmental and tax-exempt entities would be required to pay tens of thousands of dollars for an individually-designed 403(b) plan in order to obtain a letter ruling for the plan. Conversely, a prototype program would, in our view, help ease the burden on IRS resources.

cc: Robert S. Choi, Director, Employee Plans  
Andrew E. Zuckerman, Director, EP Rulings & Agreements  
Mark O'Donnell, Director, Director Customer Education and Outreach  
Monica A. Templeman, Director, EP Examinations