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Written Comments Submitted to the U.S. Department of Labor Advisory Council on Employee Welfare and Pension Benefit Plans

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On behalf of ASPPA and NTSAA

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Pension Plan Auditing and Financial Reporting Models**

Mr. Chairman, my name is Kristi Cook. I am a lawyer practicing in Jenkintown, Pennsylvania with more than 30 years of experience in employee benefit matters with a particular emphasis on issues relating to 403(b) plans and arrangements. I am speaking today on behalf of the American Society of Pension Professionals and Actuaries (“ASPPA”) and the National Tax Sheltered Accounts Association (“NTSAA”). 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. Both organizations and their members wish to thank this Committee for the opportunity to present information to the Committee today and offer some insights into the unique issues facing 403(b) plan sponsors. We will focus our comments on the specific questions asked by the Committee as they relate to 403(b) plans.

Reporting Requirements

Our membership strongly feels that the DOL must continue to support the limited scope audit for 403(b) plans. The loss of the limited scope audit would make an audit of a multi-vendor 403(b) plan prohibitively expensive. 403(b) plans that use multiple vendors generally have no trustee or centralized data consolidator. The transactions and processes performed by each investment provider in the plan, including direct transactions with the plan sponsor, with each other and potentially with other investment providers that may not be part of the plan would all be required to be audited. This is further complicated

by the widespread use of individual contracts, where the employer has limited access to or control over the investment contract. We understand that the costs for this kind of audit have been quoted to be a multiple of the cost of an audit utilizing the limited scope exemption. This would seriously jeopardize the ability of charitable organizations to maintain these plans.

Our membership also strongly supports a modified financial reporting model for 403(b) plans that can satisfy the statutory goals of §§ 103 and 104 of ERISA, but is designed on the data that is available to 403(b) plan sponsors rather than the traditional qualified retirement plan. The concept of a centralized trust that is typical in the 401(a) market upon which the current financial reporting models depend simply does not exist in significant portions of the 403(b) market, and the ERISA reporting rules need to recognize this reality. Because many 403(b) plans have been historically funded through individually controlled annuities and custodial accounts, plan level data is often not available to the plan sponsor. However, individual account data and records are always available regardless of the manner in which the 403(b) plan is funded.

We recommend that for 403(b) plans that are funded with individual annuities and 403(b)(7) custodial accounts, “plan level” audits only be accurate going forward from a specified date and no historical data (before that date) be required for any purpose. Participants’ interests are still protected in three ways:

- from employer malfeasance, because the employer has no access or control to those funds since the employees already own and control the contracts,
- from institutional malfeasance since the assets may only be invested in products issued by specific institutions which are highly regulated and audited; and
- participants themselves are protected by the securities laws in ways 401(a) participants are not, and are required to be sent transaction acknowledgements, regular statements in a timely matter, and annual financial reports on their investments.

Certification of the limited audit type for these kinds of “prior assets” contracts should provide sufficient protection, when combined with security law requirements on these contracts. As was recognized in FAB 2009-02, employers cannot obtain information on many 403(b) contracts issued prior to the final 403(b) final regulations or contracts that may have been transferred from the plan to other investment providers. Thus, information on plan assets may not be obtainable. Accordingly, if there is no “cut-off” date, the information cannot be relied upon and plan level audits will not accurately reflect the financial status of 403(b) plans.

We have two suggestions to implement this recommendation. First, we suggest that the Department of Labor (the “Department”) select a date that establishes a future target date for 403(b) product providers and data service providers to have developed an industry wide data format for 403(b) plans.¹ On this future date, all 403(b) product providers must be able to provide future information on 403(b) transactions and records in a uniform and consistent standard, acceptable to the marketplace (or the auditing

¹ Such an effort is currently underway. SPARK and NTSAA/ASPPA are working together to try to establish data sharing protocols for 403(b) plans and products. Unfortunately, work on ERISA 403(b) plans has not yet begun.

community). The Department should also clearly indicate what information will have to be reported so that corporate resources can be efficiently used to provide the necessary information.

Secondly, if the Department cannot implement this recommendation, we suggest that employers be entitled to provide to the auditor a representative sampling of individual statements, rather than attempting to consolidate the information at the plan level. All investment providers should be able to produce the requested records and the production would not generate additional costs or expense to the plan. All plan transactions would be reported on the individual records as, industry wide, there are not consistent sources of plan level assets available from the investment providers.² Unfortunately, in plans that use or have used individual accounts/contracts, the individual account records may be the only source of accurate historical plan information.

Auditor Training

Because of the unique features of 403(b) plans and the specialized knowledge that is required to understand the funding, transaction requirements, ownership variations and resulting control over the assets, we strongly recommend that individuals who audit 403(b) plans be required to undergo training and education on 403(b) plans and the problems that must be addressed and resolved by such plans after the final 403(b) regulations. Many of the problems that we are addressing in this testimony result from the auditing community treating 403(b) plans just like other qualified retirement plans with centralized funding and administration. We think the result would be different if auditors were trained in and had knowledge of how 403(b) plans were structurally, operationally and legally different. The audit requests in the marketplace have no consistent standards and the variations make compliance expensive for employers and product providers. We believe that establishing educational requirements and/or certification requirements documenting a level of expertise in 403(b) plans should be required for individuals who audit 403(b) plans. We also believe that educating the auditing community will result in consistency in auditing standards which should reduce the overall costs to employers.

Finally, we would like to ask the ERISA Advisory Council to consider the following when making recommendations to the Department:

1. Most auditors performing the initial audits for calendar year 403(b) plans require 1 ¼ years of plan data from plans (and investment providers). This requires employers and product providers to gather data for year-end 2008, which materially limits the relief provided under FAB 2009-02. The auditing of the prior year-end data for initial audits is standard procedure for auditors, but has created industry wide problems as investment providers have struggled to create plan level data from individual account records.
2. The counting of participants for the small plan audit exemption continues to be a challenge, and we recommend a change in those rules as they apply to 403(b) plans. The “active participation” requirement for 403(b) plans should be modified to count only participants that make or receive contributions or forfeitures during the current year. Because of the application of the “universal availability rule,” most 403(b) plans permit all employees to become participants immediately

² For example, 403(b) product providers usually store 403(b) account information on retail (individual) platforms or institutional (plan) based on the size of assets held. The plan is established. Smaller plans will never be treated as institutional plans.

upon employment. Thus, all employees are eligible to participate in the plan and are counted as part of the 100 active employees for the small plan exception. Many small 501(c)(3) organizations with nonmatching 403(b) plan will have low participation rates, yet will not qualify for the small plan exception because of the application of the universal availability rules for salary reduction contributions. As a typical example, a multi-state 501(c)(3) service organization with 13 locations has 120 employees who are eligible to participate in the plan, and thus must arrange for an audit. However, only 35 elect to make contributions. The average of the three fee quotes received for an audit for this plan was \$15,000. This employer will terminate the plan as soon as the IRS releases the plan termination methodology because the cost of maintaining the plan, administering the plan, and paying for the audit exceeds the benefit provided to 35 employees.

3. An industry standard data sharing model for non-ERISA plans is close to completion after 2 ½ years of work.³ Because of the difficulty coordinating information held on different systems, individual account platforms, omnibus accounting systems, group/plan based platforms, proprietary or customized systems designed to support unique contract features, etc., uniformity and consistency have been challenging. It is important to note that work on the ERISA data sharing model has not yet begun. When it is completed, the data that the auditors are now asking for may be available in more uniform and consistent formats for 403(b) plans, as it is for other qualified plans. Until that time, we expect that fees for auditing services for 403(b) plans will have a significant impact on the ability of smaller 501(c) organizations to maintain their 403(b) plans.

Because of the wealth of knowledge and expertise of our membership, NTSAA/ASPPA will volunteer to work with the Department, the auditing community, the AICPA, and/or any other organization to develop better and more meaningful reporting and auditing standards for 403(b) plans. However, based on our experience in this marketplace, we also advise this Council to encourage the Department to set realistic time lines. Establishing a date does not mean the marketplace can meet it. NTSAA/ASPPA will also volunteer to work with the auditing community and the Department to develop training or education programs on 403(b) plans.

³ The SPARK Institute began work on the 403(b) project in 2008 and some financial services organizations have been implementing the SPARK date formats in 403(b) plan transactions. NTSAA/ASPPA recently joined SPARK's efforts to coordinate administrative, reporting, recordkeeping and compliance information systems with the financial transaction reporting systems.