Statement for the Record of M. Kristi Cook, JD, TGPC Submitted to the Advisory Council on Employee Welfare and Pension Benefit Plans

On Behalf of:

The American Society of Pension Professionals and Actuaries (ASPPA) and the National Tax Sheltered Accounts Association (NTSAA)

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Current Challenges and Best Practices for ERISA Compliance for 403(b) Plan Sponsors

INTRODUCTION

ASPPA and NTSAA appreciate the opportunity to provide this Statement for the Record to the Advisory Council on Employee Welfare and Pension Benefit Plans ("Advisory Council") on these important subjects.

M. Kristi Cook is a practicing attorney with over 30 years experience working in employee benefit matters. Ms. Cook provides her testimony and this statement on behalf of ASPPA and NTSAA where she is a member of the Tax Exempt and Governmental Plans Subcommittee of the ASPPA and NTSAA Government Affairs Committee. ASPPA is a national organization of more than 7,500 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 §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 and NTSAA 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 and NTSAA's membership is diverse but united by a common dedication to the employer-based retirement plan system.

DIFFERENCES BETWEEN 403(b) PLANS AND 401(a) QUALIFIED PLANS

The primary differences between 403(b) programs and retirement plans that are qualified under Code §401(a) ("qualified plans") relate to the involvement of the employer in 403(b) plans and the use by 403(b) plans of annuity contracts and custodial accounts. These differences provide context and the reasons for statutory and regulatory differences. They also justify the unique compliance treatment that has traditionally been provided to 403(b) plans.

Involvement of Employer in 403(b) Plans

First is the involvement of the employer in 403(b) plans, which results from the development of the 403(b) marketplace.

The Internal Revenue Code (the "Code") has permitted certain nonprofit employers to purchase annuities for employees on a tax-deferred basis since 1942. However, §403(b) plans have specifically been authorized since they were added to the Code in 1958 to provide employees of organizations that were tax-exempt under Code § 501(c)(3) ("§501(c)(3) organizations") with a simple mechanism to save for retirement. Under Code §403(b), employees of eligible employers could elect to defer the receipt of some portion of their current compensation and instead have that amount contributed into an annuity that satisfied the requirements of Code §403(b). The annuity contracts could be individually owned which were established by the employees directly with an insurer or they could be group annuity contracts which were usually held by the sponsoring employers. As originally enacted, the employer's primary role under Code §403(b) was to pass through employees' salary reduction contributions to the annuity companies.

403(b) plans existed sixteen years before the Employee Retirement Income Security Act ("ERISA")[1] and were introduced as simple programs to provide certain employers with an easy way to allow employees to supplement their retirement income on a tax-favored basis. Costs were negligible and employer responsibilities were minimal. Employers relied upon the product providers to follow the terms of the 403(b) contracts which included the requirements to conform to the tax requirements of Code §403(b).

Even after the enactment of ERISA, a significant number of 403(b) programs were not subject to ERISA due to statutory exclusions[2] or regulatory exceptions.[3] Thus, many employers that offered 403(b) programs to their employees continued to have minimal involvement with the on-going maintenance and support of their 403(b) programs.

Over time, legislative changes modified the statutory and regulatory requirements applicable to 403(b) plans. However, the basic structure of 403(b) programs did not change. That is, such programs remained essentially a relationship between an employee and the annuity contract issuer,[4] subject to the requirements for tax deferral under Code §403(b). Even though subsequent

[1] ERISA was enacted in 1974.
[2] Governmental plans are exempted from Title I of ERISA and church plans are exempted from Title I unless the plan elects to be covered.
[3] DOL Reg. §2510.3-2(f) exempts certain 403(b) arrangements from inclusion as "pension plans" and therefore exempts them from Title I.
[4] In 1974, section 403(b)(7) was added to the Code to permit employees to invest in mutual funds held in custodial accounts.

changes added requirements to 403(b) arrangements that were similar to qualified plans, no changes modified the relationships between the parties establishing and supporting the 403(b) programs. That is, 403(b) plans hold assets in individual and group annuities and custodial accounts. Plan assets are not held in tax-exempt Code §501(a) trusts, as are required for qualified plans. Additionally, they generally are not held, managed or controlled by trustees or other investment advisors.

However, some employers were subject to ERISA and the 403(b) marketplace began to divide into three recognizable segments: (1) governmental employers and most religious organizations; (2) 501(c)(3) organizations that could avoid being subject to ERISA ("non-ERISA plans"); and (3) 501(c)(3) organizations that could not avoid being subject to ERISA ("ERISA plans"). Each of these segments changed how 403(b) programs were supported by product providers and employers. Governmental employers and most religious organizations continued to support their 403(b) programs with minimal employer involvement.[5]

501(c)(3) organizations are generally split into two segments based on whether or not the 403(b) arrangement qualified for the regulatory exemption from ERISA which *required* the employer to limit its involvement with the program. Employers sponsoring 403(b) plans that were not exempt began to become more involved as the requirements of ERISA imposed a level of employer responsibility that could not be met by the product providers under the 403(b) contracts. In this segment of the marketplace, group annuity products became more popular, particularly for larger plan sponsors. Smaller plan sponsors generally continued to use individual annuities as group products were not often available or competitive for smaller groups of employees. Although individual annuities did create unique problems for the smaller employers, given the lack of alternative funding options, this segment of the marketplace continued to rely heavily on those products.

As the Code was modified over time to add qualified plan type provisions[6] and impose limitations on contributions, employers had to become more involved in supporting their 403(b) programs. Larger ERISA plans tended to follow the qualified plan model and use plan administrators to administer their 403(b) plans. If a group annuity was used, then the relationship with the owner of the group annuity (usually the plan sponsor) was very similar to that of a plan administrator of a qualified plan with the plan's trustee. For non-ERISA plans and ERISA plans funded with individual annuities, compliance efforts were more difficult. Since most of these plans were funded with individually issued annuities, employers had no legal authority under state law to cause the contract issuers to conform to "plan" terms if such terms were inconsistent with or not recognized by individual annuity contracts. Cooperation throughout the marketplace was inconsistent and performance by product providers was varied.

Over time, product providers and employers became more sophisticated and compliance efforts improved. However, there remains a strong divide in the 403(b) marketplace between larger 501(c)(3) organizations that have a history of funding their plans with group annuity contracts and all other 403(b) plan sponsors. Where the employer is the legal owner of the group annuity and can exercise all the rights and incidents of ownership, the 403(b) plan under ERISA is

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[5] The exception to this general statement would be large denominational 403(b)(9) retirement income account plans.
[6] *See*, Code §403(b)(8) and (12).

similar in most respects to other qualified plans.[7] Plan level records are available, participant account data is available, transaction information is available, instructions will be followed, and enforceability is not an issue. Where individual contracts have been used, either in whole or in part, the situation is very different. Historical data is unreliable because there was no "plan" nexus upon which data could be aggregated. Similarly, employers had no enforcement rights and participants could move assets into 403(b) products with which the employer had no relationship.[8] Product providers were either voluntarily or involuntarily removed as contract providers under the plan and information that resided with the "deselected" providers may no longer be available to the employer. Accordingly, employers are often unable to satisfy reporting and disclosure, fiduciary, and compliance responsibilities if their plans are, or ever were, funded with individually issued annuity products. This is a historical legacy that is very different from other qualified plans.

Use of Annuity Contracts and Custodial Accounts

The other significant difference between 403(b) plans and qualified plans is that 403(b) plans must be funded through annuity contracts or custodial accounts.[9] This is a statutory restriction that does not apply to any other type of retirement plan. Further, the statute does not require funding through a group annuity or master custodial account. Accordingly, individually issued products must satisfy the statute, which is different than most employer-sponsored retirement plans. Some simplified retirement plans permit funding through IRAs established under an employer's plan,[10] but those plans have reduced employer ERISA responsibilities commensurate with the employee's ownership of the retirement account.

In the absence of a trust or other centralized depository of plan assets, compliance with many of ERISA's requirements can be very difficult. There are several reasons, but some of the most significant include the historical legacy described previously which means that employers have no reliable source for plan level data. If a fixed date, such as January 1, 2010, was arbitrarily established for purposes of determining opening balances for 403(b) plans that use or previously used individual contracts for *all* ERISA reporting and disclosure purposes, this would minimize the impact of this problem. [11]

Employers have no ownership rights and cannot enforce contract terms under individually issued contracts, unless the contracts so provide. Some contracts have been amended to give employers certain discretion over contract property, subject to the terms of a written plan document, but contracts with deselected providers will generally not be modified.

The IRS has recognized the difficulty with legacy contracts and deselected vendors and established clear dates upon which contracts are deemed not to be "included" under an

[7] For example, the same deferral and employer contribution limits apply to 403(b) plans and qualified plans (although 403(b) plans can have special catch-up contribution provisions). Both types of plans can provide for pre-tax deferrals, Roth contributions, and employer contributions. Both types of plans also permit withdrawals after a distributable event, such as retirement, death, disability, or severance from employment.
[8] *See*, Revenue Ruling 90-24.
[9] *See*, Code §§403(b)(1), 403(b)(7).
[10] Consider SIMPLE IRA plans and SEPs.
[11] *See,* ASPPA's and NTSAA's comment letter to the Department of Labor dated February 17, 2011, available at http://www.asppa.org/Document-Vault/pdfs/GAC/2011/2172011-comm.aspx.

employer's plan for purposes of the final 403(b) regulations.[12] The Department of Labor ("DOL") has also provided limited relief for certain individual contracts solely for purposes of completing the Form 5500, Annual Return/Report of Employee Benefit Plan.[13] The relief is insufficient in that it fails to recognize the inability of the employer to obtain verifiable opening balance information in plans funded with individual accounts. Generally Accepted Accounting Principles (GAAP) do not permit the auditing community to utilize the relief as it was probably intended when issued by the DOL. Again, establishing an arbitrary date upon which an opening balance is accepted as provided, for all DOL reporting and disclosure purposes based on current individual contract balances for active employees/participants, would ease some of the auditing issues for the Forms 5500.

Many employers sponsor 403(b) programs that are hybrids consisting of a 403(b) plan that includes employee deferrals and employer contributions and another 403(b) program that consists exclusively of employee deferrals. The combined program is often funded with a group annuity contract and the deferral only plan is usually funded with individually issued annuities. The contracts are often issued by different product providers. While data and information is generally available from the group annuity provider, employers have the same problems described above with respect to the individually issued annuity contracts. This becomes troublesome where the plans permit transfers/exchanges[14] between plans. The "legacy" issues then also affect the group contract. Also, changing providers is a fiduciary issue and some contracts, particularly older contracts, interfere with an employer's ability to exercise this fiduciary function.

THE SAFE HARBOR EXCLUSION UNDER TITLE I OF ERISA

For many years, there was little "new" in the 403(b) world. This changed markedly with the release of comprehensive IRS regulations that went far beyond the statutory changes enacted since the first set of regulations was issued. These new regulations dramatically shifted the responsibilities under the Code for employers sponsoring 403(b) plans. As a result, many organizations, acting in good faith, adopted practices or took actions which now appear problematic under the most recent DOL guidance. These practices will inadvertently cause such arrangements to potentially be subject to Title I coverage, and for many, on a retroactive basis. If ERISA does apply, then many well meaning 501(c)(3) organizations may find themselves subject to substantial penalties and fines for failing to comply with their Title I reporting and disclosure obligations. Three crucial changes made by the new IRS 403(b) regulations (and related guidance) have exacerbated the Title I problems.

Discretionary Administrative Decisions

First, there was a change to the rules regarding discretionary administrative decisions. Historically, providers of 403(b) investments have assumed responsibility for making administrative decisions that require "discretion." This was principally due to an IRS ruling which permitted participant representations to be the basis for making such decisions. The new

[12] Revenue Procedure 2007-71.
[13] Department of Labor, Field Assistance Bulletins 2009-02 and 2010-01.
[14] An "exchange" is the movement of 403(b) assets from one product provider under an employer's plan to another product provider authorized to accept the exchange. Prior to the final 403(b) regulations, this movement of assets was accomplished by a transfer that complied with Revenue Ruling 90-24.

regulations from the IRS, in most cases, no longer allow plan administration to be based simply on the employee's representation(s).

Importance of Memorandum of Understanding

A second change emanating from IRS guidance that has caused problems relates to the requirement that a 403(b) arrangement be evidenced by written documentation containing the salient features of the plan as it could assign to a third party responsibility with regard to discretionary determinations. The IRS has proposed model 403(b) plan language to comply with its new regulations.[15] The language includes a "Memorandum of Understanding," which details the allocation of responsibilities for administering the plan (including discretionary determinations) among the employer, the investment provider and, if applicable, third party administrators. This language provides that the memorandum is specifically incorporated, by reference, into the plan. Although not clear, it would appear that this "Memorandum of Understanding" would be part of "the documents governing the arrangement" as contemplated by Field Assistance Bulletin ("FAB") 2010-01. This is a significant concern because under the proposed language, it is possible to draft a "non-ERISA" document for a 501(c)(3) organization and attach a "Memorandum of Understanding" that assigns to a third party responsibility with regard to discretionary determinations.

If the "Memorandum of Understanding" is not considered part of "the documents governing the arrangement," transitional relief will be absolutely necessary.

In addition, relief is needed for employers who entered into independent agreements with third party administrators in the good faith belief that doing so was consistent with the safe harbor by removing the employer from the discretionary determination process. It is also important to note that the majority of 501(c)(3) organizations that decided to hire an independent firm did so in good faith to ensure that the arrangement was compliant with the tax laws.

Timing for Adoption of Plan Document

A third concern under the new IRS rules is the requirement that a compliant plan document be adopted in a relatively short time frame because it is unclear what compliance steps they can take without losing the Title I exemption. The IRS mandate was established with insufficient time for 403(b) plan document expertise to truly develop within the marketplace. This resulted in plans being drafted and adopted without proper consideration of the plan provisions which impact qualification for the safe harbor exemption. This is particularly true for 501(c)(3) organizations which often don't have the funds to pay for competent outside counsel that understands the nuances of the "limited involvement" safe harbor exemption. In many cases, these organizations rely on advice provided by well intentioned volunteers associated with their cause which often turns out to have been incorrect.

Most smaller 501(c)(3) organizations are struggling to maintain the "limited involvement" exemption because of the increased costs of ERISA compliance for these organizations and the

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[15] The model language is provided in IRS Announcement 2009-34. The IRS refers to this model language as the "Listing of Required Modifications" or "LRMs" and it is used primarily to guide those who will be drafting prototype documents.

lack of other plan alternatives. Their compliance options are problematic because it is unclear what compliance steps they could take without losing the Title I exemption for two significant reasons:

1. Prior to FAB 2010-01, there was no guidance that employers could rely on to deny a 403(b) contract/vendor inclusion under its plan if that contract included features that required the employer to exercise discretion over plan assets, such as loan features, hardships, etc.

2. In addition, before the release of FAB 2010-01, it wasn't clear that employers were precluded from independently hiring service providers to review and authorize plan transactions that in the past had been authorized by investment providers. Accordingly, many employers permitted investment providers to offer arrangements with optional features that require some level of discretionary review *because they did not believe they could refuse them.* This left these smaller organizations with limited choices. They could hire a third party to perform some of these services or "sign off" on forms presented by the investment providers or other vendors so participants could access their 403(b) savings.

ASPPA and NTSAA have recommended that the DOL provide transitional relief for 501(c)(3) organizations offering employee 403(b) savings arrangements which may be subject to ERISA coverage as a result of the clarifications provided in recent guidance. In particular, we recommended that relief be provided to organizations that offered 403(b) employee savings arrangements that otherwise qualified (and continue to qualify) for the exemption provided by DOL Regulation §2510.3-2(f), but may now fall outside of the safe harbor as a result of recent DOL guidance. Examples would include:

1. Employers offering 403(b) arrangements which, after July 26, 2007, (the release date of the final IRS 403(b) regulations), allocated responsibility for discretionary determinations or other administrative functions in a way that would impermissibly require employer action beyond the limits of the safe harbor.

2. Employers offering 403(b) arrangements that have entered into a "Memorandum of Understanding," as provided for in IRS model language, to allocate discretionary determinations to other parties, but relief would only be necessary if the memorandum was considered beyond the documents governing the arrangement.

3. Employers who offered 403(b) arrangements which provided for an array of investment options from unrelated investment managers through an open architecture investment platform or through a single insurance company's arrangement with access to a broad range of products. Employers offering such arrangements should be offered relief if there is a reasonable belief that the arrangement will not meet the standards set forth under FAB 2010-01 to remain within the safe harbor.

4. Employers, who as a result of changes made by the new IRS regulations, were pressured (or otherwise misled) by their investment provider or other party to the 403(b) arrangement to take actions or otherwise exercise discretion that would be impermissible

under the safe harbor. Relief would only apply to those employers who at all times prior to July 27, 2007, had acted in a way consistent with the provisions of the safe harbor.

5. Employers who have adopted 403(b) arrangements after July 26, 2007, which inadvertently grant the employer authority to make discretionary determinations but only if such authority has never been exercised.

ASPPA and NTSAA recommend that employers who have become subject to ERISA under the circumstances described above be permitted to stay within the "limited involvement" safe harbor exemption by taking remedial action as described below. Alternatively, affected employers who are willing to forgo the safe harbor exemption, should be permitted to retroactively correct any reporting, disclosure or other ERISA violation without penalty if all actions are completed within the "correction period" described below.

The relief for affected employers should be conditioned upon remedial action being taken during a "correction period" of 12-18 months following the announcement of relief. The remedial actions should require the employer to cease any further actions beyond those permitted under DOL Regulation §2510.3-2(f) and subsequent guidance as clarified by FAB 2010-01. The employer must also make a good faith effort to reform service contracts and 403(b) documentation so that any responsibility for discretionary determinations will be identified and allocated to parties.

CHALLENGES FOR DISCLOSURE OF FEES AND SERVICES UNDER SECTION 408(b)(2) OF ERISA FOR 403(b) PLANS

ASPPA and NTSAA expect that two important transitional issues are likely to occur in the application of ERISA §408(b)(2) to 403(b) investment products, for which relief may eventually be required. We provide this as a matter of information and will provide further detail to the Advisory Council as events unfold.

"Deselected" Contracts

Individually owned contracts of deselected vendors, where the employer exercises no authority with regard to such contracts, can create challenges under ERISA §408(b)(2). It is not entirely clear if "deselected" annuity contracts, which do not have to be included in the plan's financial statements under FAB 2010-01, will be considered plan assets for purposes of the ERISA §408(b)(2) regulation. If so, then the required service provider disclosures relating to these contracts would appear to be necessary. Responsible plan fiduciaries receiving these "deselected" disclosures will often have incomplete information about the deselected providers. Fiduciaries may not have the ability to properly assess if the deselected provider had completed the disclosure properly. It is also not clear what actions the fiduciary could take with regard to these deselected contracts if the information and compensation disclosed does not appear to be reasonable. Clarification and transitional relief is likely necessary to address this problem.

Disclosures of the Estimated Cost of Recordkeeping Services

ASPPA and NTSAA strongly support the mandate in the ERISA §408(b)(2) regulations that requires the disclosure of estimates of the costs of administrative services when there is no

explicit charge for the service in a "bundled" arrangement. This is particularly important in the 403(b) marketplace, where the costs of recordkeeping services have historically been bundled into the total cost of the investment products, without any specific itemization of the services being rendered or the costs related to those services.

This is likely to create a transitional challenge for 403(b) fiduciaries. We anticipate that there will be variation from provider to provider in the disclosures of the "estimated" costs of the services to plan sponsors. This is because there is no specific standard for a uniform method of disclosing this estimate. Additionally, there may a different level of service for the same 403(b) product and sometimes vendors provide different services for the different products they offer.

This means that, until the marketplace develops standards by which such disclosures can be judged, 403(b) fiduciaries will be faced with making a determination on the "reasonableness" of compensation without a clear basis by which to judge them. Specifically with regard to the application of the prohibited transaction exemption under ERISA §408(b)(2), a plan sponsor with multiple 403(b) vendors will not have the capacity, in many cases, to determine the basis of the differences in the data disclosed to it from different providers. Such differences in this data should not impose a duty upon the sponsor to further explore the reasonableness of the disclosure, even where similar products are involved.

ASPPA and NTSAA are working with other organizations to create a 403(b) Model Disclosure Form to facilitate such comparisons.

403(b) PLAN TERMINATION AND HANDLING OF CUSTODIAL MUTUAL FUND ACCOUNTS

ASPPA and NTSAA understand that the DOL worked with the IRS to develop the issues raised in Revenue Ruling 2011-7, which provided employers and the industry with some of the necessary guidance to assist employers who wish to terminate their plans. However, additional guidance is needed where the 403(b) plan includes Code §403(b)(7) custodial accounts as a plan investment.

ASPPA and NTSAA believe that the treatment of 403(b)(7) custodial accounts on plan termination should be consistent with the treatment of distributed annuity contracts as outlined in Revenue Ruling 2011-7. In particular, this treatment is needed for individual custodial accounts (which are contracts directly between the plan participant and the custodian) where the plan sponsor has no right under the contract to disburse assets on plan termination; and where the custodian has no legal right under the contract to unilaterally amend the account to provide to a plan sponsor that right of disbursement upon plan termination.

The distribution of the 403(b)(7) custodial accounts directly to a participant is consistent with state law as well as private letter rulings previously issued by the IRS. Often custodial accounts are direct contracts between the participant and the custodian and thus it is appropriate that they be distributable "in-kind" assets of a 403(b) plan. As an "in-kind" asset, the plan sponsor has the legal ability to distribute the custodial account upon termination of the plan. The distribution of assets of a 403(b)(7) custodial account is subject to the terms and conditions of the employer's plan, which alleviates the potential for abuse.

ASPPA and NTSAA will be submitting a comment letter to the IRS on this issue. When it has been filed, ASPPA and NTSAA will provide the Advisory Council with a courtesy copy for your records.

AUDIT ISSUES AND FINANCIAL STATEMENTS

Education and Outreach

ASPPA and NTSAA believe that the actual number of 403(b) that are ERISA plans in existence far exceeds the number of 5500 forms that were received by the DOL for plan year 2009. Therefore the true numbers of ERISA plans in the country is likely to be well in excess of the plans that have reported to date.

ASPPA's and NTSAA's members have indicated that they are still receiving a number of employer requests to: assist in filing past and current Form 5500s under the DOL's Delinquent Filer Voluntary Compliance Program (DFVCP); explain to them what they need to do to get their 403(b) plans in compliance; verify that the vendors are doing everything for them so they do not have to worry about government filings and compliance; and review their plan documents for compliance.

One of the problems in this area is the lack of communication/education opportunities among peers within the 501(c)(3) organization community and easy access to education on regulatory changes and updates. In the public school sector, there is a very active trade association (ASBO) which not only has had IRS speakers over the last few years but provides their membership with information about the 403(b), 457 and 401(a) documents and operations. Their website even contains some sample administrative forms for these employers to use. Periodic meetings are set up throughout the country to educate them on these types of plans and the problems that are encountered.

Unfortunately in the non-profit sector, there are few trade associations that are available, and those that are available very rarely have educational programs that involve retirement plans. There is also no partnership with the IRS and the DOL to help in the education process. We are aware of the attempt that the IRS has made to reach out to these employers and the problems they have had in doing so. Therefore, the problems in this area, whether it is non-reporting or delinquent reporting, will continue.

Purpose of Audit

ASPPA and NTSAA understand and agree that the audit requirements are meant to protect the participants and beneficiaries in ERISA plans. For ERISA plans where this is not a new requirement, the audits serve a purpose of protection. We continue to believe, as outlined in our testimony in 2010, that a working group should be established between the DOL, the AICPA and NTSAA members that could work through the problems that continue to exist in the audit area for 403(b) plans.

The Aftermath of 2009

Some of the problems incurred for the 2009 filings will not exist going forward into 2010, but the aftermath has prompted some employers to look for alternatives for retirement planning. The time and cost for 2009 was an experience that some employers, vendors, CPAs, and financial advisors just do not wish to deal with going forward.

Plan termination for many smaller ERISA employers is being considered. By smaller plans we are not referring necessarily to the "fewer than 100" participant count. There are many employers who have less than 100 active participants but because of the universal eligibility requirement, the number of "eligible" employees is in excess of 100. In the small tax-exempt area, many employees work for below market compensation because of their commitment to their employer's mission. As a result, it is not unusual to have lower percentages of eligible employees who contribute to the plan. Unfortunately, these individuals are counted in the overall numbers to determine whether an independent audit is required under ERISA.

Continuing Problems

Even though FAB 2009-02 permits assets from a "deselected vendor" (those that accepted no contributions after 2008) to be ignored for Form 5500 financial statement purposes, the accounting procedures require that the auditor cannot just pick up these accounts from the first day of the plan year, rather they must go back to prior data to "protect" their credentials. This issue could be addressed by the DOL to assist both the auditor community and the employers by issuing clear guidance which would give auditors comfort in not having to worry about the pre-2008 assets in the plan.

The following additional problems have been uncovered in the process of preparing for a Form 5500 filing and collecting the audit reports from the vendors under ERISA plans:

- Additional "vendors" are still being uncovered during the data collecting process. This not only complicates the data collection process but delays the audit for the Form 5500. One example of this occurrence is when the "vendor" is a broker-dealer and the underlying investment company is identified during the data collection process. This will continue to occur in light of the fee disclosure requirements. For the 2009 filings, this will mean amended returns in order to adjust the beginning balance.

- Vendors were not required to maintain data for over 40 years. They do not currently and have not in the past maintained the source data for the past 40 plus years. Vendors, recordkeepers, and third party administrators ("TPAs") are continuing to build these files. We are getting closer, but unfortunately the industry is not there yet. As a result, the reports from the vendors continue to fail to reconcile, and the time frame to compose the revised data and prepare a new report is a minimum of 10 more days.

- It is difficult to reach an individual in a large company that truly understands the audit process and can provide the necessary information to the auditors.

- It appears that there is no allocation of sufficient resources within the vendors themselves.

- Large players in the 403(b) marketplace continue to stay in the market and offer products, although they have no current ability to track sources of funds and no ability to provide an audited program report. The TPA will receive from this vendor a series of Excel spreadsheets that do not balance and reports that contain errors. The TPA then must go back to the employer in an effort to balance the report, but find that the vendor's records are not correct. The reports must then be redone. During this time, the various parties involved will vent their frustration to the TPA and the auditor.

- Another issue is the unexpected discovery of other plans in the process of the audit as well as multiple administrators of these plans. Not understanding the "new" 403(b) world, employers do not understand that coordination there needs to be administrative coordination in most multiple plan scenarios. Additionally, employers have been provided with inconsistent information with respect to multiple 403(b) plans, creating ERISA and non-ERISA plans for different groups of employees; or attempting to create a non-ERISA plan alongside a qualified plan or even a SEP to accept the employer contributions.

ASPPA and NTSAA continue to believe that there should be relief for the small 501(c)(3) organizations who cannot afford to maintain ERISA plans in this new world.

ASPPA and NTSAA recommend that the DOL expand the exemption from the independent audit requirement to make it more available to small employers. One easy way this could be done is to recognize the uniqueness of the 403(b) universal eligibility rule by re-defining a 403(b) plan's "active participants" for purposes of the exemption from the independent audit requirement. If the DOL changed this definition for 403(b) plans to "eligible employees that make or receive a contribution during the plan year," significantly more 403(b) plans would qualify for the small plan exception than under current rules.

ASPPA and NTSAA recommend that a committee of industry experts should be established to review and suggest modifications to the existing audit guidelines for 403(b) plans that take the following into consideration:

a. The differences between group, annuities, individual contracts, and individual custodial agreement and potentially set up different audit requirements for each;

b. The need for specific clarification that beginning balances as of 1/1/2009 are absolute for all purposes, and relief to auditors so that they may modify their standard procedures and accept data provided as of 1/1/2010;

c. The need for a model "Audit Checklist" that is specific to 403(b) plans and does not contain qualified plan requirements; and

d. The importance of coordination between the DOL rules and the IRS compliance rules.

Thank you for the opportunity to discuss these issues. These comments were prepared by ASPPA's and NTSAA's Tax-Exempt/Governmental Plans Subcommittee of the Government Affairs Committee. We welcome the opportunity to discuss these issues with you. 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.