

October 22, 2008

Thomas W. Reeder  
Office of Benefits Tax Counsel  
Department of Treasury  
1500 Pennsylvania Ave. NW  
Washington, DC 20020

Dear Tom:

On behalf of the 403(b) practitioners and representatives of the institutions and organizations signing below, we write to urgently request an extension of the effective date for complying with the written plan requirement added by the final regulations under section 403(b) of the Internal Revenue Code of 1986, as amended (the "403(b) regulations" and the "Code"), and a reasonable good faith compliance period to allow plan sponsors to adjust to the final 403(b) regulations and other IRS guidance.

As you know, generally, other than with respect to certain exceptions set out in the regulations and Revenue Procedure 2007-71, the 403(b) regulations, including the requirement to have a written plan, will currently become effective January 1, 2009.

Based on our knowledge as advisors to plan sponsors and financial institutions, it is our view that the current deadline of January 1, 2009 is not sufficient to ensure compliance with the final 403(b) regulations and appropriate analysis by plan sponsors of the significant issues raised by the regulations. This is particularly true due to the lack of guidance explaining the regulations in a number of critical areas where decisions must be made. While we appreciate the efforts made by representatives of the Service and Treasury to fill in some of the guidance through informal speeches, numerous issues remain, such as:

- Continuing uncertainty with respect to which contracts are to be treated as part of the plan and which contracts which may be subject to reasonable good faith relief under Rev. Proc. 2007-71.
- When an "information sharing agreement" is required and when one is not.
- The tax consequences to employers, participants and investment providers of a failure to have an information sharing agreement in place on January 1, 2009, or to have contracts not treated as part of the plan on January 1, 2009 for contracts required to be treated as part of the plan on that date – and the reporting duties of issuers of such contracts.
- What it means to have a plan "maintained pursuant to" a written plan – how and when it should be formally adopted, and how and when it may be amended.
- Apparent differences between the Service and the Department of Labor regarding which contracts are part of the 403(b) plan and whether and how 403(b) plans can be terminated and assets distributed.
- How to correct identified errors to preserve the tax-deferred status of the plan and contracts under EPCRS.

It is critical for these issues to be resolved in order to analyze and make informed changes to the design and investment of 403(b) plans to comply with the 403(b) regulations, and only after decisions regarding these issues are made can a plan be drafted, reviewed, approved and communicated to employees. In addition, these open issues are a major impediment to many providers making necessary changes to their administrative systems. We urge you to clarify these issues soon.

Further complicating this situation is that model language is not yet available for plans other than "salary reduction only" plans of school districts, though we understand that Lists of Required Modifications (LRMs) for 403(b) are being prepared currently. In addition, there is currently no prototype plan approval process, though we understand one is being created. As a result, work by individual employers and financial institutions to draft plans may have to be redone in the coming year once those LRMs are issued and prototype procedures established. Placing that burden on charities and schools in this period during which their economic resources are already stretched does not seem to be a good use of their limited resources. The current financial turmoil also makes it difficult for charities and churches dependent upon donations and school districts dependent on tax revenues to make resources available for year-end 403(b) tax compliance.

Importantly, too, although there are many key issues outstanding under the final 403(b) regulations, there are no correction procedures based on the new rules added by the 403(b) regulations included in the current Employee Plans Compliance Resolution System. We understand that EPCRS is currently being updated to include corrections based on the final 403(b) regulations, to be included in its next iteration. However, we submit that it is not good policy to require absolute compliance with the final 403(b) regulations immediately on January 1, 2009 when the correction procedures for violations of the 403(b) regulations that would mitigate the tax consequences of noncompliance are not yet in place.

All of these issues are exacerbated for the small charities, churches and schools, many of which are still largely unaware of, or understandably confused by, the burdens of complying with the 403(b) regulations while having limited recourse to sophisticated advisors. While we appreciate the significant outreach efforts made by the Treasury and the Service, we believe there are still significant numbers of plan sponsors who, not because of willful disregard for the 403(b) changes, have lacked the economic and human resources to focus on the 403(b) regulations and the information from their service providers regarding the changes. We understand that, notwithstanding the best efforts made by many service providers to assist their clients with their efforts to comply with the regulation's requirements, a large percentage of the major 403(b) service providers' plan sponsor clients (ranging from small 501(c)(3) organizations to large public and private colleges and universities) have not committed to a course of action regarding the structure, administration or documentation of their 403(b) plan. Unfortunately, even if those decisions were made tomorrow, it is operationally impractical for plan sponsors and providers to implement changes for thousands of 403(b) plans by January 1, 2009, including all of the necessary agreements, plan documents, participant communications materials, and operational changes.

We appreciate the goal of the Treasury and the Service to bring about better compliance by 403(b) plans with the rules of the Code. Many of the provisions of the final 403(b) regulations are beneficial, and we do not request a broad delay of the final regulations. However, we urge patience and forbearance in what amounts to a "sea change" in the design of retirement programs for the entire charitable employer and public school environment – while lacking the established infrastructure or complete transition rules to adequately handle the transition.

For these reasons, we specifically request that

1. A plan sponsor not fail to satisfy the 403(b) regulations if the plan sponsor makes a reasonable, good faith effort to comply with the 403(b) regulations on and after January 1, 2009, until the later of (i) January 1, 2010, or (ii) a reasonable time after EPCRS is updated to include specific correction rules for 403(b) plans based on the final regulations, and
2. That the written plan requirement of the 403(b) regulations be delayed until the later of (i) January 1, 2010 or (ii) a reasonable time after the Service opens a procedure for obtaining approvals for prototype 403(b) plans.

If you have any questions or would like to discuss these issues further, please contact David Powell, phone 202-857-0620, e-mail [dwp@groom.com](mailto:dwp@groom.com) or Danny Miller at 202-887-5711, e-mail [dmiller@cwlaw.com](mailto:dmiller@cwlaw.com). We would be happy to arrange a meeting with some or all of the signatories below.

Sincerely,



David W. Powell



G. Daniel Miller

cc: Steven T. Miller, Commissioner, Tax Exempt and Governmental Entities  
Bill Bortz, Department of the Treasury  
Robert Architect, Internal Revenue Service  
Susan L. Rees, Department of Labor

## Additional Signatories

[List as of October 22, 2008; additional signatories may be added]

In alphabetical order:

Robert L. Abramowitz, Morgan Lewis  
American Benefits Council  
Elena Barone, Investment Company Institute  
Jason K. Bortz, Davis & Harmon  
Church Alliance  
Marilyn Collister, GreatWest  
Committee of Annuity Insurers  
Susan Diehl, PenServ, Inc.  
Aaron Friedman, The Principal  
Evan Giller, Giller & Calhoun  
David M. Glaser, Patterson, Belknap, Webb & Tyler  
Thomas G. Hogan, Jr., MetLife  
Weiyen Jonas, Fidelity Investments  
James D. Kemper, Ice Miller  
David N. Levine, Groom Law Group  
Jeffrey Levy, Cammack LaRhette Consulting  
Louis T. Mazawey, Groom Law Group  
Amy A. Null, Wilmer Hale  
Bernard F. O'Hare, Patterson, Belknap, Webb & Tyler  
David L. Raish, Ropes & Gray  
Securities Industry and Financial Markets Association (SIFMA)  
Barbara N. Seymon-Hirsch, Davis & Harmon  
Emile Schoffelen, Cammack LaRhette Consulting  
SPARK Institute  
The Ministers and Missionaries Benefits Board of American Baptist Churches  
The Pension Fund of the Christian Church (Disciples of Christ)  
The Pension Boards-United Church of Christ, Inc.  
Thrivent Financial for Lutheran  
Robert Toth, Jr., Baker & Daniels  
Marian A. Tse, Goodwin Procter  
Marcia Wagner, Wagner Law Group  
Michael Webb, Cammack LaRhette Consulting  
YMCA Retirement Fund