Association of School Business Officials International

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Internal Revenue Service
CC:PA:LDP:PR (Rev. Proc. 2007-71)
Room 5203
P. O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Written Comments from the Association of School Business Officials International Requesting Clarification and Additional Guidance on Rev. Proc. 2007-71

These comments are submitted on behalf of the Association of School Business Officials, International (ASBO) a nonprofit organization representing 5,700 school business officials of public education school districts and community colleges (K-14). ASBO has, in partnership with the Internal Revenue Service, offered resources to help anxious and confused school business officials meet the requirements of the final 403(b) regulations and, in that role, has received considerable input from members who would appreciate clarification and guidance on some of the elements of Revenue Procedure 2007-71.

While the attempt to deliver some appropriate model language for use by public education employers is appreciated, there is some understandable concern about certain portions of the guidance as it relates to reliance on the model language, and there is further understandable concern about the responsibilities of plan sponsors in terms of orphan accounts, both of which will be addressed in this comment letter.

ASBO further would like to thank and commend the IRS for providing a correction mechanism for the "re-exchange" of an improperly exchanged account occurring on or after September 25, 2007 (provided, however, that employers include exchanges in the optional features of their plans, once adopted).

This comment letter requests that the Internal Revenue Service amend or add to the guidance in Revenue Procedure 2007-71 in those areas of confusion, and breaks down the comments into two specific sections: 1) Model Language, and 2) Orphan Accounts.

Model Written Plan Language Concerns

Again, we thank the Service for its attempt to provide written language that employers might use to adopt their own written plan, however, we are concerned about the following:

1. We believe that there is some confusion in the marketplace over the nature of the reliance afforded to public schools under Section 4.01 of the Revenue Procedure (including public K-12 as well as public community colleges, colleges and universities) with respect to the model plan language. Specifically, while we believe the IRS clearly intended the language to afford reliance to the extent of language incorporated into the qualifying employer's plan (either word-for word or substantially similar), the final sentence of that section is being read by some to require word-for-word adoption of the entire set of model plan language (rather than individual provisions) in order to enjoy such reliance. As noted, we know that IRS staff members have publicly stated that employers can utilize appropriate portions and have reliance on the portions used, yet the fact that the language of the guidance in that section infers the opposite is of concern to our members.

We urge the Service to provide written guidance that makes it clear that the model language need not be adopted in its entirety or word for word in order to have reliance when only appropriate portions are used. We further urge the Service to similarly confirm that such reliance is not adversely impacted by the inclusion of additional terms or language, including options to select or deselect certain provisions, as might be the case in an adoption agreement, provided that

the additional terms or language, and/or the actual selections or deselections, would not themselves adversely affect the plan's qualification.

2. Omitted in the model language provided in Revenue Procedure 2007-71 are two widely used features:

a)The Roth 403(b) option language is a widely used feature, growing in popularity, now that it has been made permanent (in the Pension Protection Act of 2006).

We request that the Service provide model language that includes the Roth 403(b) option.

b)Non-elective (employer) contributions are routinely used for a wide range of purposes, all designed to help further the primary goal of providing an excellent educational experience to our nation's children while struggling with ongoing budget difficulties.

We request that the Service include model language to provide for the making of non-elective contributions, both in-service, and for up to 5 tax years following severance of employment as permitted in the Code.

3. Given that an automatic enrollment feature is prohibited under the statutes of many states, and that the use of that feature is generally inappropriate in the public education K-14 segment, which consists almost exclusively of the voluntary contributions made by employees, ASBO is concerned that busy school administrators may inadvertently utilize the model language as is, without understanding the implications of the adoption of the automatic enrollment feature.

We would appreciate the Service considering a change of format that would necessitate employers needing to affirmatively select the optional features of their plan to avoid the inadvertent adoption of a feature that is generally not appropriate, and, even if appropriate, would likely not be selected due to the additional administrative burdens created with that addition. Alternatively, we ask that the Service delete that provision from the model language.

4. Because of the close scrutiny of the Service, and the plan disqualification result of a violation of the universal availability requirement of Section 403(b)(12)(A)(ii), we have grave concerns about the suggested exclusion of employees based on hours worked. It is important to note that eligibility of employees has been an area of confusion for employers (with many believing that they *cannot permit employees that normally work less than 20 hours per week to participate)* and ASBO is told by members that the suggested exclusion of those specific employees simply exacerbates that confusion. Additionally, many employers do not track the working hours of part-time employees, in particular those that are paid on a "per diem" basis, and cannot afford to pay the increased costs of administering such an exclusion.

We ask that the Service make it clear that employers who do not wish to exclude employees who would normally work less than 20 hours per week can utilize only the first sentence of section 2.1 and still have reliance. This would ease general concern and help eliminate the mistaken belief that some employers have had that they MUST exclude those who do not normally work 20 or more hours per week. That has been a common misconception, as previously explained.

5. There are a number of miscellaneous issues that ASBO believes might cause inadvertent

operational errors. The following two are most often mentioned by ASBO members as problematic:

a) The requirement that beneficiaries be listed on the salary reduction agreements would be a virtually new requirement, and one that would be administratively burdensome. Since there is no such requirement in the Code or underlying regulation, we ask that it be removed from the model language.

b) The model language provides for loans; however, it does not appear to prohibit the granting of a new loan when there is an outstanding defaulted loan. Because the vast majority of our members do not permit payroll deducted loan repayments (because of increased costs to provide for those loan repayments), we urge the IRS to add to the loan language the prohibition on the taking of a new loan when there is an outstanding defaulted loan unless the loan is being repaid by payroll deduction.

Orphan Accounts

ASBO and its members are grateful to the Service for addressing the very important issue in the Revenue Procedure: the scope of inclusion of pre-existing contracts and accounts in the plan. However, the clear message from the final 403(b) regulations appeared to be that all contracts and accounts, whenever issued or established, and regardless of the last contribution date, were to be included in the plan. Such a rule would of course present plan sponsors with a practically impossible task, inasmuch as they frequently had no prior legal obligation to retain a relationship with former providers under their 403(b) programs. In Revenue Procedure 2007-71 the Service clearly intended to provide relief on this issue. Unfortunately, as the Service is likely aware, there has been considerable confusion regarding the precise outlines of that relief.

We would like to request that the IRS confirm the following understandings with respect to the combination of that guidance as well as the exclusion provided for pre-September 25 Rev. Rul. 90-24 transfers.

Specifically, it is our understanding that:

- All contracts and accounts with providers that are under the plan on or after January 1, 2009, including those contracts and accounts receiving transfers under the scope of an information sharing agreement, are required to be included in, and subject to the terms of the plan, whether or not those contracts or accounts receive a contribution after 2008, and whether or not the participant is a current employee, a former employee, a beneficiary, or an alternate payee.

- All contracts and accounts of current employees with providers deselected on or after January 1, 2005, and before January 1, 2009, are also in the plan. This would include, for example, contracts or accounts with providers that may have received contributions in 2008, *provided that* the plan sponsor clearly deselected them as authorized to receive contributions, transfers, or exchanges on or before January 1, 2009. However, the failure to include such a contract or account in the plan on or after January 1, 2009 will not cause the contract or account to lose its status as a 403(b) contract or account provided that it can be established that either the plan sponsor or the provider made a reasonable good faith effort to incorporate the contract or account in the plan. Thus, for example, if a plan sponsor reaches out to the affected provider and the provider does not agree to cooperate with the coordination of compliance with the plan sponsor, the failure to incorporate the contract or account into the plan will not adversely affect the status of the contract or account as a 403(b) contract or account. All contracts and accounts of former employees and beneficiaries (and presumably alternate payees), with such status being measured on January 1, 2009, with providers deselected prior to January 1, 2009, are and will remain outside of the plan except for the purposes of information sharing relative only to loans.

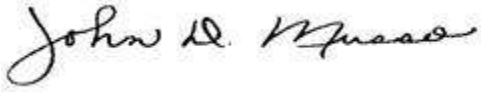
- All contracts and accounts established by transfers pursuant to Rev. Rul. 90-24 prior to September 25, 2007, and which otherwise satisfy the exclusionary rules in the final regulations, are and will remain outside of the plan.

- Nothing in the above descriptions is intended or understood to prevent an exchange or transfer under the new rules from one of the contracts or accounts excluded from the plan, to a contract or account which is either under the plan or connected to the plan through an information sharing agreement.

As the Service considers these and other comment letters that might be filed, we will appreciate any opportunity to provide input into the final result of the written guidance. It is our desire to help our members meet the requirements of the final regulations and the subsequent guidance; however, in the current climate of uncertainty, it is clear that many of our members simply don't know how to interpret or otherwise take the necessary actions to make sure the accounts of their employees, and their plans as a whole, do, in fact, meet the requirements.

We are more than happy to provide additional input, or otherwise inform the Service on the practical problems our members are facing in their effort to adhere to the new requirements, along with ways we might work together to operate 403(b) plans in a compliant plan environment.

Sincerely,



John D. Musso, RSBA
Executive Director
ASBO International

cc: Robert Architect (IRS)

Founded in 1910, ASBO International's mission is to provide programs and services to promote the highest standards of school business management practices, professional growth, and the effective use of educational resources.