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December 13, 2006

**VIA E-MAIL AND FIRST CLASS MAIL**

Bradford P. Campbell  
Acting Assistant Secretary  
Employee Benefits Security Administration  
Room S-2524  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

OFFICE OF SENATOR TOMAS  
ASST. DIR. OF HR POLICY  
2006 DEC 18 PM 4:57

RE: Form 5500 Regulation Revisions (RIN 1210-AB06)

Dear Assistant Secretary Campbell:

I write on behalf of the College and University Professional Association for Human Resources (CUPA-HR), the National Association of College and University Business Officers (NACUBO), and the Society for Human Resource Management (SHRM). Thank you for meeting with our representatives on November 1 to discuss the proposed revisions to the Form 5500 published in the July 21, 2006 *Federal Register* (pages 41392-41407) and allowing us this opportunity to provide comments.

As was noted in the meeting, we are concerned with the additional reporting requirements for 403(b) plans contained in the proposed revisions. It is our understanding that the Department's changes are based on two assumptions: (1) 403(b) plans are increasingly similar to 401(k) plans, and (2) there are violations of Title I of the Employee Retirement Income Security Act occurring, and in particular, a high incidence of untimely remittance of employee contributions.

**1. Fundamental Differences Between 403(b) Plans and 401(k) Plans Justify Different Reporting Requirements**

While the constituent organizations share the Department's concern whenever there is a mishandling of employee contributions, the proposed additional reporting requirements would

place significant burdens and costs on employers offering 403(b) plans and potentially adversely impact the number and quality of benefits that they are able to offer to their employees. Moreover, despite some growing similarities, fundamental differences between 403(b) and 401(k) plans remain that justify different reporting requirements.

403(b) arrangements are unique in that they were developed by Congress to serve a very specific employer segment and workforce. Specifically, Congress sought to provide a low-cost retirement vehicle for employers that could not afford the burden of administering a traditional retirement plan: religious, charitable, and educational organizations, and public school systems, colleges and universities. Congress consciously limited the requirements that apply to 403(b) plans, selecting only a few of the many that apply to qualified retirement plans. Most recently, in response to employers' concerns about the cost to administer the "exclusion allowance," Congress provided relief to this special population by repealing the limitation.

To further alleviate the employer's potential administrative burden, Congress created a unique ownership scheme in which 403(b) plans are funded by either an insurance annuity, and/or a 403(b)(7) custodial account, which is only permitted to invest in mutual funds. Congress's intent was to facilitate a direct relationship between the employee and the vendors, thereby alleviating the employer of the responsibility of ongoing administration once it funded the benefits. While this placed greater responsibility and reliance on the vendors, Congress considered it to be a legitimate trade-off to facilitate the offering of less costly retirement plans by a segment of the employer population whose assets were better spent on their core mission of providing for the betterment of society.

Funding a 403(b) plan through an annuity contract or 403(b)(7) custodial account creates a sense of ownership in an employee to his or her retirement benefit. The employee typically owns the annuity or account and has contracted directly with the underlying annuity provider or mutual fund company. Contrast this with a 401(k) plan which is funded by a trust held in the name of the plan for which the employer is the settlor. With a 401(k) plan, employees view themselves as merely participants in a larger trust. Employees in 403(b) plans choose among multiple vendors, with the employer's role typically limited to providing the list of vendors from which an employee may choose to invest. In essence, the employer, through the 403(b) plan, merely serves as a funder of an employee's individual retirement annuity or custodial account that he or she owns, rather than a sponsor and settlor of a monolithic retirement plan.

If the Department follows through with its proposed new reporting requirement for 403(b) plans, it will do so by ignoring Congress's intent and significantly increase costs for an employer population that Congress has long ago determined should be alleviated of regulatory burdens, and the costs associated with them. Further, it will have the unintended consequence of eliminating the freedom of choice and sense of ownership employees now enjoy. The cost to an employer of auditing a plan that is funded by multiple vendors with multiple recordkeepers will be too great for the overwhelming majority of employers to absorb. Most employers will be left with no choice but to eliminate all but one vendor in order to be on a single recordkeeping

platform, which reduces the cost of an audit significantly. Ironically, as a result of the Department's proposed reporting requirement, 403(b) programs will look more like 401(k) plans, with only a single vendor being offered. While that may be the underlying intent of the Department, such fundamental changes in policy are better left for Congress to determine through legislation rather than by the Department through administrative guidance.

**II. In Order for the Public to Provide Meaningful Comments the Department Should Make Public Data on the Error Rate Among 403(b) Plans**

Our constituent organizations are not aware of the widespread errors that are described in the Department's introduction to the changes. Given that the Department only launches an investigation into a 403(b) plan as a result of an employee's complaint, it is not surprising that it has "detected violations in a high percentage" of its investigations. Under these circumstances, the Department would not likely be investigating if there were nothing wrong. Nonetheless, if there are problems in the administration of 403(b) plans, our constituents are interested in working with the Department to address them. Understanding these problems would better prepare us to work with the Department to create a solution that works for all involved. It certainly would be better than the current proposal to make 403(b) plans subject to audit, with its unintended consequence of eliminating freedom of choice for employees and the sense of ownership they currently enjoy.

To facilitate a collaborative working relationship, it would be helpful if the Department would make public the data on which its rationale is based. In particular, we recommend that the Department share the following:

1. the number of violations, in the aggregate or annually;
2. whether that number has been trending upward or downward;
3. whether the violations were more common among a particular size or type of plan or employer; and
4. why it believes these specific additional reporting requirements would help minimize the violations.

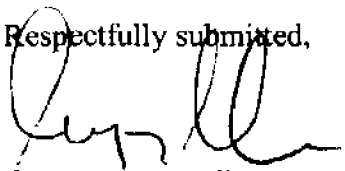
**III. Delay of Implementation**

If the Department insists on moving forward with its new reporting requirement, our constituent organizations respectfully request that it extend the compliance deadline by two years. As noted above, employers will need time to adjust to an audit program and in most cases, make significant changes to their 403(b) platforms in accordance with the new requirements. Eliminating vendors and settling on one provider takes an inordinate amount of time particularly for those employers working with a collectively bargained 403(b) plan, where changes to the plan and its platform will be the subject of bargaining. Even in the non-collectively bargained environment, communicating the changes, and transitioning to a single vendor platform will take time to implement. Employees will need time to adjust to the

elimination of the choices in vendors and funds to which they have grown accustomed. Therefore, we recommend that the Department extend the compliance deadline by two years.

Thank you for the opportunity to provide these comments, and feel free to contact me at 202.739.5448 or Josh Ulman at 202.446.8371 with any questions or concerns.

Respectfully submitted,



Gregory L. Needles

- c: Robert Doyle
- Josh Ulman
- Mike Aitken
- Matt Hamill