



June 1, 2009

Via Electronic Filing

CC:PA:LPD:PR (Announcement 2009-34)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20044

Re: Comment on Revenue Procedure for 403(b) Plans; Announcement 2009-34

Dear Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to comment under Announcement 2009-34 on potential issues in the Internal Revenue Service's (the "Service") proposed procedures establishing an opinion letter and prototype plan program for Section 403(b) plans. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council would like to express its sincere appreciation to the Service for deciding to establish a 403(b) opinion letter and prototype plan program and for allowing plans to amend retroactively under a remedial amendment period. The program and the amendment period will be very helpful to plan sponsors trying to meet the requirements of the 2007 final regulations and subsequent guidance.

The Council believes that some minor changes to the prototype program will make it much more effective and usable by its 403(b) plan sponsor members. We agree with you that the program will be most successful if can be used by many 403(b) plan sponsors. With that in mind, the Council recommends a few changes below that would address a wider variety of common plan designs than would be permitted under the

original proposal. Although there are a number of important issues, the Council would like to highlight just a few issues that we believe will make a significant difference in allowing employers to utilize the new program.

First, the Council strongly urges the Service to consider adding the ability to include a vesting schedule in the prototype plan. While many non-ERISA 403(b) plans do not include employer contributions, many other 403(b) plans, especially ERISA-covered 403(b) plans, include employer contributions and vesting schedules. This one change would greatly multiply the number of plans that would then be able to use prototype 403(b) plans.

Although the Council recognizes that Section 403(b) does not expressly provide for vesting, the Service has long permitted vesting schedules in 403(b) plans. Moreover, section 401(a) prototype plans may have vesting schedules and the Council believes it makes good policy sense to provide equal treatment for 403(b) prototype plans. Certainly, to the extent the 403(b) program is covered by ERISA, the rules under ERISA Section 203 would apply to 403(b) vesting schedules. For other 403(b) plans, the Council believes the prototype program could accommodate vesting schedules that satisfy the minimum vesting standards of Internal Revenue Code Section 411. Such accommodation, the Council believes, would actually encourage employers to implement and/or maintain 403(b) plans.

Second, the Council requests that the prototype program include language allowing funding vehicles to supersede a plan term in certain circumstances. The Council is concerned about inadvertent operational and form defects as a result of conflicts between plan provisions and provisions in funding contracts or custodial accounts. The proposed prototype program would provide that the basic plan document and adoption agreement supersede any conflicting provision in the funding vehicles. While the Council strongly agrees that such a rule is necessary when the conflicting funding vehicle provisions would violate the requirements of the statutes and regulations, we believe a universal conflict provision would not promote the Service's stated goal of making the program broadly available.

Many 403(b) plans include many existing contracts and accounts which comply with the requirements of 403(b) but could conflict with plan language. For example, some contracts and accounts may include restrictions in excess of those imposed by the plan. Other contract or account provisions may simply provide for different treatment of the same subject, both of which would meet regulatory and statutory requirements. For example, the proposed prototype language appears to require that a beneficiary may be designated only at the plan level when it is likely that various funding vehicle contracts provide that the process of keeping and determining the beneficiary will be controlled by the issuing vendor. The Council understands that plan fiduciaries typically outsource the beneficiary designation/determination process, even for 401(a) plans, so it would seem counterintuitive to require the plan provision to override the funding

contract provision. In addition, the Council recommends that the beneficiary language in the proposed prototype be adjusted to allow for maintenance of beneficiary designations by the funding contract in addition to other records maintained for the plan.

Next, the Council recommends more flexibility with respect to plan loans. The prototype language defaults to payroll deduction repayment unless an alternative method is elected in the adoption agreement. The proposed sample adoption agreement language would impose a selection of a single repayment method for the entire plan. The administrative practices of the various providers under the plan may have varying loan practices. For example, some contracts may permit loans for principal residences to be amortized over 15 years while other contracts will limit such loans to 5 years. The Council recommends that the prototype plan and agreement allow plans to include a selection that would allow any legally permitted method prescribed by the funding vehicle.

Finally, the Council recommends that the Service consider allowing more flexibility in plan designs, similar to the flexibility permitted in 401(a) prototype plans. For example, the prototype could allow more variance in employer contribution schedules (such as matching contributions exceeding 100% and contributions which vary based on age and service). This type of change would greatly increase the usability of the new prototype program.

Again, we appreciate the work you have done and the opportunity to comment on the proposed programs for 403(b) plans. We hope that these comments are helpful. If you have any questions about these comments, please contact Jan Jacobson, the Council's senior counsel, retirement policy, at 202-289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson", with a long horizontal flourish extending to the right.

Jan M. Jacobson
Senior Counsel, Retirement Policy
American Benefits Council