

Legal Alert: IRS Publishes 403(b) Model Plan, Orphan Contract Guidance

November 28, 2007

On November 27, 2007, the Internal Revenue Service released Revenue Procedure 2007-71, elaborating in certain respects the final section 403(b) regulations published in July. (Click [here](#) for a copy.) Prior alerts describe [those regulations](#) and [transferability issues after September 24, 2007](#).

Model Plan Language

The Revenue Procedure includes a model section 403(b) plan document that public schools may adopt to satisfy the “written plan” requirement of the final regulations effective in 2009.

- The model document addresses only the requirement in form for a written plan; to qualify under section 403(b), the program must also satisfy the final regulations in operation.
- A public school that amends its plan to incorporate any part of the model document, either verbatim or on terms that are substantially similar in all material respects, will to that extent be treated as satisfying the “written plan” requirement. A public school that so adopts the model plan in its entirety will have equivalent status as receipt of a private letter ruling from the Service providing that the written form of the plan satisfies section 403(b).
- Use of the model plan language by other section 403(b) sponsors does not result in any similar assurance of compliance with the final regulations; the Service cautions that there may be differences in applicable tax or ERISA rules for these other sponsors that are not reflected in the model document. Such employers that intend to adopt the model document language in part should carefully consider the need to modify certain key plan provisions and terms. These other sponsors may appropriately incorporate model provisions into a document approved by the Service in a private letter ruling without

losing reliance on the ruling for periods prior to the effective date of the final regulations.

- For all section 403(b) sponsors, the plan will be treated as having been amended timely to reflect a requirement of the final regulations if (1) the plan is amended no later than the *first day* of the first tax year beginning after December 31, 2008 (generally, January 1, 2009), (2) the amendment is effective as of the applicable effective date of the requirement under the final regulations, and (3) the written plan is operated as if that amendment is in effect during the interim period.

The model plan may generally be useful in understanding and complying with the requirements of the final regulations. For example, section 6.4(d) of the model plan describes the type of information that would satisfy the information sharing agreement required in certain circumstances under those regulations. That language clarifies that contracts eligible to receive contributions pursuant to the plan, and as such are subject to the terms of the written plan, need not also be the subject of an information sharing agreement unless and until the issuer ceases to be so eligible. (References to contracts include section 403(b)(7) custodial accounts.)

The Revenue Procedure requests general and specific commentary on the model plan language. Comments are due by March 16, 2008.

Transitional Guidance

Under the final regulations, contracts issued in a Revenue Ruling 90-24 exchange prior to September 24, 2007, are not subject to the “written plan” or information sharing agreement requirement. The Revenue Procedure amplifies the transitional relief provided in the final regulations for “orphan contracts” and certain other contracts.

- Contracts issued in 2005 through 2008 by an issuer that does not receive contributions in a year after the contract was issued – for example, because the issuer is no longer an authorized provider or the contract is received in a Revenue Ruling 90-24 exchange after September 24, 2007 – will not be disqualified under section 403(b) for failure to be included in a written plan if *either*:
 - The employer makes a reasonable, good faith attempt to collect available information about such issuers that ceased receiving

contributions after 2004 (issuers that ceased receiving contributions before 2005 need not be included) and notifies those issuers of the name and contact information of the person charged with coordinating for the employer the information necessary to satisfy section 403(b);
or

- Before making any distribution or loan to the participant or beneficiary, the issuer makes a reasonable, good faith effort to contact the employer and to exchange any information needed to comply with section 403(b) with the person responsible for administering the employer's plan.

Direct references in the revenue procedure to Revenue Ruling 90-24, such as this one, suggest that ruling remains in effect on at least a transitional basis.

- Similar relief is provided where:
 - A contract is issued before 2009 on behalf of a participant who is a former employee of the employer on January 1, 2009, or for a beneficiary; and
 - The issuer, before 2009, ceases receiving contributions for the contract. This may occur, for example, if the issuer is no longer an authorized provider, or the employer is no longer in existence, or the contract is received in a Revenue Ruling 90-24 exchange after September 24, 2007.

In this circumstance, the contract will not be disqualified under section 403(b) for failure in the written plan to include terms relating to that contract provided that, if the participant or beneficiary requests a loan, the issuer makes reasonable efforts to determine (i) whether the participant or beneficiary has in the prior 12 months had any other outstanding loans from qualified plans of the employer (taking into account IRC section 72(p)(2)(D) and 72(p)(5)), and (ii) the highest outstanding balance of any such loans in that period. The issuer may rely on information from the participant as to whether the participant is a former employee (if that reliance is not unreasonable under the facts and circumstances), but not on information from the participant or beneficiary as to outstanding loans if the employer is in existence at the time of the loan.

- Finally, relief from the required information sharing agreement is provided for a contract received in a Revenue Ruling 90-24 exchange after September 24, 2007, and before January 1, 2009. To the extent that such contracts are not issued by an authorized provider and are not made subject to an information sharing agreement with the employer before January 1, 2009, the contracts may again be exchanged in accordance with Revenue Ruling 90-24, prior to July 1, 2009, for a contract of an issuer that is either receiving contributions as part of the employer's plan or has an information sharing agreement with the employer. The Service refers to this process as a "re-exchange" back into the plan. A properly and timely re-exchanged contract will not lose its section 403(b) status for failure to meet the information sharing requirements of the final regulations.



Please contact any of the following members of our Employee Benefits and Executive Compensation practice if you have any questions regarding this development:

George H. Bostick	202.383.0127	george.bostick@sablaw.com
Daniel M. Buchner	202.383.0869	daniel.buchner@sablaw.com
Adam B. Cohen	202.383.0167	adam.cohen@sablaw.com
Ian A. Herbert	202.383.0644	ian.herbert@sablaw.com
Alice Murtos	404.853.8410	alice.murtos@sablaw.com
Robert J. Neis	404.853.8270	robert.neis@sablaw.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sablaw.com
W. Mark Smith	202.383.0221	mark.smith@sablaw.com
William J. Walderman	202.383.0243	william.walderman@sablaw.com
Carol A. Weiser	202.383.0728	carol.weiser@sablaw.com