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## LEGAL UPDATE

December 16, 2008

**To:** Superintendents, Member School Districts (K-12)

**From:** Carl D. Corbin, Schools Legal Counsel CDC

**Subject:** 403(b) Plans  
Memo No. 32-2008

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As our office has discussed in Legal Update Memos No. 19-2007, 11-2008, 20-2008, and 29-2008 the United States Internal Revenue Service ("IRS") published new regulations governing Tax Shelter Annuities ("TSA") allowed under Title 26 of the United States Code section 403(b).<sup>1</sup> The regulations apply to K-12 public school districts, county offices of education, and community college districts ("districts"). The regulations place significant new administrative burdens upon districts that choose to offer a 403(b) TSA to its employees.

The IRS just published Notice 2009-3, which provides districts with an additional year to finalize the district's 403(b) written plan insofar as districts comply with the following three requirements:

1. On or before December 31, 2009, the district has adopted a written 403(b) that is effective as of January 1, 2009;
2. During 2009, the district operates the plan in accordance with a reasonable interpretation of section 403(b), taking into account the final regulations; and
3. Before the end of 2009, the district makes its best efforts to retroactively correct any operational failure during the 2009 calendar year to conform to the terms of the district's written 403(b) plan.

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<sup>1</sup> The regulations were published in the Federal Register on July 26, 2007 at 72 Fed.Reg. 41128. Additional information is available on the IRS website located at: <http://www.irs.gov/retirement/article/0,,id=172430,00.html>.

To be clear, each district offering a 403(b) program must still ensure the district has entered into an Information Sharing Agreement (“ISA”) with all of the vendors who are participating in the district’s plan and all vendors who have not signed an ISA must no longer receive employee salary contributions after December 31, 2008. The IRS did not provide an extension to this requirement in Notice 2009-3. In addition, districts must ensure a written 403(b) plan is adopted no later than December 31, 2009.

Please contact any of our attorneys if you have any questions regarding this legal update.

## **Relief From Immediate Compliance With 2009 § 403(b) Written Plan Requirement**

### **Notice 2009-3**

This notice provides relief during 2009 for sponsors of § 403(b) plans with respect to the requirement to have a written § 403(b) plan in place by January 1, 2009. This notice also briefly describes other programs the Service intends to establish relating to § 403(b) plans.

### **Background**

Final regulations under § 403(b) were published on July 26, 2007 (72 Fed. Reg. 41128) (the final regulations). Effective January 1, 2009, sponsors of § 403(b) plans are generally required to maintain a written plan that satisfies, in both form and operation, the requirements of the final regulations. Although many sponsors of § 403(b) plans have already adopted a written § 403(b) plan, the Service and Treasury are aware that some sponsors may not have a written § 403(b) plan in place by January 1, 2009.

Further, there is no current program under which a plan sponsor can obtain assurance that the written form of its plan satisfies § 403(b), other than through a private letter ruling. The Service and Treasury have therefore concluded that compliance with the final regulations would be facilitated by the establishment of both pre-approved and individually designed plan programs and that transition relief should be provided to all § 403(b) plan sponsors who have made appropriate efforts to comply with the written plan requirement in the final regulations.

### **Relief for 2009**

The Service will not treat a § 403(b) plan as failing to satisfy the requirements of § 403(b) and the final regulations during the 2009 calendar year, provided that:

- (1) on or before December 31, 2009, the sponsor of the plan has adopted a written § 403(b) plan that is intended to satisfy the requirements of § 403(b) (including the final regulations) effective as of January 1, 2009;
- (2) during 2009, the sponsor operates the plan in accordance with a reasonable interpretation of § 403(b), taking into account the final regulations; and
- (3) before the end of 2009, the sponsor makes its best efforts to retroactively correct any operational failure during the 2009 calendar year to conform to the terms of the written § 403(b) plan, with such correction to be based on the general principles of

correction set forth in the Service's Employee Plans Compliance Resolution System (EPCRS) at section 6 of Rev. Proc. 2008-50 (2008-35 I.R.B. 464).

The relief under this notice applies solely with respect to the 2009 calendar year, and may not be relied on with respect to the operation of the plan or correction of operational defects in any prior or subsequent year.

### **Upcoming Guidance**

As part of the establishment of the prototype program, the Service will publish a request for comments on a draft revenue procedure on obtaining Service approval of prototype § 403(b) plans that will be adopted by eligible employers, and on sample plan language for drafting prototype plans. The Service also intends to establish a determination letter program for individually designed § 403(b) plans once the § 403(b) prototype program is established. The programs described in the revenue procedure will also provide for a retroactive remedial amendment of § 403(b) plans for years after 2009. The Service will also modify EPCRS to include additional § 403(b) issues.

### **Effect on Other Documents**

Section 6 of Rev. Proc. 2007-71, regarding the date amendments are adopted, is modified.

### **Drafting Information**

The principal authors of this notice are Angelique Carrington and James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1-877-829-5500 (a toll free number) or e-mail Ms. Carrington or Mr. Flannery at [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov).