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December 4, 2006

Bradford Campbell
Acting Assistant Secretary,
Employee Benefits Security Administration &
Deputy Assistant Secretary for Policy
US Department of Labor
200 Constitution Ave NW
Room S-2524
Washington, DC 20210

Re: Form 5500 Revisions

Dear Mr. Campbell:

We very much appreciate your taking the time on November 1 to meet with us and discuss the Department of Labor's ("DOL") proposed revisions to the Form 5500 Annual Report and their impact on retirement arrangements under IRC Section 403(b) ("403(b) plans"). The purpose of this letter is to respond to your request to further address the questions that you asked at the meeting and to expand on the points that we raised. We are also suggesting some alternatives to the proposal that we believe balance the objectives of the DOL against the additional burdens the proposal would impose. Please also refer to the comments on the proposal we submitted to the DOL on September 19, 2006.

In the meeting, we provided three major reasons why we are asking the DOL to reconsider this proposal, and we will discuss these more fully below. First, we have serious concerns about the costs that the changes in Form 5500 reporting will impose on the tax-exempt, not-for-profit employers that provide 403(b) plans. Second, it is not apparent that by requiring the plans to provide this additional information the DOL obtains a benefit commensurate with these costs. Finally, the sponsors of 403(b) plans are sufficiently different from the private sector employers that sponsor 401(k) plans to justify maintaining the distinctions in the reporting requirements. Please note that our description in this letter of the employers that sponsor 403(b) plans and our experience with these plans applies to the higher education and research community served by TIAA-CREF.

The limited reporting obligations that apply to 403(b) plans have been permitted by the rules for many years. The rationale for this treatment is a function both of the structure of 403(b) plans and the nature of the employers that sponsor them. The rules governing 403(b) were tailored to meet the needs of the not-for-profit community, and particularly higher education. The plans were simple, easy to establish, and inexpensive. They did not require that an employer maintain a large infrastructure to support them. The funding vehicles were similarly simple: originally, the only permissible investments were annuity contracts. Mutual funds were added in 1978, and there still are no other investments allowed (it is self-evident that there is no company stock). Many plans are structured without single record keepers, so that much of the ministerial

operations are conducted directly by the service providers. The simplicity and ease of Form 5500 reporting was a factor that helped keep plan administrative expenses low.

Over the years, 403(b) plans have proven to be very successful in enabling employees in higher education to meet their retirement goals. Part of that success is due to this low cost structure.

The imperatives that have resulted in the development and success of 403(b) plans have not changed. The 403(b) plans that are subject to Title I still exclusively serve the not-for-profit, tax exempt community. One of the principal differences between private sector, for-profit employers that sponsor 401(k) plans and the not-for-profit institutions that sponsor 403(b) plans is in their relative capacity to shoulder additional costs. Most employers in higher education are not in a position to easily spend additional amounts on their human resource function. Their budgets are limited, and they cannot easily find the resources to increase either direct spending (such as for auditors) or staffing. As tax-exempt employers, they do not benefit from the tax deduction that would otherwise mitigate the impact of these expenses to the for-profit sector. The costs that would need to be incurred to meet the new requirements are significant, and in our experience many of these employers are already struggling to maintain their benefits at current levels. There is a real risk that continued increase in administrative costs in the benefits area will be met by a reduction in benefits and coverage.

In the preamble to the proposal you note that amendments to the tax code over the years have resulted in 403(b) plans and 401(k) plans being given similar tax treatment, and you suggest that the increasing similarities between the two types of plans should result in identical treatment for Form 5500 purposes. While there are now in fact many similarities in the tax treatment between the two code sections (as well as some important differences), we do not think that these changes in the tax code should drive the Form 5500 rules. Tax-exempt charitable institutions are not for-profit businesses and should not be treated the same way. We urge the DOL to continue to focus upon the continuing differences in both the nature of the employers and the design of the plans, as well as actual experience as to violations of the rules. None of the circumstances that led the DOL to provide simplified reporting in the first place to 403(b) plans have changed so materially as to impel the radical change in the rules that is being proposed.

The preamble also states the DOL's conclusion that the change in the reporting requirements would not impose a "substantial additional burden." We respectfully disagree. The costs of complying with the new requirements, both in money and time, are not trivial. Of primary concern is the imposition of the requirement that the plans engage an independent qualified public accountant to conduct an audit. While the costs of such audits vary depending upon the number of participants and the complexity of the plan, it is our understanding that a range of $40,000 to $60,000 for a limited scope audit is not atypical. The schedules themselves, even on the short form, are complex and time consuming to complete, and require a level of expertise to fill out correctly. It is our understanding that even an employee familiar with the forms will need a considerably longer period of time to complete them than the DOL has estimated. And since 403(b) plans have been exempt from the requirement to complete the financial schedules in the past, employers do not necessarily have the in-house expertise to do so, and will need to expend resources to obtain personnel who are conversant with the requirements. Moreover, in many 403(b) plans there are multiple providers of funding vehicles and no single record keeper. This

heightens the complexity of completing the forms because there are multiple sources of information that must be integrated.

Thus, the new rules will impose a substantial additional burden to employers that are not well positioned to accept it. In order to justify this burden, the rules should deliver a significant benefit. The DOL states in the preamble that it has detected violations of Title I in 403(b) plans, and that the "predominant issue has been the improper handling of employee contributions." During the meeting, we also understood you to say that while you do not have data that demonstrates the rate of violations, you believe that widespread violations are taking place. This was based in part on the fact that since violations have been found in 401(k) plans, there is no reason to believe that they are not present in 403(b) plans. While we appreciate your input at the meeting, this is not consistent with our experience. TIAA-CREF is not aware of significant violations of Title I among the plans that it serves, particularly with respect to the handling of employee contributions. We are similarly not aware of data that suggests that the current regulatory regime for reporting on 403(b) plans, in place since the passage of ERISA, allows for such violations. We also suggest that because of the differences between for-profit employers and not-for-profit employers, generalizations across the segments are suspect. And it is precisely these differences that support the current approach of differentiating between 403(b) and 401(k) plan reporting.

As we discussed above, many not-for-profit employers have limited resources available to them, and there is a different dynamic caused by their not receiving a tax benefit for costs associated with employee benefit plans. Another equally important difference is that by their very nature, tax-exempt, not-for-profit employers sponsoring 403(b) plans have far less of an incentive to intentionally violate the rules of Title I governing the handling of contributions. The "managers" of institutions of higher education will not personally benefit from diverting these funds from the plan. Nor are these employers subject to the pressure to constantly demonstrate earnings, as are for-profit employers. Their resources are devoted to furthering their charitable purposes. Finally, while it is true that the size of 403(b) plans has grown over the years in concert with the value of the stock market, the number of 403(b) plans is still dwarfed by the number of 401(k) plans. The higher education community is still a limited and contained universe that is much simpler to oversee than the sprawling 401(k) market, and it is not clear to us why the current audit program is insufficient.

Even if our information is incorrect about the prevalence of Title I violations stemming from the improper handling of employee contributions, the remedy being proffered by the DOL appears to us to be overbroad. Both Schedule H and Part III of the proposed 5500-SF require the collection a substantial amount of information, going far beyond the problem you are trying to solve. And the requirement that plans engage an independent qualified public accountant to conduct a full audit is a very costly one. However, as we emphasized at the meeting, we want to work with the DOL to help you meet your concerns while at the same time preserving a simplified reporting regime. Consequently, if you do not agree that the current rules provide you with sufficient information about 403(b) plans, we suggest the following alternatives:

1) Maintain the limited reporting obligations for 403(b) plans, except require such plans to complete the appropriate compliance questions that ask plan administrators to answer whether the plan has failed to transmit to the plan any participant contributions within the

required time frame during the plan year.

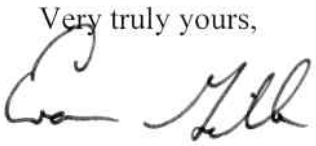
2) Allow all 403(b) plans, regardless of number of participants, to complete the new Short Form 5500, and apply the small plan audit waiver under 29 CFR 2520.104-46 to all 403(b) plans. The policy reasons that gave rise to the small plan audit waiver (particularly, concern over imposing a burden on small employers) are similar to those that support its application to 403(b) plans.

3) Require a very limited audit that would provide for an independent qualified public accountant's opinion solely on the issue of whether the plan has failed to transmit to the plan any participant contributions within the required time frame during the plan year. If this alternative is adopted, we would strongly urge that the audit requirement be narrowly crafted to avoid frustrating the purpose of keeping audit fees low.

Finally, if the DOL does adopt a proposal that eliminates or significantly alters the limited reporting option for 403(b) plans, we request that the effective date be delayed until the 2009 plan year. In order to meet the new reporting requirements, both employers and vendors will need to have adequate time to prepare systems, procedures and personnel. As many budgets have already been approved for 2007, this delay would allow for appropriate planning and infrastructure work.

Once again, we appreciate the opportunity to provide you with our views on this very important matter. We understand that your timeframe is short, but we would be happy to provide you with more information or to speak with you again if that would prove helpful to you.

Very truly yours,



Evan Giller

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