

Bulletin to NTSAA members from Kristi Cook:

Ellie and I met with the IRS work group on the proposed 403(b) regulations in Washington DC yesterday. The purpose of the meeting was to discuss issues that have arisen since the comment period on the regulations closed, to request clarifications on certain provisions in the regulations that have been interpreted differently by various reviewers and to offer suggestions targeted to address compliance concerns.

Unfortunately, after a spirited discussion, the IRS seems determined to follow the course laid out in the proposed regulations with respect to the two largest issues raised by our membership. It appears that the IRS will want each employer to establish a written “**403(b) plan**” which includes specified qualification provisions. The establishment, maintenance and support of the plan will be the employer’s responsibility. Since most employers that are not subject to ERISA will be unable or unwilling to take on these responsibilities, it will be essential for the marketplace to address the employers’ concerns and find solutions to the employers’ predicament. Also, it is clear that the IRS would like to eliminate all **90-24 transfers**, except perhaps for beneficiaries of inherited 403(b) accounts. We understand that this will cause a “run” on 90-24 transfers while they are still available, but remind all members that any such actions must always be in the best interest of the participant.

After a brief discussion of potential issues related to the **Privacy Act** and the inability of financial institutions to disclose financial information to parties other than the owner of the financial instrument (the employee), the IRS was unmoved in their resolve to keep the employer as the responsible party for compliance, notwithstanding the inability of the employer to obtain information from vendors.

Beyond these three issues, we requested additional guidance on **post-employment employer 403(b) contributions**, particularly with respect to contributions made after the death of a participant prior to receipt of all required contributions. We were assured that they would try to provide additional guidance on this matter. Similarly, they acknowledged that there were problems with the separate account requirements for **excess 415(c) contributions** and they were seeking solutions to that problem. Also, they acknowledged the need for significant transitional relief for existing 403(b) arrangements. Thus, we can expect that the final regulations may not immediately apply to existing contracts and custodial accounts.

They did clarify that **post-employment rollovers** from a 403(b) account into a new 403(b) account would not be permitted. Thus, once an individual is no longer an employee of an eligible employer, that individual may not establish a 403(b) account even to accept rollovers of an existing 403(b) account. Since transfers outside of an employer’s plan will not be permitted, this means that employees’ 403(b) accounts must remain in the investments permitted under the employer’s plan unless they are rolled into an IRA, losing the benefits of 403(b) plans.

While many in the industry believed that the provision in the proposed regulations establishing the requirement that employers deposit withheld **403(b) salary reduction contributions** as soon as reasonable or practical established a guideline with some flexibility, the IRS stated that they believed that their example of a 15 day period established a clear deadline and should be treated as a “safe harbor.” Therefore, employers should be prepared to deposit all 403(b) salary reduction contributions within the 15 day time period.

While both Ellie and I wish we could report that we made some progress in explaining the practical problems involved for employers and vendors, as well as the loss of control and flexibility for participants, we both believe that the IRS feels very strongly that the unique nature and history of 403(b) plans can no longer be supported. The direction seems to be toward making 403(b) plans as similar as possible to 457(b) plans and/or 401(k) plans, despite their statutory and historical differences. So, to put the best spin on the situation, we need to prepare for a marketplace with “true” employer plans and the shift in products and services that will require. We each need to look upon the anticipated regulations as an opportunity and get creative in how we will take advantage of that potential. For each there will be a different answer.

Both of us, however, also feel that the NTSAA must continue the grass roots efforts to dissuade Treasury and the IRS from finalizing these regulations as proposed. Clearly, the ongoing activities that members are currently undertaking continue to be important and should be maintained!

It is probable, however, that the only way to change the current positions being taken by Treasury and the IRS is to introduce and gain passage of legislation which does, indeed, carve out and recognize 403(b) as a unique and distinctly different kind of retirement benefit. Unfortunately, insufficient funds were raised to engage a lobbyist to undertake that mission. However, we can and will continue, to the extent that is possible, attempt to work on legislation through other organizations that do have lobbyists and also have similar goals.

Comments from Government Relations Committee Chair, Ben Ward:

What should you do right now? Think about your own plan to live with the new regulations, but also encourage your schools and non-profit organizations to write the IRS and explain how burdensome this will be and that many employers will have to abandon this savings device.

You should also send those letters and your own letter explaining how this action by the IRS is directly in conflict with long term savings plans to save Social Security. Your representatives and Senators need to be aware that a very large group of employed people who vote are about to have a significant benefit taken away from them or at least severely restricted.