U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

May 25, 2012

Ms. Sandy L. Friess, CPA
WIPFLi LLP
2901 East Enterprise Avenue
Suite 500
Appleton, WI 54913

2012-02A
ERISA SEC.
3(2)(A)

Dear Ms. Friess:

This is in response to your request for guidance concerning Department of Labor regulation 29 C.F.R. 2510.3-2(f). Specifically, you ask whether the status of an Internal Revenue Code (Code) section 403(b) tax-sheltered annuity program (403(b) plan) excluded from coverage under Title I of the Employee Retirement Income Security Act of 1974 (ERISA) by virtue of the Department's regulation at 29 C.F.R. 2510.3-2(f) would be adversely affected if the employer also maintains a money purchase plan qualified under Code section 401(a) into which the employer makes contributions based on the employee's salary deferrals to the 403(b) plan.

A 403(b) plan is a retirement plan for employees of public schools, employees of certain tax-exempt organizations, and certain ministers. Under a 403(b) plan, employers may purchase for their eligible employees annuity contracts, or establish custodial accounts invested only in regulated investment company stock (mutual funds), for the purpose of providing retirement income. Annuity contracts must be purchased from a state licensed insurance company, and the custodial accounts must be held by a custodian bank or IRS approved non-bank trustee/custodian. The annuity contracts and custodial accounts (collectively referred to as "contracts") may be funded by employee salary deferrals, employer contributions, or both.

A 403(b) plan "established or maintained" by an employer that is a private sector tax-exempt organization generally is a "pension plan" within the meaning of section 3(2) of ERISA and covered by Title I pursuant to section 4(a) of ERISA.[1] The phrase "establish or maintain" is not defined in ERISA. Questions regarding the application of this phrase to 403(b) plans funded entirely with employee salary deferrals prompted the Department of Labor in 1979 to issue a "safe harbor" regulation at 29 C.F.R. 2510.3-2(f). The "safe harbor" provides that a program for the purchase of annuity contracts or custodial accounts in accordance with provisions set forth in section 403(b) of the Code

[1] Under ERISA 4(b)(1) and (2), "governmental plans" and "church plans" generally are excluded from coverage under Title I of ERISA. Therefore, a 403(b) plan that is either a "governmental plan" under 3(32) of ERISA or a non-electing "church plan" under 3(33) of ERISA is not subject to Title I.

and funded solely through salary reduction agreements, or agreements to forego an increase in salary, are not "established or maintained" by an employer under section 3(2) of the Act, and, therefore, are not employee pension benefit plans subject to Title I, provided that certain conditions are met. There are four general conditions: (1) participation of employees is completely voluntary, (2) all rights under the annuity contract or custodial account are enforceable solely by the employee or beneficiary of such employee, or by an authorized representative of such employee or beneficiary, (3) the involvement of the employer is limited to certain specified activities, and (4) the employer receives no direct or indirect consideration or compensation in cash or otherwise other than reasonable reimbursement to cover expenses properly and actually incurred in performing the employer's duties pursuant to the salary reduction agreements.

The safe harbor allows the employer to engage in a range of activities to facilitate the operation of the program. The employer may permit annuity contractors — including agents or brokers who offer annuity contracts or make available custodial accounts — to publicize their products to employees, may request information concerning proposed funding media, products, or annuity contractors, and may compile such information to facilitate review and analysis by the employees. The employer may enter into salary reduction agreements and collect annuity or custodial account considerations required by the agreements, remit them to 403(b) providers, and maintain records of such collections. The employer may hold one or more group contracts in the employer's name covering its employees and exercise rights as the representative of its employees under the contract, at least with respect to amendments of the contract. The employer may also limit funding media or products available to employees, or annuity contractors who may approach the employees, to a number and selection designed to afford employees a reasonable choice in light of all relevant circumstances.[2]

You represent that several of your clients are tax-exempt organizations with 403(b) plans that they treat as not covered by Title I of ERISA by reason of the "safe harbor" at 29 C.F.R. 2510.3-2(f). The employers also each maintain an ERISA-covered money purchase plan qualified under Code section 401(a) into which the employer makes matching contributions based on the employee's salary deferrals to the 403(b) plan.

A 403(b) plan does not fail to comply with the "safe harbor" merely because the employer maintains a separate plan qualified under Code section 401(a). Nor does compliance with the safe harbor preclude an employer from taking employee

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[2] The Department of the Treasury issued final regulations at 26 C.F.R. 1.403(b) in July 2007, updating and expanding the then existing Treasury Regulations under Code section 403(b). The Department of Labor issued Field Assistance Bulletin (FAB) 2007-02 concerning the extent to which compliance with the Treasury Regulations would cause employers to exceed the limitations on employer involvement permitted under 29 CFR 2510.3-2(f). See also DOL FAB 2010-01 for additional guidance concerning the scope of the safe harbor regulation.

participation in the 403(b) plan (including salary reduction contributions) into account in ensuring that employer contributions to the other plan meet tax qualification requirements in the Code. It is the view of the Department, however, that conditioning employer contributions to the separate pension plan on the employee making salary reduction contributions to the 403(b) plan would be inconsistent with the limited employer involvement permitted by section 2510.3-2(f)(3) of the safe harbor, and would also conflict with the requirement in section 2510.3-2(f)(1) that employee participation in the 403(b) plan be "completely voluntary."

This letter constitutes an advisory opinion under ERISA Procedure 76-1, and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. This letter relates solely to the application of provisions of Title I of ERISA, and does not express any views regarding whether the plans about which you request guidance comply with the provisions of sections 401(a) or 403(b) of the Code.

Sincerely,

Susan Elizabeth Rees
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations