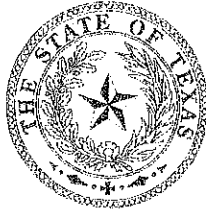


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Lon Burnam  
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*Texas House of Representatives  
Committee on Pensions and Investments*

November 29, 2007

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FILE # ML-45471-07  
I.D. # 45471

**OPINION COMMITTEE**

The Honorable Greg Abbott  
Attorney General of Texas  
209 W. 14th Street  
Austin, Texas 78701

**RQ-0653-GA**

Dear General Abbott:

As chair of the House Committee on Pensions and Investments, I ask for your opinion regarding the application of certain provisions of Section 9, Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon's Texas Civil Statutes), to Texas public school districts and open-enrollment charter schools (educational institutions) offering 403(b) plans.

A 403(b) tax-sheltered annuity plan (403(b) plan) is a tax-advantaged retirement plan available to employees of certain public educational institutions or tax-exempt organizations and to certain self-employed ministers. See Section 403(b)(1)(A), Internal Revenue Code of 1986. A 403(b) plan allows participants to defer taxable income by contributing to or purchasing qualified investment products from certain companies through payroll deductions made by their employers.

Texas educational institutions offering 403(b) plans often obtain the services of third party administrators (TPAs) to assist in the administration of their 403(b) plans. As part of the service provided to an educational institution, a TPA typically:

- receives employees' salary reduction agreements,<sup>1</sup> screens the agreements for compliance with applicable federal and state law, and approves the required employee payroll deductions; and
- receives the funds from the employees' payroll deductions and forwards those funds to the appropriate companies for deposit into the appropriate employees' 403(b) policies or accounts.

<sup>1</sup> A salary reduction agreement is the agreement between an educational institution and an employee to reduce the employee's salary for the purpose of making direct contributions to or purchases of a qualified investment product. See Section 4(7), Article 6228a-5, Vernon's Texas Civil Statutes.

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In order to provide these services, TPAs are necessarily given access to certain personal and financial information of participating employees. For example, TPAs have access to:

- the name and identifying number (i.e., social security number or employee identification number) of each employee who purchases a qualified investment product;
- records related to purchasing the investment product, including the employee's salary reduction agreement;
- information regarding the investment product purchased, including information about the company from which the employee purchased the investment product; and
- information regarding the amount of the purchase.

As a result of new federal regulations issued by the Internal Revenue Service under Section 403(b) of the Internal Revenue Code,<sup>2</sup> the services provided by TPAs in administering 403(b) plans are likely to increase because under the new regulations employers are expected to assume greater responsibility in administering their 403(b) plans. Some of that responsibility may be assumed by TPAs that can offer the following services:

- assisting educational institutions with employee-initiated transfers of policy or account values from one company to another;
- approving loans requested by employees from qualified investment products;
- approving employee distributions from qualified investment products; and
- assisting educational institutions in preparing a written plan<sup>3</sup> that complies with the new federal regulations.

TPAs are not always independent from the companies that sell qualified investment products. In some instances, a company that sells qualified investment products may form a subsidiary organization to offer TPA services. In other instances, a company and a TPA might both be owned by the same parent company. Frequently, in these situations, the affiliated TPA offers services for fees reportedly ranging from \$1,000 to \$5,000 annually, fees that are well below the market rate charged by independent TPAs for the same services.

Section 9, Article 6228a-5, Vernon's Texas Civil Statutes, prohibits certain practices by educational institutions offering a 403(b) plan to its employees. In pertinent part, Section 9 provides:

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<sup>2</sup> Revised Regulations Concerning Section 403(b) Tax-Sheltered Annuity Contracts; Final Rule, 72 Fed. Reg. 41, 128 (July 26, 2007).

<sup>3</sup> The written plan includes which companies offer qualified investment products under the educational institution's 403(b) plan, plan eligibility for employees, plan contribution limits, distribution rules (including rules for loans, transfers, rollovers, hardship distributions, and lump-sum payments), and rules regarding the timeliness of sending salary reduction contributions to the companies offering the qualified investment products.

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Sec. 9. (a) An educational institution may not:

....  
(4) grant exclusive access to an employee by discriminating against or imposing barriers to any agent, broker, or company that provides qualified investment products under this Act;

(5) grant exclusive access to information about an employee's financial information, including information about an employee's qualified investment products, to a company or agent offering qualified investment products unless the employee consents in writing to the access;

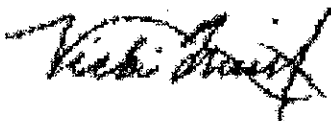
(6) accept any benefit from a company or from an agent or affiliate of a company that offers qualified investment products; or

(7) use public funds to recommend a qualified investment product offered by a company or an agent of a company that offers a qualified investment product.

In light of the above facts and statutory provisions, I ask you to answer the following questions:

- (1) Does an educational institution violate Sections 9(a)(4) through (7), Article 6228a-5, Vernon's Texas Civil Statutes, if the institution contracts with a TPA that is owned by or otherwise affiliated with a company that sells qualified investment products to the institution's employees?
- (2) Specifically, does an educational institution violate Section 9(a)(6), Article 6228a-5, Vernon's Texas Civil Statutes, if the institution contracts with a TPA described by question (1) and the TPA provides its services for free, for a nominal fee, or at a reduced rate?

Sincerely,



Vicki Truitt, State Representative  
Chair, House Committee on Pensions and  
Investments