

## DOL Issues Annual Reporting and ERISA Coverage Guidance for 403(b) Plans

In Field Assistance Bulletin 2010-01 the Department of Labor clarifies selected issues relating to (1) the regulatory exemption from ERISA coverage for 403(b) plans that are limited to employee pre-tax and after-tax contributions, and (2) annuity contracts or custodial accounts that may be treated as outside the 403(b) plan and excluded from the Form 5500 and audited financial statements.

### ERISA Exemption for 403(b) Plans Limited to Employee Contributions

DOL regulations provide an exemption from ERISA coverage for 403(b) plans that include only employee pre-tax and/or after-tax contributions and satisfy other specified requirements. The exemption is not available to plans that include employer matching or non-elective contributions. If the exemption applies, the plan is not subject to any of ERISA's requirements, such as filing annual reports on Form 5500 or preparing and distributing summary plan descriptions.

One of the requirements for the exemption is that the plan offer a number and selection of funding media or annuity contractors that are designed to afford employees a reasonable choice in light of all relevant circumstances. During the last couple of years, DOL representatives have questioned informally whether this requirement could be satisfied by a plan that permitted contributions to only one vendor, even if that vendor offered a variety of investment alternatives.

FAB 2010-01 states that the exemption generally requires a plan to offer a choice of more than one 403(b) contractor and more than one investment product. Quoting the preamble to the 1979 regulatory exemption, the FAB explains that "employees must be afforded a reasonable choice of both products and contractors under the relevant circumstances in order for the Department to consider the employer not to have established or maintained the plan." The FAB explains further, however, that relevant facts and circumstances may include costs and administrative burdens. These considerations may permit an arrangement that offers, for example, a single insurance company's product with access to a broad range of affiliated investment alternatives or an "open architecture" custodial account platform with a broad range of unaffiliated mutual fund investment products.

In the wake of the 2007 IRS final regulations for 403(b) plans, some employers with ERISA-exempt arrangements have attempted to phase them out by imposing restrictions on the number of available vendors or the opportunity to transfer funds among available vendors. One example is an arrangement that includes a number of different vendors but requires each participant to select a single vendor to receive contributions and does not permit transfers of funds among the vendors. The FAB does not specifically address whether such an arrangement would be exempt from ERISA, but the strong implication is that it would not.

### Annual Reporting by 403(b) Plans

Those 403(b) plans that are subject to ERISA must file an annual report on Form 5500 with the DOL. Beginning with the 2009 plan year these Forms 5500 require more extensive financial reporting, including audited financial statements for plans with 100 or more participants.

Because of the historical treatment of 403(b) plans as collections of individual contracts between employees and insurers, plan administrators have raised concerns about the availability of certain financial information. Last year, in response to these concerns, the DOL issued Field Assistance Bulletin 2009-02, allowing certain annuity contracts and custodial accounts that receive no contributions after 2008 not to be treated as part of the 403(b) plan or as plan assets for Form 5500 reporting purposes. You can read our summary of FAB 2009-02 by clicking on the

following link. [DOL Issues Form 5500 Relief for 403\(b\) Plans.](#)

FAB 2010-01 elaborates on this relief. Among other things, the Department explains that annuity contracts and custodial accounts may be excluded only if the employer's involvement with the contract or account is very limited. The employer may provide information to the vendor concerning the contract owner's employment status, for example, but may not (i) consent to or make decisions about employee rights under the contract or account, (ii) certify in advance that an employee is eligible for a distribution that is permissible under the Internal Revenue Code, or (iii) approve a hardship distribution or a loan before the distribution or loan is made.

Some vendors that no longer receive contributions from an employer nevertheless require the employer to provide written certification, before a distribution is made to an employee or former employee of the employer, that the employer's plan complies with Internal Revenue Code requirements and that the distribution complies with the terms of the plan. Although the FAB does not address this kind of certification specifically, it suggests fairly clearly that such a certification could be evidence that the employer may not exclude the vendor's contract or account for Form 5500 reporting purposes.

Finally, the FAB explains that an independent qualified public accountant auditing the financial statements of a 403(b) plan is not required to determine that particular contracts or accounts may be excluded for reporting purposes. But if the accountant discovers, as part of the audit, that contracts or accounts have been excluded incorrectly, the accountant must raise and resolve with the plan administrator any questions relating to the exclusion. If these issues cannot be resolved, the DOL expects them to be noted in the audit report.

If you have questions or would like additional information about this guidance or the new requirements for 403(b) plans, please feel free to contact Brian Dougherty at (215) 587-5919 or [bdougherty@postschell.com](mailto:bdougherty@postschell.com).

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