

Good News! Transition Relief for §403(b) Plan Reporting on 2009 Form 5500

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On July 20th, the Department of Labor issued Field Assistance Bulletin ("FAB") 2009-02 to provide transitional relief for §403(b) plans that make "good faith efforts" to comply with 2009 Form 5500 reporting requirements. It does not address any other issue under Title I or any obligations under the Internal Revenue Code. The FAB may be found at www.dol.gov/ebsa/regs/fab2009-2.html.

Effective for 2009 plan years, §403(b) plans covered under Title I of ERISA are subject to all reporting requirements of Form 5500, including all schedules and attachments, as well as audited financial statements (if the plan covers 100 or more participants at the beginning of the year). Prior to 2009 plan years, §403(b) plans had very limited reporting on Form 5500.

It should be noted that §403(b) plans that are not subject to ERISA, including church plans and governmental plans, have always been and continue to be exempt from Form 5500 reporting rules.

A Problem for Plans Using Individual Contracts or Custodial Accounts

Many ERISA-covered §403(b) plans use individual annuity contracts or individual custodial accounts for each plan participant, and have allowed plan participants to freely transfer their §403(b) assets to or among various investment providers, including investment providers who are unknown to the plan sponsor. In contrast to sponsors of §401(k) plans, employers with these individual contract arrangements generally did not routinely collect any

annual investment information from outside vendors or engage professional recordkeeping services for the plan, and the new reporting requirements are problematic, at the very least.

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Under FAB 2009-02, individual contracts or custodial accounts that meet all of the following requirements do not have to be reported as plan assets on Form 5500:

- The contract or custodial account was issued to a current or former employee prior to January 1, 2009;
- The employer has no obligation to make any contributions (including salary deferrals) to the contract or custodial account after December 31, 2008;
- The contract or custodial account is legally enforceable against the insurer or custodian by the participant alone, without any employer involvement; and
- The employee is fully vested in the entire contract or custodial account.

This provision can potentially eliminate a large number of individual contracts or custodial accounts from consideration in gathering information necessary to complete the 2009 Form 5500. Additionally, the FAB provides that any current or former employee whose only assets under the §403(b) arrangement meet all of the above

requirements is not counted as a plan participant on Form 5500. This provision has the effect of minimizing the number of individuals who count as plan participants, and could result in a plan being able to file as a small plan, thus avoiding the requirement for audited financial statements.

Both of these provisions are welcome relief for employers whose §403(b) plans are a collection of individual contracts or custodial accounts.

In addition to these two important provisions, FAB 2009-02 also indicates that the DOL will not reject a large plan Form 5500 report that includes audited financial statements with a qualified, adverse, or disclaimed opinion. The accountant's opinion must include a statement that such opinion results solely because of issues with pre-2009 contracts or custodial accounts.

Conclusion

The DOL has issued reasonable and welcome relief for employers who sponsor ERISA-covered §403(b) plans funded through individual contracts or custodial accounts. Plan sponsors, their service providers, and their auditors can take comfort that, as long as they act reasonably, prudently, and in the best interests of plan participants and beneficiaries, they will be able to complete their Form 5500 reports without incurring undue expense or effort in collecting information from numerous vendors.