



Employee Benefits Law Information Memo

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DOL ISSUES FORM 5500 REPORTING RELIEF FOR SECTION 403(b) PLANS

The United States Department of Labor (“DOL”) recently issued Field Assistance Bulletin 2009-02 (“FAB”), providing transitional Form 5500 reporting relief for certain employers that maintain tax-sheltered annuity plans designed to satisfy the requirements of Internal Revenue Code Section 403(b) (“Section 403(b) Plans”).

Background

Section 403(b) Plans that are established and maintained by private, tax-exempt entities (including colleges, universities, hospitals, associations and the like) have long been subject to Form 5500 Annual Return/Reporting requirements. For plan years beginning prior to January 1, 2009, the Form 5500 reporting requirements have been limited. However, following the issuance of Internal Revenue Code Section 403(b) regulations by the Internal Revenue Service in 2007, the DOL published Form 5500 revisions and final regulations that, among other things, eliminate special limited reporting for Section 403(b) Plans for plan years that begin on or after January 1, 2009.

The new Form 5500 reporting requirements require, among other things, that sponsors of ERISA-covered Section 403(b) Plans with 100 or more participants must now file audited financial statements with the plan’s Form 5500. Generally, such financial statements must include itemized statements of plan assets and liabilities at both the beginning and the end of a plan year. The financial statements must be accompanied by an independent accountant’s opinion that such statements fairly present the financial status of the plan, and conform with generally accepted accounting principles (i.e., an “unqualified” opinion).

In most cases, sponsors of Section 403(b) Plans with fewer than 100 participants will be eligible for a waiver from the requirement to file audited financial statements, but will still be required to report aggregate financial information relating to the plan. (Sponsors of such “small plans” may be able to report such information on Form 5500-SF, which is a two-page simplified version of the Form 5500.)

Due to the common structure of Section 403(b) Plans, as a collection of individual annuity contracts or custodial accounts (collectively “Accounts”), sponsors and administrators of Section 403(b) Plans could experience difficulties in assembling financial information for the 2009 plan year, particularly with respect to reporting existing plan assets at the beginning of the plan year. This is because, prior to 2009, a Section 403(b) Plan participant often was allowed to direct transfers among investment providers, including investment providers not authorized to receive plan contributions directly from the employer, without the sponsor’s involvement or consent. Thus, to achieve compliance with the new annual reporting requirements, employers maintaining a plan of this type would be required to identify and obtain financial information for each plan participant from all investment providers that hold contributions initially made under the employer’s Section 403(b) Plan. To further complicate matters, employers would need to identify and locate every former employee who may have been a plan participant for purposes of determining whether he or she has an existing Account (or Accounts) of which the employer may be unaware (because the employer ceased to have any obligation to make contributions or forward salary reduction contributions to such Accounts).

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Transition Relief

Recognizing the challenges associated with the new Form 5500 (or Form 5500-SF) annual reporting requirements for Section 403(b) Plans, the DOL issued the FAB, which provides the following transitional relief for employers/plan sponsors that make good faith compliance efforts for the 2009 plan year.

Accounts Issued Before 2009. Employers do not need to treat an Account as part of the employer's ERISA-covered Section 403(b) Plan for purposes of the Form 5500 annual reporting requirements, if the following requirements are met:

1. the Account was issued to a current or former employee before January 1, 2009;
2. the employer ceased to have any obligation to make contributions to the Account (including employee salary reduction contributions), and actually ceased making contributions to the Account, before January 1, 2009;
3. all of the rights and benefits under the Account are legally enforceable against the Account insurer or custodian by the individual owner of the Account without any involvement by the employer; and
4. the individual Account owner is fully vested in the Account.

Participants With Only Excludable Accounts or Contracts. For purposes of the Form 5500 annual reporting requirements, an employer/plan sponsor is not required to count as a participant in a Section 403(b) Plan any current or former employee who only maintains Accounts that were issued before 2009 and that are otherwise excludable pursuant to the FAB. This means that a plan that might otherwise be subject to the audited financial statement requirement, because the plan covers more than 100 participants, may qualify for the simplified reporting requirements available to "small plans" (if enough participants can be excluded under this provision).

Qualified, Adverse or Disclaimed Accountants' Opinions. The DOL will not reject a Form 5500 based on an accountant's opinion that is "qualified," "adverse," or disclaimed, where the accountant expressly states that the sole reason for such an opinion is that pre-2009 Accounts were not covered by the audit or not included in the plan's financial statements. (Accountants performing plan audits must otherwise comply with the generally accepted auditing standards required by ERISA and the DOL.)

Good Faith Compliance. The DOL acknowledges that there are likely additional annual reporting compliance issues that Section 403(b) Plans will face when preparing the Form 5500 for the 2009 plan year. Regarding such acknowledgement, the DOL stated that the "guiding principle" for Section 403(b) Plan sponsors must be to "ensure that appropriate efforts are made to act reasonably, prudently, and in the interests of the plan's participants and beneficiaries."

Recommended Action. Employers that maintain ERISA-covered Section 403(b) Plans should take steps to prepare for the new Form 5500 reporting requirements. Working with the plan's investment providers and the accountants for the plan now may help make compliance easier when the filing deadline approaches in 2010. Documenting the compliance steps taken also may help the employer minimize any sanctions that the DOL might seek to impose on the employer in the case of any filing deficiencies.

If you have any questions about this memorandum, please contact Susan L. Dahline (315-218-8227, sdahline@bsk.com) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below.

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PLAN AMENDMENT AND RESTATEMENT REMINDERS: ACTION NEEDED

Pension Protection Act of 2006 ("PPA") Amendments. Tax-qualified retirement plans, including defined benefit and defined contribution plans, must be amended by **the last day of the plan's 2009 plan year** to reflect changes made by The Pension Protection Act of 2006 (i.e., by **December 31, 2009** in the case of calendar-year plans). Plan sponsors should take steps as soon as reasonably possible to adopt the required amendments.

Economic Growth Tax Relief and Reconciliation Act of 2001 ("EGTRRA") Restatements. Employers that maintain defined contribution plans that have been pre-approved by the Internal Revenue Service (i.e., prototype or similar volume type submitter plans) must amend and restate such plans by April 30, 2010 for purposes of maintaining the tax-qualified status of such plans. To the extent desired by the employer, the amended and restated plan also must be submitted to the Internal Revenue Service for approval by **April 30, 2010**. Employers that use a prototype or volume submitter plan should contact the plan provider to schedule an update to the plan document, and a (re)submission to the Internal Revenue Service for approval, as soon as reasonably possible.