



DOL Form 5500 Relief and IRS Proposed Prototype Plan Program May Ease Transition for 403(b) Plans

On July 20, 2009, the DOL issued Field Assistance Bulletin 2009-02, providing transitional relief for sponsors of 403(b) plans subject to ERISA who make good faith efforts to comply with ERISA's annual Form 5500 reporting requirements for the 2009 and subsequent plan years. Earlier this year, the IRS announced its intention to establish prototype plan and determination letter programs for 403(b) plans.

Background

Internal Revenue Code Section 403(b) permits the establishment of tax-sheltered annuity or custodial account arrangements for employees of public schools and Section 501(c)(3) tax-exempt organizations, such as hospitals, churches, private schools, cultural institutions and charities.

403(b) plans sponsored by tax-exempt organizations (other than certain church plans) that are covered by ERISA are subject to the annual reporting requirements of Title I of ERISA. In 2007, the DOL eliminated the limited reporting requirements for these 403(b) plans, generally effective for plan years beginning on or after January 1, 2009. (See our December 19, 2007 [For Your Information](#).) Under the new rules, large ERISA-covered 403(b) plans (generally with 100 or more participants) must now provide plan financial information, including audited financial statements, with their Form 5500. Small plans (generally those with fewer than 100 participants) are eligible for a waiver of the audit requirement, but must still report aggregate financial information for the plan. In [Field Assistance Bulletin 2009-02](#) (FAB 2009-02), the DOL provides important transition relief with regard to the Form 5500 reporting obligations, including the audit requirement.

One of the more significant provisions of the 2007 IRS final 403(b) regulations required 403(b) plan sponsors to have a written plan document in place by December 31, 2008 (see our September 12, 2007 [For Your Information](#)), but this requirement was subsequently delayed until December 31, 2009 (see our December 18, 2008 [For Your Information](#)). Earlier this year, the IRS, in [Announcement 2009-34](#), stated its intention to establish a program for the pre-approval of prototype plans under Section 403(b).

Form 5500 Relief

The DOL has now provided relief from some of the Form 5500 financial reporting requirements for ERISA-covered 403(b) plans that make good faith efforts to transition to ERISA's annual reporting requirements. In FAB 2009-02, the DOL states that annuity contracts and custodial accounts do not have to be treated as plan assets

for purposes of the Form 5500 reporting requirements, including the large plan audit requirement, if all of the following conditions are met –

- The contract or account was issued to a current or former employee before January 1, 2009.
- The employer ceased to have any obligation to make contributions (including employee deferrals) and in fact stopped making contributions to the contract or account before January 1, 2009.
- All of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer.
- The individual owner of the contract is fully vested in the contract or account.

BUCK COMMENT. *It is unclear from the FAB whether contributions to a contract that were made in early 2009 but were attributable to late 2008 may be treated as 2008 contributions. Further guidance is needed on this issue.*

Group annuity contracts or custodial accounts issued to an employer will be treated as issued to its employees for purposes of the relief provided by FAB 2009-02 if the employees have individual certificates reflecting their rights under the contract or account and the certificates enable the employees to enforce all of those rights without any employer involvement.

BUCK COMMENT. *It is important to review all group contracts and accounts to determine if they qualify for the relief provided by FAB 2009-02.*

Although not specifically stated in the FAB, the DOL has now indicated that this relief is ongoing and not limited to 2009.

Under the transition relief, if a current or former employee only has annuity contracts or custodial accounts that meet the above requirements, the employee does not have to be counted as a plan participant for annual reporting purposes. This will enable some plans to exclude certain participants and therefore qualify for simplified financial reporting as small plans for Form 5500 purposes.

Further, the DOL states it will accept Forms 5500 with audit reports that are qualified, adverse, or disclaimed solely because the pre-2009 contracts were not covered by the audit or included in the plan's financial statements.

BUCK COMMENT. *The relief provided by the FAB will be most helpful to plans with large numbers of old, frozen annuity contracts or custodial accounts which are no longer eligible to receive new contributions.*

The DOL acknowledges the potential difficulty and additional costs employers may have in connection with the shift to the expanded annual reporting requirements, especially with respect to lost or destroyed records necessary to complete the Form 5500. In such cases the DOL notes that "the guiding principles must be to ensure that appropriate efforts are made to act reasonably, prudently and in the interest of the plan's participants

and beneficiaries.” It expects accountants conducting plan audits to notify employers of questions, issues and irregularities discovered through the audit that could materially affect the plan’s audit expenses or the costs of making the transition to ERISA’s new reporting regime.

BUCK COMMENT. *Employers need to determine the extent to which correcting any irregularities is prudent and in line with the DOL’s guiding principles, and whether the costs involved may be charged to the plan.*

403(b) Proposed Prototype Plan Program

In Announcement 2009-34, the IRS announces its intention to establish a prototype plan program to make it easier for some 403(b) plan sponsors to comply with the requirement for a written 403(b) plan document. Separately, the IRS provides sample prototype plan language and states it intends to establish a determination letter program for individually designed plans and certain prototype plans which may not automatically comply with the nondiscrimination requirements applicable to 403(b) plans. In connection with the determination letter program, the IRS also states its intention to permit plans to retroactively correct certain defects in the plan documents.

Prototype Plan. A prototype plan is an IRS pre-approved plan sponsored by a third-party vendor (generally a financial institution) that is adopted by various employers. The prototype vendor submits a basic plan document and adoption agreement to the IRS to receive an advance opinion letter that the plan document complies with the requirements for 403(b) plans.

BUCK COMMENT. *Once prototype 403(b) plans become available, employers interested in using them should carefully review their terms to make sure they are consistent with the terms of their current plans and administrative practices. Employers should also ensure that the prototype plan provisions do not conflict with the terms of any existing annuity contracts or custodial accounts used in connection with the 403(b) plan.*

Sample Plan Language. As noted above, the IRS has posted [draft sample prototype plan language](#) on its website. Every prototype plan would contain certain provisions, such as terms of eligibility, the investment arrangements available under the plan, limits on compensation, terms governing hardship distributions, loans, and rollovers, and amendment procedures. Prototype plans could not incorporate by reference the limitations of Section 415 or the ACP test of Section 401(m)(2). While there are no restrictions on the types, number or features of annuity contracts or custodial accounts that may be offered under a 403(b) prototype plan, the prototype plan terms would have to override any inconsistent provisions of the annuity contracts and custodial accounts.

BUCK COMMENT. *The IRS' posting of model prototype language does not modify Revenue Procedure 2007-71, which provides model 403(b) plan language to help public schools comply with the 2007 regulations, and which the IRS indicated could also be used by other non-school 403(b) eligible employers with suitable modifications. Absent further IRS guidance, public schools and other eligible employers may continue to use that model language for individually designed plans.*

Although the IRS' sample language is intended to provide guidance on the provisions required in prototype plans, it sheds light on the provisions that may be included in individually designed plans as well. However, care must be taken when using the sample prototype plan language in drafting individual plans as certain provisions may not be appropriate for employers other than those with the simplest plan design.

Determination Letter. In general, an eligible employer adopting an approved 403(b) prototype plan can rely on the opinion letter obtained by the prototype plan sponsor and need not request an individual determination letter. However, if contributions to the prototype plan (other than pre-tax employee contributions) are subject to the nondiscrimination and coverage requirements of Sections 401(a)(4) and 410(b), reliance would be allowed only if certain uniform standards are met. An eligible employer could rely on a prototype opinion letter in all other respects, but request an individual determination letter (once such program is established) solely with respect to Sections 401(a)(4) and 410(b). Governmental or non-electing church plan sponsors can rely fully on the opinion letter in all cases as these plans are not subject to the nondiscrimination rules otherwise applicable to 403(b) plans.

An employer who adopts an individually designed 403(b) plan may request a determination letter with respect to applicable IRS requirements once the determination letter program is established.

Filing for a determination letter for an individually designed plan or for a prototype plan with potential nondiscrimination issues would permit the employer to make remedial amendments, as discussed below.

Remedial Amendments. The draft revenue procedure contained in Announcement 2009-34 would allow an eligible employer to retroactively correct defects in plan provisions by timely adopting an approved 403(b) plan by a date to be determined by the IRS (but not earlier than March 15, 2010) or by amending its plan and submitting a request for a determination letter once the determination letter program is established.

BUCK COMMENT. *The 403(b) prototype and determination letter programs will likely not be finalized in time for them to be used to comply with the impending IRS December 31, 2009 plan document deadline, so employers should move forward with their efforts to have a written plan document in place by year end. As noted above, employers may continue to use the model language for individually designed plans in Revenue Procedure 2007-71 with any necessary modifications for non-school employers.*

Operational Errors. The remedial amendment period in the draft revenue procedure does not override the requirement in Notice 2009-3 that employers operate their 403(b) plans in accordance with a reasonable interpretation of the final IRS 403(b) regulations starting in 2009. Employers must also continue to use best

efforts to retroactively correct any operational errors that may occur during 2009, based on the principles of the IRS' Employee Plans Compliance Resolution System (EPCRS).

Conclusion

Sponsors of 403(b) plans subject to ERISA should begin to gather information for the Form 5500 filing and to identify and review all annuity contracts and custodial accounts to determine whether any can be excluded from their reporting and audit obligations. All sponsors of 403(b) plans, whether or not they are subject to ERISA, should take steps to have a written plan document by December 31, 2009, to ensure operational compliance under the 2007 final regulations retroactive to January 1, 2009, and to correct any operational errors under EPCRS. Sponsors may want to consider whether to adopt a 403(b) prototype plan once the IRS finalizes the program.

Buck's consultants are available to assist you in these efforts. We can also assist 403(b) plan sponsors in applying for a determination letter once the program is established.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.