



403(b) Plans: Revisited

Thursday, May 7, 2009

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A wide-angle photograph of the San Francisco skyline at dusk. The city's lights are on, and the buildings are reflected in the water in the foreground. The sky is a deep blue. The word "Disclosure" is written in a yellow, sans-serif font in the upper right corner of the image.

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Significant 2009 Changes

Internal Revenue Regulation Changes

- Written plan document, including all required provisions
- Stricter exchange and transfer rules
- Changed and clarified Universal Availability rules
- Annual notice to participants on rights to participate and methods for making or changing elections

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Significant 2009 Changes

Internal Revenue Regulation Changes (continued)

- Controlled group rule clarification
- Timing of deposit requirements
- Plan termination availability



Significant 2009 Changes

5500 Reporting Regulations for ERISA 403(b) Plans for Years Beginning in 2009

- Expanded Form 5500 reporting requirements
- Independent accountant plan audit requirements for “large plans”



Significant 2009 Changes

Employer Now Responsible for the Plan

- Compliance with the rules and regulations, such as
 - Contribution limits
 - Nondiscrimination rules
 - Distributions
- Coordination of actions among multiple vendors
- Liability for penalty taxes, correction fees, employment taxes
- Accordingly, the employer responsibilities should be assigned to appropriate personnel



Self-Correction Opportunity

- Plan document satisfying the requirements on or before 12/31/2009 effective as of 1/1/2009
- Operates the plan in accordance with a reasonable interpretation of 403(b)
- Before the end of 2009, sponsor makes best efforts to retroactively correct any operational error using the correction principles set forth in RP 2008-50 - Employee Plans Compliance Resolution System “EPCRS”
 - Self-correction window without incurring large government correction fees

Bottom-line is fix it in 2009



2009 Compliance Checklist

Does the Employer Really Make Deferral Opportunity Universally Available?

- All employees of the employer must be permitted to make salary deferrals except:
 - Nonresident aliens
 - Employees eligible to make deferrals to another 403(b), 401(k) or 457(b) plan
 - Students under a work study program
 - Employees working less than 20 hours (expect less than 1,000 hours in the upcoming year and less than 1,000 hours in the preceding year)



2009 Compliance Checklist

Has an Annual Notice to Employees Been Provided for 2009?

- Notice requirement at least once a year

- Stating:
 - Period of time during which an election may be made, and
 - Any other conditions on elections



2009 Compliance Checklist

Is There a Plan Document that Complies with the New Regs?

- Must contain all material terms and conditions regarding:
 - Eligibility (Universal Availability)
 - Benefits / contributions
 - Applicable limitations
 - Contracts available
 - Time and form of distributions
 - Allowance of exchanges within a plan
 - Allowance of plan to plan transfers

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2009 Compliance Checklist

- Optional provisions:
 - Loans, hardship distributions
 - Acceptance of rollovers
- Can incorporate documents/agreements by reference
- Delegation of responsibility for administrative functions
- Coordinate document with vendor contracts and Information Sharing Agreements to insure that there is no conflicting language
- Current vendor(s) must be listed in plan document or vendor(s) must have an Information Sharing Agreement with employer



2009 Compliance Checklist

Is an Information Sharing Agreement in Place with Vendors Where Required?

- Discontinued/de-selected contracts (Rev. Proc 2007-71)
 - No contributions since 12/31/04 – grandfathered, no compliance responsibilities and not part of the plan
 - Contributions ceased 1/1/05 – 12/31/08 – reasonable good faith effort to include vendor contracts in current plan – notify vendor, but no response required
 - Pre-2009 contracts - vendor must make reasonable, good faith effort to contact employer before making any distribution or loan

A wide-angle photograph of the San Francisco skyline at dusk. The city lights are visible against a dark blue sky, and the lights reflect on the water in the foreground. The text "2009 Compliance Checklist" is overlaid in yellow on the right side of the image.

2009 Compliance Checklist

An Information Sharing Agreement (“ISA”) between an employer and a vendor to share information includes:

- Employment status
- Contributions & Catch-ups
- Distributions
- Hardship withdrawals
- Loans



2009 Compliance Checklist

Is the Exempt Organization Now in a Broader “Controlled Group” ?

- Two or more Sec 501(c) organizations or the combination of a 501(c) org. and a non-501(c) org. under common control are treated as a single employer
- **Common control** means that the entities have an 80% or more common directorship, trusteeship or representation that is controlled directly or indirectly
 - Control means the general power to remove
 - Facts and circumstances determine



2009 Compliance Checklist

Is the Organization Meeting the New Timing of Deferral Contributions Deposit Requirements?

- 403(b) elective deferrals must be transferred within a period that is not longer than is reasonable for the proper administration of the plan
- Typically within 7 days for most situations
- ERISA Plans already subject to this rule



2009 Compliance Checklist

Do You Wish to Freeze or Terminate the Organization's 403(b) Plan?

- Can amend plan to eliminate future contributions
- Can now terminate the plan and allow accumulated benefits to be distributed on termination
- The employer must not make contributions to any other 403(b) contract within 12 months after distribution of all assets from the terminated plan



The New Audit Requirements For ERISA Plans

*Financial statements and footnotes of large plans
must be audited by an independent auditor*

A wide-angle photograph of the San Francisco skyline at dusk. The city's lights are on, and the buildings are reflected in the water in the foreground. The sky is a deep blue. The text "Current IRS/DOL Reporting" is overlaid in yellow in the upper right corner.

Current IRS/DOL Reporting

For plan years beginning in 2009, new Form 5500 rules will require same extensive reporting and independent audit requirements as apply to 401(k) plans.

“The DOL intends to fully enforce this new audit requirement in 2009.”

A panoramic view of the San Francisco skyline at dusk, with the city lights reflecting on the water. The title text is overlaid on the top right of the image.

New Reporting Requirements for ERISA 403(b) Plans

- For 2009 Plan Year
- Plan must file full Form 5500
 - Large plans – Financial info in Schedule H
 - Small plans – Financial info in Schedule I
- Financial statements and footnotes of large plans must be audited by an independent auditor
- All returns must be filed electronically
- Increased oversight



403(b) Plan Audit Considerations

- Will the Plan be auditable for the year beginning in 2009?
- Can a comparative statement of net assets for both 2009 and 2008 years be ready for the audit?
 - 2008 will be covered by auditor's report
 - Participant records may be difficult to “roll up” into plan level records
 - Auditors cannot prepare your financial statements

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First Year Audit Considerations

Are the plan asset beginning balances reasonable considering the life of the plan?

- Participant account balance amounts
- Contributions
- Withdrawals
- Investment activity

A wide-angle photograph of the San Francisco skyline at dusk, with the city lights reflecting on the water. The text "403(b) Plan Audit" is overlaid in the top right corner in a yellow font.

403(b) Plan Audit

Will you be able to provide the auditors with the following information that is in compliance with the new Regs?

- Plan document and any plan amendments
- Summary Plan Description
- Copies of investment or insurance contracts
- Vendor service agreements, including Information Sharing Agreements
- Plan communications and materials provided to employees



403(b) Plan Audit

Are you ready to provide the following information to auditor?

- Listing of parties in interest
- Meeting minutes and any legal correspondence
- Year end statements for all plan assets (2009 and 2008) as well as subsequent asset statements
- Participant account statements (2009 and 2008)
- Year-end payroll or census report
- SAS 70 report for service providers
- Discrimination testing results
- Plan expenses



403(b) Plan Audit

- Documentation of internal controls – Are you ready to walk through each process with the auditors and provide support for each process?
 - Eligibility
 - Payroll system
 - Contributions calculation and remittance timing
 - Benefit payments
 - Plan exchanges
- No controls?
 - Expect a SAS 112 – control deficiency letter from the auditor (every year until controls are put into place)

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403(b) Plan Audit

...and all of the back up for any of those transactions the auditors choose to test

A wide-angle photograph of the San Francisco skyline at dusk, with the city lights reflecting on the water in the foreground. The sky is a deep blue, and the buildings are illuminated with warm lights.

403(b) Plan Audit Considerations

Reporting and Disclosure Requirements

- FASB Statement No. 35
- FASB Statement No. 157 - Fair Value Measurements
- Guaranteed investment contract or stable value funds - SOP 94-4-1 information



ERISA 403(b) Plans

A wide-angle photograph of the San Francisco skyline at dusk. The city's lights are on, and the buildings are reflected in the water in the foreground. The sky is a deep blue. The text "ERISA 403(b) Plan Attributes" is overlaid in yellow on the right side of the image.


ERISA 403(b) Plan Attributes

- Reporting and disclosure requirements
- ERISA fiduciary standards
- ERISA pre-empts state laws

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ERISA Fiduciary Standards

- Fiduciary - anyone with decision making authority over the plan and/or plan assets
- Fiduciaries are charged with:
 - Acting solely for the benefit of plan participants in a prudent manner
 - Acting based on the knowledge and experience of an expert
 - Avoiding conflicts of interest
 - Allowing only “reasonable” expenses to be charged to participant accounts

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ERISA 403(b) Plan Sponsor Fiduciary Responsibilities

- Selection and monitoring of investments
- Selection and monitoring of investment managers
- Investment information provided to plan participants
- Plan technical compliance
- Selection and monitoring of plan record keeping and administration provider(s)

A wide-angle photograph of the San Francisco skyline at dusk. The city's lights are on, and the buildings are reflected in the water in the foreground. The sky is a deep blue. The text 'Potential Fiduciaries' is overlaid in the top right corner in a yellow-green color.

Potential Fiduciaries

- Board of Directors
- Officers
- Anyone with authority over the plan and/or plan assets, including:
 - Plan compliance
 - Plan investments
 - Claims
 - Distributions
 - Plan provisions and/or benefits



Non-ERISA Plans



Non-ERISA Plan Safe Harbor Attributes

- Employee participation completely voluntary
- Salary reduction arrangement only
 - Employers' responsibilities limited to:
 - Collect and remit \$ to vendor
 - Maintain collection records
 - Ensure that employees' W-2 income and tax withholdings are properly adjusted for payroll taxes
- All rights solely enforceable by employee



Non-ERISA Plan Safe Harbor Attributes

Allowable Activities (FAB 2007-2)

- Review program structure and operation for tax compliance defects
- Ensure program is 403(b) tax compliant
- Develop administrative processes and obtain cooperation of vendors to correct tax defects
- Keep records of plan activities
- Permit vendors to publicize their products
- Compile information to facilitate employee review
- Limit number and selection of vendors to give employees a reasonable choice



Tricky Non-ERISA Safe Harbor Issues

- Vendors may require instructions from Plan Sponsor to:
 - Authorize plan-to-plan transfers
 - Process distributions
 - Make determinations regarding hardship distributions, QDROs and eligibility for or enforcement of loans
- Negotiate with annuity providers or account custodians to change the terms of their products



Next Steps

- List existing and future retirement plan goals
- Assign plan responsibilities
- Determine current vendor contacts and review contracts/information sharing agreements
- Determine critical decisions that need to be made
 - Plan provisions
 - Vendors going forward - deselecting of vendors
 - ERISA/Non-ERISA plan
- Develop a process with a timeline to achieve/maintain compliance and to carry out plan goals
- Identify and fix any current compliance issues

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The Process

- If non-ERISA plan:
 - Establish and document procedures to stay within “safe harbor”
 - Evaluate past and present vendors to ascertain if the plan has the vendor relationship going forward
 - Consider limiting number of vendors

If an ERISA plan:

- Evaluate past and present vendors to ascertain if the plan has the vendor relationship going forward
- Consider consolidation to a single vendor
- Review vendors' investment line-up and fees
- Gather, or engage a firm to help you gather, plan accounts data to prepare for 2009 plan year independent CPA audit, if applicable
- Consider hiring a third party to establish and monitor processes and procedures to maintain compliance and limit liability exposure

A panoramic view of the San Francisco skyline at dusk, with the city lights reflecting on the water. The word "Summary" is written in yellow text in the upper right corner of the image.

Summary

- It is a New World for 403(b) plans
- Liability exposure management is the necessary and least expensive alternative



Appendix A

403(b) Plan Overview



What Employers Can Have a 403(b) Plan?

- Code Section 501(c)(3) organizations - tax-exempt organizations
 - Organized for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international sports competition, or for the prevention of cruelty to children or animals
- Public educational organizations
- Licensed church minister or an organization that shares religious bonds with such minister that it employs



Maximum Deferral Limits

- \$16,500 (Code Sec 402(g))
- Special catch-up contribution for 15 years of service employees of educational organizations, hospitals, health and welfare service organizations and church related organizations. The lesser of:
 - \$3,000,
 - Excess of \$15,000 over prior year special catch-up contribution deferrals with current employer, or
 - Excess of \$5,000 X years with the employer, over total prior year deferrals with employer
- \$5,500 catch-up contribution for employees age 50 and over (Code Sec 414(r))



Roth Contributions

Roth (after-tax) contributions are allowed subject to the following:

- Plan must separately account for Roth contributions
- Limits remain the same – treated like deferrals for purposes of contribution limits and distribution rules
- Qualified distributions (made after 59 ½ or made after death) not taxed if distribution is made after 5 year holding period (begins first year of Roth contribution)



Employer Contributions

- 403(b) plans that allow employer contributions are ERISA plans
- Employer contributions are subject to:
 - Nondiscrimination testing under Sec 401(a)(4)
 - Minimum coverage testing under Sec 410(b) of the Code
 - ACP testing under Code Sec 401(m) for matching contributions
- Combined employer & employee contributions cannot exceed:
 - \$49,000 dollar limit, or
 - 100% of compensation under Sec 415(c) of the Code.
 - Alternate limit for churches of \$10,000 if 100% of compensation is exceeded (\$40,000 lifetime maximum)



Employer Contributions

- An employer can make contributions to former employees
 - Deemed to have monthly compensation for the period through the end of the taxable year in which ceases to be an employee and through the end of each of the next 5 taxable years
 - Must not exceed the lesser of the
 - Dollar limit of \$49,000 for 2009, or the
 - Compensation based on the former employee's average monthly compensation during most recent year of service
 - Cannot discriminate in favor of former employees who are HCEs



Appendix B

Best Practices Issues

And Considerations



Plan Administration

- A multitude of vendors can mean:
 - Higher participant plan costs
 - Added complexity to plan compliance and administration
 - Lack of clear vendor responsibility for and/or participation in plan compliance
 - Lower plan administration service quality
 - Absence of independent, knowledgeable selection and monitoring of plan investments
- The employer remains liable for compliance breaches



Vendor Selection Criteria

- Will vendor accept fiduciary responsibility for:
 - Plan compliance
 - Investment selection and monitoring
- Will vendor indemnify employer for compliance failures?
- Are procedures in place to identify and avoid potential vendors' conflict of interests?
- Does vendor offer a complete universe of investment managers or only its own products?



Corporate Governance

- Employers can no longer avoid “being involved” in a 403(b) plan
- Best Practices
 - Written Investment Policy with periodic monitoring
 - Periodic plan expense review
 - Effective communication to employees
 - Documented procedures to assure compliance
 - Plan Administration and Investment Committee
 - Clear delegation of responsibilities from Board of Directors
 - Periodic reporting to Board of Directors



Appendix C

401(k)/ERISA/NON-ERISA 403(b) Plan

Comparison

401(k)/ERISA/NON-ERISA 403(b) Plan Comparison



	401(k)	ERISA 403(b)	Non-ERISA 403(b)
Elective deferral contributions - limit 2009 \$16,500	Yes	Yes	Yes
Elective deferral catch-up contributions - limit 2009 \$5,500	Yes	Yes	Yes
Special catch-up for 15 years of service - max \$3,000	No	Yes	Yes
Roth contributions	Yes	Yes	Yes
Employer matching contributions	Yes	Yes	No
Employer contributions for former employees	No	Yes	No
Employer profit-sharing contributions	Yes	Yes	No
Minimum distribution rules	Yes	Yes	Yes
Investment alternatives limited to annuity contracts and mutual funds	No	Yes	Yes

401(k)/ERISA/NON-ERISA 403(b) Plan Comparison



	401(k)	ERISA 403(b)	Non-ERISA 403(b)
Plan Document required	Yes	Yes	Yes
SPD, Form 5500 & SAR	Yes	Yes	No
Elective deferral ADP testing	Yes	No	No
Universality Requirement	No	Yes	Yes
Termination of Plan	Yes	Yes	Yes
Loans & Hardship provisions	Yes	Yes	Yes
ERISA fiduciary responsibilities	Yes	Yes	No
State law governance	No	No	Yes
Incidental death benefits *Existing insurance grandfathered	Yes	No*	No*