



FIELD ASSISTANCE BULLETIN NO. 2009-02

DATE: July 20, 2009

MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT
IAN DINGWALL, CHIEF ACCOUNTANT
REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: ANNUAL REPORTING REQUIREMENTS FOR 403(b) PLANS

This Bulletin provides guidance on certain Form 5500 Annual Return/Report requirements for tax-sheltered annuity programs described in section 403(b) of the Internal Revenue Code (Code) with respect to contracts issued before January 1, 2009. The guidance in this Bulletin relates solely to Form 5500 reporting obligations and does not address any other issue under Title I of ERISA or any obligations under the Code.

BACKGROUND

A tax-sheltered annuity program under section 403(b) of the Code (“403(b) plan”) is a retirement plan for employees of public schools, employees of certain tax-exempt organizations, and certain ministers. Under a 403(b) plan, employers may purchase for their eligible employees annuity contracts or establish custodial accounts invested only in mutual funds for the purpose of providing retirement income. Under ERISA § 4(b) (1) and (2), “governmental plans” and “church plans” generally are excluded from coverage under Title I of ERISA. Therefore, Code section 403(b) contracts and custodial accounts purchased or provided under a program that is either a “governmental plan” under § 3(32) of ERISA or a non-electing “church plan” under § 3(33) of ERISA are not subject to the annual reporting requirements of Title I of ERISA. A 403(b) plan established or maintained by a tax-exempt organization, however, would be a “pension plan” within the meaning of section 3(2) of ERISA that would be covered by Title I pursuant to section 4(a) of ERISA.¹

¹ The terms “establish” or “maintain” are not defined in ERISA. The Department of Labor in 1979 issued a “safe harbor” regulation at 29 C.F.R. § 2510.3-2(f) which states that a program for the purchase of annuity contracts or custodial accounts in accordance with section 403(b) of the Code and funded solely through salary reduction agreements or agreements to forego an increase in salary are not “established or maintained” by an employer under section 3(2) of the Act, and, therefore, are not employee pension benefit plans that are subject to Title I, provided (footnote continued)

In July 2007, the Department of the Treasury/Internal Revenue Service issued final regulations at 26 C.F.R. 1.403(b)-0 *et seq.*, 72 Fed. Reg. 41128 (Jul. 26, 2007) (IRS 2007 final regulations), reflecting legislative changes made to Code section 403(b) since the existing regulations were adopted in 1964. The IRS 2007 final regulations also incorporate interpretive positions that Treasury/IRS have taken in other guidance on Code section 403(b). The IRS 2007 final regulations provide that a 403(b) plan must be maintained pursuant to a “written defined contribution plan” that contains all the material terms and conditions for benefits under the plan. Following publication of the IRS 2007 final regulations, the IRS issued transitional relief in Revenue Procedure 2007-71 on certain annuity contracts and custodial accounts issued before the January 1, 2009, effective date of the IRS 2007 final regulations. The IRS issued further transitional relief in IRS Notice 2009-3.

The Department of Labor (Department) separately published Form 5500 revisions and related final regulations generally effective for plan years beginning on or after January 1, 2009, which, among other things, changed the annual reporting requirements for Code section 403(b) plans covered by Title I of ERISA. *See* 72 Fed. Reg. 64731 (Nov. 16, 2007). The form revisions and final regulations eliminated special limited reporting for Code section 403(b) plans.² Under the new annual reporting rules, beginning with their Form 5500 filing for the 2009 plan year, “large” ERISA-covered 403(b) plans (generally plans with 100 or more participants) are required to file audited financial statements with their Form 5500 pursuant to ERISA section 103(a)(3)(A).³ Small 403(b) plans (generally fewer than 100 participants) are eligible for a waiver of the audit requirement.⁴ Given the nature of Code section 403(b) plan investments, small 403(b) plans will for the most part be able to use the Form 5500-SF (Short Form 5500), a new simplified form for small plans invested in certain types of assets. Even small 403(b) plans, however, must report aggregate financial information regarding the plan.

Some plan administrators have expressed concern that the historical treatment of 403(b) plans as a collection of individual contracts with respect to which employees could engage in a range of actions without the consent or involvement of an employer or plan administrator could make it costly, and in some cases impossible, to identify and obtain financial information about certain pre-2009 contracts and custodial accounts to which the employer is no longer making employer contributions or forwarding employee salary reduction contributions. Employers and investment providers have noted in particular that in many cases they would not be able to obtain the information necessary to include these contracts and accounts in the expanded Form 5500 required for 403(b) plans beginning with the 2009 plan year. Moreover, even in cases where some annual reporting with respect to the contracts would be possible, the compliance efforts involved would be substantial and expensive.

In the absence of transitional relief, some 403(b) plans may file a Form 5500 or Form 5500-SF that is subject to rejection under ERISA section 104(a)(4)(A) because the filing will be

that certain factors are present. *See* Field Assistance Bulletin 2007-02 for recent guidance issued by the Department on the application of the safe harbor in the context of the IRS 2007 final regulations, discussed below.

² Although these new annual reporting rules apply for plan years beginning on or after January 1, 2009, portions of the 2009 reports require comparing information from the end of the prior year.

³ Under the Department’s regulation at 29 C.F.R. § 2520.103-8, the accountant who conducts the audit may exclude from the audit certain information prepared and certified by a bank or insurance carrier.

⁴ Small 403(b) plans for this purpose include those eligible for the “80-120 rule” at 29 C.F.R. § 2520.103-1(d).

incomplete due to the administrator's inability to identify all participant contracts and accounts to be included as plan assets, and obtain other financial information required to be included in the plan's financial statements. Further, the Department generally finds unacceptable and rejects under ERISA section 104(a)(4)(B) Form 5500 filings with adverse, qualified or disclaimer opinions (other than disclaimers pursuant to the limited scope audit provisions in 29 C.F.R. § 2520.103-8 or 103-12). The American Institute of Certified Public Accountants (AICPA), the national professional organization for Certified Public Accountants (CPAs) in the United States, including CPAs that audit employee benefit plans, has indicated, that plan accountants generally will issue qualified or disclaimer opinions for large 403(b) plans subject to ERISA's audit requirements each year at least until sufficient time has elapsed to allow the auditors to be confident that the assets of the plan being reported are materially correct.

TRANSITION RELIEF

The Department understands that administrators of 403(b) plans subject to Title I of ERISA will face compliance challenges in making the transition for the 2009 plan year to ERISA's generally applicable annual reporting requirements. We also anticipate that the Department may confront issues regarding the adequacy of Form 5500 filings submitted by 403(b) plans during its enforcement of the annual reporting and audit requirements as provided in Part 1, sections 101, 103 and 104, and Part 5, section 502(c)(2), of Title I of ERISA. For reasons similar to those underlying the above described Treasury/IRS transition relief, the Department of Labor has determined to provide the following transition relief for administrators of 403(b) plans that make good faith efforts to transition for the 2009 plan year to ERISA's generally applicable annual reporting requirements. This relief is limited to the Form 5500 annual reporting requirements, including the requirement for large plans to include as part of their annual report the report of an independent qualified public accountant.

Specifically, the administrator of a 403(b) plan does not need to treat annuity contracts and custodial accounts as part of the employer's Title I plan or as plan assets for purposes of ERISA's annual reporting requirements provided that:

- (1) the contract or account was issued to a current or former employee before January 1, 2009;
- (2) the employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact ceased making contributions to the contract or account before January 1, 2009;
- (3) 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;⁵ and
- (4) the individual owner of the contract is fully vested in the contract or account.

⁵ The fact that an individual's contract or account rights are reflected by an individual certificate under a group annuity contract held in the employer's name would not, for that reason alone, make the individual certificate ineligible for the transition relief described in this memorandum provided that the certificate gives the individual the ability to enforce all his or her contract or account rights without any involvement by the employer.

Moreover, current or former employees with only contracts or accounts that are excludable from the plan's Form 5500 or Form 5500-SF under the above transition relief do not need to be counted as participants covered under the plan for Form 5500 annual reporting purposes. The Department also will not reject a Form 5500 on the basis of a "qualified," "adverse" or disclaimed opinion if the accountant expressly states that the sole reason for such an opinion was because such pre-2009 contracts were not covered by the audit or included in the plan's financial statements. Except with respect to this relief, accountants engaged pursuant to ERISA section 103(a)(3)(A) to perform audits of employee benefit plan must perform audit procedures and report in accordance with generally accepted auditing standards as required by ERISA and the Department's implementing regulations.

The Department understands Code section 403(b) plans subject to Title I of ERISA may encounter compliance issues unrelated to pre-2009 contracts in making the transition to the Form 5500 annual reporting and audit requirements generally applicable to Title I plans.

Acknowledging that there may be instances when full annual reporting compliance by 403(b) plans may not be possible for the 2009 plan year, the guiding principle must be to ensure that appropriate efforts are made to act reasonably, prudently, and in the interest of the plan's participants and beneficiaries. Although ERISA's annual reporting requirements may result in added costs to a plan, an administrator of a 403(b) plan administered in accordance with ERISA's fiduciary and other applicable requirements should be able to prepare an acceptable 2009 Form 5500 or Form 5500-SF without undue expense or burden. The Department has noted in other contexts relating to ERISA's recordkeeping requirements that whether lost or destroyed records can, or should be, reconstructed and whether the persons responsible for retention of the plan's records are, or should be, personally liable for the costs incurred in connection with the reconstruction of records or other consequences of their loss or destruction is necessarily dependent on the facts and circumstances of each case.⁶ In that regard, we expect that accountants engaged to conduct employee benefit plan audits will notify plan administrators of questions, issues, and irregularities discovered as part of the audit engagement that could materially affect the plan's audit expenses or other costs associated with making the transition to ERISA's generally applicable annual reporting regime. Providing administrators with that compliance assistance information will help them ensure that decisions regarding use of plan assets to defray annual reporting costs are reasonable, prudent, and in the interest of the plan's participants and beneficiaries.

Questions concerning the information contained in this Bulletin may be directed to the Division of Coverage, Reporting and Disclosure at 202.693.8523. Questions concerning individual plans facing specific transition issues should be directed to EBSA's Office of the Chief Accountant at 202.693.8360.

⁶ See Information Letter to Gregg Goodman from Robert J. Doyle (Aug. 23, 1983); 67 Fed. Reg. 17269 (April 9, 2002) (preamble to regulation on electronic recordkeeping under 29 C.F.R. § 2520.107-1).