

**2011 ERISA Advisory Council**  
**Current Challenges and Best Practices for ERISA Compliance for**  
**403(b) Plan Sponsors**

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**Description**

The 403(b) marketplace is unique and faces its own distinctive challenges in the current regulatory environment. Most 403(b) plans are organized differently from 401(k) plans and other defined contribution plans that are qualified under Section 401(a) of the Internal Revenue Code.

Over the years, many 403(b) plans have consisted of participant-owned contracts and accounts under which the participants possessed many (and sometimes all) of the contractual rights. Especially prior to the Tax Reform Act of 1986, many such contracts and accounts may have operated more like Individual Retirement Accounts (“IRAs”) than employer-sponsored plans with plan participants directly interacting with the provider of the investment product for the plan without the plan sponsor’s involvement.

As 403(b) plan compliance requirements evolved, sponsor, participant and service provider relationships also have evolved. Many of the 403(b) plan relationships still reflect a much greater deference to the rights of the participants and their relationships with their investment provider than one would find in the average 401(k) plan. With 403(b) plans, it is more likely, in the absence of contrary fiduciary obligations, that participant accounts with a deselected provider (a provider that is no longer eligible to receive new contributions, transfers, etc.) will be frozen rather than terminated, leaving the decision to move to a new investment provider in the hands of the participant. Moreover, in such plans significant elements of plan compliance and oversight responsibilities frequently have been delegated to one or more administrators, which likely include one or more providers of investment products to the plan. Because some 403(b) plans have multiple product providers and because some of the contracts give the providers certain types of discretionary control (such as control over the investment line up) current Department of Labor (“DOL”) guidance for ERISA plans can be more challenging to apply to 403(b) plans.

Not all employers are eligible to sponsor 403(b) plans. Those eligible employers whose 403(b) plans may be subject to ERISA Title I, if the plan is not otherwise eligible for ERISA safe-harbor status, include a wide range of private tax-exempt employers (including, where applicable, affiliates) under Section 501(c)(3) of the Internal Revenue Code, including: private secondary schools; private colleges, universities, and graduate schools; healthcare institutions; churches that have elected to have ERISA Title I apply to the plan; and many other tax exempt organizations, including many United Way organizations.

The Department of Treasury’s publication (“Treasury”) of final 403(b) regulations in 2007, and subsequent guidance issued by the DOL and the Internal Revenue Service (“IRS”), has provided

an opportunity to clarify certain 403(b) plan issues, including the role of the plan sponsor versus that of its vendors, third party administrators and plan participants. The Council plans to study the current issues facing plan sponsors in administering 403(b) plans so that it can determine (i) whether to make recommendations to the DOL to provide additional guidance [information] to plan sponsors regarding best practices for complying with the new rules and regulations regarding 403(b) plans, and (ii) whether there is further need for the DOL to address additional 403(b) issues through regulation or other guidance to facilitate effective and efficient administration of these plans.

### **Objective and Scope**

The Council is examining this topic and intends to draft recommendations for the Secretary of Labor to consider. Our study will focus on:

- A. Differences between 403(b) plans and other qualified plans in structure and operation and the role of the plan sponsor with respect to each type of plan. Attention will be directed to the differences between smaller and larger 403(b) plans.
- B. The impact of any limitations of the safe harbor exclusion under Title I of ERISA and whether possible relief is needed in certain areas.
- C. Issues regarding the distribution of annuity contracts to participants, including, but not limited to, distribution upon termination of employment or as a result of plan termination.
- D. Challenges for disclosure of fees and services under Section 408(b)(2) of ERISA for 403(b) plans.
- E. Current practices in independent audits of the financial statements of 403(b) plans.

## **Questions for the Witnesses**

1. How does the administration and structure of a 403(b) plan compare to that of a 401(k) plan or IRA? What are the similarities and what are the differences?
2. What is the role of the plan sponsor in the administration of an ERISA-regulated 403(b) plan? How has this changed over time, if at all? Is there a need for change?
3. For those 403(b) plans that recently became ERISA-regulated plans, what actions did plan sponsors and third parties take that you believe were most successful? What opportunities still exist for plan sponsors in fulfilling their ERISA duties?
4. What issues are unique to large 403(b) plans? What issues are unique to smaller 403(b) plans? What issues are common to both large and small plans?
5. What challenges do plan sponsors face in obtaining information for purposes of meeting compliance requirements? Do the challenges arise mainly from the number of providers of investment products to 403(b) plans?
6. What issues arise when the investment product provider is no longer available for current plan activity (i.e., frozen providers)? Does the current regulatory framework adequately address these situations? If not, what specific issues should the DOL address and what are the recommended actions to be taken by the agency?
7. What is the impact on a 403(b) plan's ERISA safe harbor status on information sharing agreements between the plan sponsor and investment product providers? How does this affect participants and their decision making regarding investment products? How is this affected, if at all, where the plan sponsor maintains both an ERISA 403(b) plan and a safe harbor 403(b) plan, and information is shared across these plans?
8. What unique issues, if any, related to 408(b)(2) disclosures for 403(b) plan should be addressed by the DOL?
9. What unique issues, if any, regarding plan distribution of 403(b) contracts, annuity certificates, and custodial accounts should be addressed by the DOL?
10. What unique issues, if any, regarding termination of 403(b) plans should the DOL address?
11. What issues have arisen due to the current regulations related to independent audits of 403(b) plan financial statements?
12. Is there any need for additional guidance from the DOL regarding the independent audit requirements for financial statements of 403(b) plans, e.g., in addressing year-end 2008 balances for the audits in later years?