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US DEPARTMENT OF LABOR ADVISORY COUNCIL

ON EMPLOYEE WELFARE AND PENSION BENEFIT PLANS

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TOPIC: CURRENT CHALLENGES AND BEST PRACTICES FOR ERISA COMPLIANCE FOR 403(b) PLAN SPONSORS

Good afternoon, my name is Susan Diehl, President of PenServ Plan Services, Inc. (“PenServ”). PenServ is a retirement plan consulting company and currently services over 1200 financial institutions, law firms and CPA firms with IRA, SEP, SIMPLE, qualified plans, HSAs, Coverdell ESAs, 125 plans, 457 and 403(b) documents, administrative forms, technical training and technical information. Over 1000 financial advisors have access to our hotline for answers to their technical questions. We are also a Mass Submitter of prototype/volume submitter plan documents with the IRS and make sure that our clients have the most current information with respect to these plans and the administrative forms needed to comply with all areas of qualification, withholding and taxation. Out of its Columbia, South Carolina Office, PenServ serves as the third party administrator (TPA) for over 2000 employee benefit plans (servicing over 250,000 participants) ranging from the smallest plan (1 person) to large plans with thousands of participants, and as a consulting firm and Mass Submitter of plans represent 1000s of employers. It is on behalf of these clients (both institutional, advisors and employers) that we are here today testifying with the following comments.

First we would like to commend the Advisory Council for identifying that challenges exist not only on the audit side of ERISA 403(b) Plans, but also with respect to other taxation and ERISA regulations that apply to these programs. We appreciate the opportunity to comment on the issues listed below and to address the provisions that continue to complicate the administration and servicing of 403(b) plans.

We have been requested to address the last section in the list of topics pertaining to the current practices in audits as laid out in the Advisory Council’s Objective and Scope of this project but we respectfully would like to address all five (5) items in the written comments.

1. **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.**

   In an effort to highlight the major differences between 403(b) plans and qualified plans we have attached a two quick reference charts that describe the differences between an ERISA 403(b) and 401(k) plan. The second chart describes the differences between a Non-ERISA 403(b) and an ERISA 403(b).

   The initial problem results from the fact that much of the information communicated to plan sponsors is provided by advisors who are knowledgeable in the investment aspects of a plan, but are unfamiliar with the differences between a 401(k) or a 403(b). With the advent of the new regulations, many providers with 401(k) backgrounds are moving into the 403(b) arena without a full understanding of the technical differences. In many cases, smaller employers are ill-advised on the impact of a particular plan type, and subsequently learn that the program was poorly designed and other options would have provided a better alternative.

   Plan design includes a significant difference when reviewing the selection of a 403(b) or 401(k). For example, an employer can pair the 403(b) with a profit-sharing plan, or money purchase or even a SEP plan and use the second plan for employer contributions only. The §415 limitations do not apply overall to the 2 plans; however, if the employer adopts a Money Purchase or Profit-Sharing plan (both 401(a) qualified plans), a combined limit under §415 is available to participants. In many cases, the employer is unaware of the advantage that exists in adopting a 403(b) rather than a 401(k) plan.

If the employer investigates the administrative side and is able to reduce the number of vendors under the plan, a 403(b) is administratively easier than a 401(k). Unfortunately many employers are unable to reduce the number of vendors due to state law or the employees' wishes to have a choice of investment options. There are some States that have what is referred to as an "open" State, where the employer must offer unlimited investment choices to vendors that comply with the final 403(b) regulations.

2. **The impact of any limitations of the safe harbor exclusion under Title I of ERISA and whether possible relief is needed in certain areas.**

<u>A True Nonprofit Case Study</u>

I would like to begin by telling you a true story of a nonprofit company that is an organization committed to helping abused children. I told this story at the 2010 ERISA Advisory Council meeting, but the story has continued and to date, has not come to closure. Here is the rest of the story. This non-profit employer has offices in a number of cities nationwide (6 at this time) with a total of 110 employees. Another group of individuals "work" volunteer for the organization. The remaining employees receive a stipend or low salary to encourage them to work hard to raise enough money to assist in their efforts to help the kids that need it most.

About 10 years ago the Employer established a 403(b) plan that would allow employees to defer from income and provide for their retirement. Budgetary concerns prohibited the Employer from contributing on their behalf. No employee has ever met the definition of "Highly Compensated Employee". Since the plan's inception date, only 35 employees have made contributions to the program. When the final 403(b) regulations were issued, the Employer understood the need to adopt a formal plan and sought assistance to draft a plan document and review of the operational procedures. They understood the need to include on-going costs in the budget and estimated the annual expense to be approximately $1,500 per year.

The Plan included four vendors that had received deferrals from the inception of the Plan. None of the vendors wanted to act as their "administrator" under a Non-ERISA 403(b) and a Third Party Administrator (TPA) was employed to collect data from the investment companies. Since the investment providers did not separately track rollovers and elective deferral contributions and could not provide plan level source data, the source values in each participant's account had to be determined. Since there were no employer contributions, the only amounts that needed to be sorted were the principal amount of elective deferrals, earnings thereon, incoming rollovers into the plan and the associated earnings, and a breakdown of transferred amounts from other 403(b)s received from other plans. The TPA received the historical data and then researched the allocations, creating a best-effort segregation of assets for the 10 year period. The Employer believed correct data was available and continued the non-ERISA Plan, with the TPA assisting in the day-to-day administration.

And then…the FABs were issued (FAB 2009-02 and 2010-01). They could no longer have a TPA in place without subjecting the plan to ERISA, but the Employer also could not perform any of the administrative functions and the Vendors refused to sign off on transactions or assist with the Plan's administration. The retirement program for this Charity was turned upside down. In 2010 they were told that they now had to satisfy ERISA. The Charity received a list of items that they had to deal with including:

- A new plan document (taking into effect operations in 2009);
- Summary Plan Description;
- Form 5500 filings (retroactive to 2009); and
- Engage a CPA firm and collect information required for the annual audit, since the participant count exceeded 100.

All these requirements at an additional cost to the Employer! The additional administrative costs were estimated at approximately $2,500; the new auditor's fee would be approximately $5,000 for a limited scope audit and if they failed to meet those requirements, a full scope audit would be required and the cost would increase to $10,000 - $15,000 (they were told that based on the auditing firm's experience so far the limited scope audit would probably not be available).

In fact, a limited scope audit was not an option with respect to most of the investment providers; none of the vendors had a SAS 70 audit and could not produce the desired data and reports by the time of the audit. The TPA was unable to produce the requested audit data, as they were unfamiliar with the reports required by the auditors but there were no other options, since the Employer was now subject to ERISA requirements.

The actual fees for the 2009 year totaled $13,500; for 2010 the cost totaled $12,000. With costs exceeding $340 per active participant, the employer decided to terminate the plan. The organization was not able to support these costs; but they were advised that was not an option…not at this time, since their 403(b) offered mutual funds and they could not "distribute" the custodial accounts in-kind. Every participant would need to receive a distribution before the Employer could effectively terminate; and unlike qualified retirement plans, a forced distribution was not available to 403(b) arrangements.

This employer has frozen their ERISA 403(b); future contributions have been suspended, in hope that participants would request a distribution of their assets to effectively terminate the Plan. They realize they cannot terminate at this time, but are hopeful that a change to current regulations will help them in the future. In the meantime, to have enough funding for the administration of their frozen 403(b) Plan, they are adding more true volunteers in their offices and terminating employees, to eliminate the salaries of paid workers. As is the case with many charities the funding for their programs has been reduced, the services provided under their mission statement are jeopardized and they are searching for other ways to cut costs.

Unfortunately this is a true story, but is similar for thousands of nonprofit organizations that have sponsored 403(b) plans over the past 40 years and are now maintaining an ERISA plan with unrealistic costs when weighted against the mission of these charities.

Some of the "luckier" smaller 501(c)(3) employers that have a small number of employees have been able to terminate their plans, since the assets were readily identifiable, they had only annuity investments that can be distributed and have managed to terminate and distribute all assets.

These employees will no longer have a retirement plan available to them. There is no other option for these small employers can offer their employees. We have heard many times that SIMPLE IRAs would work for these smaller employers, but remember there are required employer contributions and due to budgetary constraints, cannot afford to make an employer contribution. We truly do not believe that this was the intent of the Department of Labor in issuing the FABs and the additional guidance.

Plan Document Issues

As we await the next piece of the 403(b) puzzle, namely the 403(b) Prototype plan program and those plans that will not meet the requirements of the determination letter guidelines, we need to examine the requirements for adoption of a prototype.

For employers that acknowledge that are not (or have been) subject to ERISA, many (but not all) have plan documents in place but will likely require a customized document.

Pursuant to the Announcement issued in 2009[1], the IRS will open for the first time, a prototype program for 403(b) Plans. The draft LRMs (Listing of Required Modifications) for 403(b) plans provides some insight into how these plans should operate in the future. One of the more important aspects of these rules is the addition of a Memorandum of Understanding (MOU), which will be a requirement under the Revenue Procedure when released by the IRS.[2] There is a caution to the drafter of the prototype that the allocation of certain duties under the plan may force it to be subject to Title I of ERISA. Although we believe this will actually help in the administration of plans (there is now confusion on the allocation of duties), we believe that coordination between IRS and DOL on this issue should be addressed. For example: an Employer restates to a prototype 403(b), and uses a standardized nonERISA plan document. The Employer, all vendors, the TPA and any other entity employed to handle a part of the administration must be defined (possibly the attorney has duties under the plan as well).

Even though the Employer has adopted a “NonERISA Plan document”, the mere completion of the MOU providing the Employer with an administrative job, or the hiring of a TPA and putting down the name of a TPA could in fact, subject them to Title I of ERISA. The current draft of the LRMs does not indicate this potential problem. The employer must obviously restate their plan to an ERISA Plan, but may not know that the problem even exists.

We believe that one or more of the following options could be adopted by the Department as a rule to reflect the uniqueness of the 403(b) plan and preserve the retirement assets accumulated by individuals in the plan:

- A selected date can be adopted as of a specific day beginning balances are established for plan purposes, namely January 1, 2009, or the first day of the plan year in which the Employer became subject to the ERISA requirements.

[1] Announcement 2009-34 and the Proposed Revenue Ruling issued the same day and LRMs for 403(b) Prototype Plans
[2] LRMS #21, Notes to reviewer; Treasury Regulation 1.403(b)-3(b)(3)

- A fact sheet could be published itemizing the points an Employer can adopt and those not permitted (refer to the sample in our attachments)
- Provide a specific email address or hotline for the 501(c)(3) employers to ask their specific questions on 403(b) plans. If advertised, this may reach those tax-exempt employers that are not yet aware of these changes, or have questions.
- Provided relief to certain 403(b) employers who have found themselves subject to ERISA, while making what they assumed were smart decisions and attempting to seek professional assistance. For small employers (sometimes even the larger ones) it makes sense for them to employ a TPA who will ensure that compliance is maintained for the plan. The current rule requires vendors to provide the administration and many are not able to meet those requirements.
- Unlike a 401(k) plan an employer cannot provide a 1 year eligibly for deferring into the 403(b) Plan. The Universal Availability Rule is used in lieu of the 1 year eligibility period in the 403(b). This requires more 403(b) plans, especially those with high turnover to count more employees for the Form 5500 participant count then in a 401(k). This has been one area where employers are being convinced to terminate their 403(b) and adopt a 401(k) in the future. Consideration should be made for the IRS and Department to review the Universal Availability rules as compared to the 1 year eligibility rules for purposes of counting eligible employees for the Form 5500.

3. **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.**

Prior to the issuance of IRS Revenue Procedure 2011-7 there were major issues related to the distribution of contracts/custodial accounts at the point of plan termination. Since the publication of the ruling, we feel that Revenue Procedure 2011-7 addressed many of the annuity issues. With respect to 403(b)(7) custodial accounts, more guidance is needed, especially in the case of terminating plans. Additional guidance is also needed with respect to abandoned plans and those plans of the smaller charities which are/will be no longer in existence.

Since we are aware that the Department and IRS worked jointly on the termination issues of 403(b) plans and since this author was also involved in the preparation of the follow-up letter to IRS on plan termination issues for custodial accounts, we will defer to the ASPPA/NTSAA letter that was submitted to IRS on July 15, 2011, prior to the date of this testimony.

That said, I would like to raise two points that are shared with the ASPPA/NTSAA Membership:

- We firmly believe that 403(b)(7) custodial accounts can be distributed "in-kind", and preserve the status as a distributed 403(b)(7) account[3];
    - This will prevent leakage from the retirement system; and
    - Provide those employers who wish to terminate a method to legally distribute the "assets".

[3] Refer to Revenue Procedure 2007-71 which provides for the same rule for "grandfathered" 403(b) plans. (Those plans that no longer received contributions after 2008 and were not part of the employer's plan beginning in 2009); Over 300 PLRs issued by the IRS indicates that a custodial account can be treated as a qualified trust under "401(a)".

- In the case of abandoned 403(b) Plans, the current Qualified Termination Administrator Rules do not address the 403(b) deemed termination. This would allow participants in abandoned plans the opportunity to receive their retirement monies.

4. Challenges for disclosure of fees and services under Section 408(b)(2) of ERISA for 403(b) plans.

Considering the looming deadline for these requirements and the challenges involved in calculating the value of multiple money sources is a daunting task for many employers. Under an ERISA 403(b) plan, the matter is further complicated by the multiple vendor issues. In most cases, employers do not understand how to begin the process and must seek professional assistance to meet the new regulations, again increasing the cost of the plan.

In a perfect world, all investment companies (vendors) would have collected this information and be able to provide the data for 403(b) accounts to the "administrator" or TPA (third party administrator). These entities are knowledgeable in the receipt and manipulation of data and would have minimal challenges if consistent information would be provided in a format similar to the 401(k) model. However, many vendors have not been able to meet the initial requirements of the 403(b) regulations and are struggling with the increased data requirements of those rules and the associated costs.

Some of the challenges are:

- Multiple vendors under a 403(b) plan, provide their own statements and include information separately from that accumulated by the TPA or the administrator of the 403(b) plan. To resolve these issues, several questions must be addressed prior to the implementation date:
    - Can these statements be collected and mailed together in one envelope?
    - If that method is used, would this meet the "substantially similar" requirement?
    - There are many 403(b) plans who are requesting the data in a specific format. In those cases the information from all vendors can be reported together in a uniform understandable format. What if there is one or two vendors (possible "deselected") that will not send their data in the same format, can this be placed in the same envelope and the can the Employer base this on a good faith effort to obtain the information?
- Cost is a concern for all parties under this new rule. This process is costly to vendors and TPAs, as well as the employer. In many cases, this cost for collection and mailing is being absorbed by non-profit employers.
- Since the time and cost of the new disclosures are required for these plans, many firms are preparing the same format for disclosures to nonERISA 403(b) plans, to ensure conformity. If a firm does not employ this logic could cause issues if a non-ERISA 403(b) is subsequently determined to be an ERISA Plan and notification from the administrator/TPA/Employer is made after the required date for fee disclosure.

PenServ began this process of notifying the vendors of the information to be collected for the fee disclosure a few months ago and have begun to collect the data for purposes of producing one fee disclosure from all investments as an informative, uniform understandable format. We would be happy to share this with the Department, if requested.

5. Current practices in independent audits of the financial statements of 403(b) plans.

Education and Outreach

The latest estimate on the number of actual ERISA 403(b) plans is well over two times the number of form 5500 forms received by the Department of Labor for Plan Year 2009. This number does not include the small nonERISA plans that believe that they can remain NonERISA and have done nothing to convert to the ERISA plan documents and administration. Therefore, the true number for ERISA plans could be well in excess of the number reported to date.

As anecdotal evidence, I would submit that we receive calls every week from clients and prospective clients requesting special assistance to:

- file all past and current form 5500s under the DFVP;
- explain the requirements to bring their 403(b) plan into compliance;
- verify that vendors are providing sufficient information to complete government filings and meet compliance rules;
- review the plan document (in many cases a plan adopted at inception…the worst case scenario we have encountered is a plan from 1978 that was never updated).

One of the problems in this area is lack of communication/educational opportunities among their peers and easy access to regulatory changes and updates. In the Public School sector there is a very active trade association (ASBO) which has not only provided IRS speakers over the last few years but provides their membership with information about the 403(b), 457 and 401(a) documents and operations. Their website even contains sample administrative forms for these employers to use. Periodic meetings are set up throughout the country to educate employers on these types of plans and the problems that are encountered.

Unfortunately in the non-profit sector there are few trade associations available to provide technical information, and secondly those that are available rarely have programs that involve retirement plans. Unlike the nonERISA educational employers there is comparable partnership with the IRS and/or the Department to help in the education process. We are aware of the attempt IRS has made to reach out to these employers and has had problems in doing so. Therefore, problems in this area whether it be non-reporting or delinquent reporting will continue.

Purpose of Audit

We understand and agree that the audit requirements are meant to protect the participants and beneficiaries in ERISA Plans. We continue to believe as outlined in our testimony in 2010 that a working group should be established between the Department of Labor, the AICPA, TPAs, vendors, and other firms that could work through the problems that continue to exist in the audit area for 403(b) Plans.

If a comparison is made to 401(k) plans and the question is posed as to why there are not similar problems in 401(k) audits. There is a very distinct difference between these two types of ERISA plans that currently exists. Under a 401(k) Plan there is no investment company involvement (no "vendors"). If the plan is an audited plan in most cases there is a TPA or for the largest employers a department is set up within the employer that administers the plan. The investment information is typically received daily and posted on a website for the employee to see. These are daily valued plans in most instances, and there is a very distinct division between the "responsibilities" of the parties. The TPA or "Administrator" provides on a timely basis the information needed for the audit, without any problems of receiving the required data.

In the 403(b) world, the data has not been available and building the past records has been done in some cases in other cases it may not be able to be obtained at all. And there is direct involvement from the investment company(ies) without consistency and internal procedures. Sharing of data is not consistent and not on a daily basis as is in the 401(k) marketplace.

<u>The Aftermath of the 2009</u>

Some of the problems employers experienced in the 2009 filings will not exist going forward into 2010, but the aftermath has prompted employers to look for alternatives for retirement planning. The time and cost for 2009 was an experience that employers, vendors, CPAs and financial advisors just do not wish to deal with going forward. Plan termination for smaller ERISA employers was a topic considered by many. By smaller plans we are not referring necessarily to the "fewer than 100" participant count. There are many employers with fewer than 100 participants but more than 100 eligible employees. In the small tax-exempt area, many employees do not have the means to contribute to the plan but unfortunately are counted in the overall numbers. If the employer is one that experiences turn-over then establishing a 401(k) plan with a one year eligibility seems to be the plan of choice over the 403(b) for many of these plans, dispensing the 403(b) in the process. As mentioned above this difference is the result of comparing the 1 year eligibility requirement under a 401(k) to the Universal Availability rule under a 403(b) plan.

<u>Continuing Problems/Suggestions</u>

The Department's Field Assistance Bulletin (FAB) 2009-02 permitted certain assets from a "deselected vendor" (those that accepted no contributions after 2008) to be ignored for 5500 purposes. It should be noted that this relief was not extended to the auditing firm with respect to their audits of the plans under generally accepted auditing standards.

This issue could be addressed by the Department in issuing audit relief for contracts and accounts that can be excluded from the "plan" both as to reporting those assets and an allowable exclusion for the audit community as well.

The following additional problems were discovered in the process of establishing standards for the Form 5500 filing and collecting the audit data from the vendors under ERISA Plans:

- Additional "vendors" were uncovered during the data collecting process. This not only complicated the data collection process but delayed the audit for the Form 5500.
- The fact remains that Vendors were not required to maintain data for over 40 years. They do not currently and have not in the past maintained data needed for auditing these plans. Vendors, Recordkeepers, and TPAs are continuing to build these files, however there is still the problem of system output by some of the vendor community. As a result the reports

from the vendors continue to not reconcile.

- Since this was a high cost endeavor by all in the 403(b) community, there is no allocation of sufficient resources within the vendors themselves.
- The TPA/auditors received from some vendors a series of Excel spreadsheets that did not balance, and reports that contained errors. Systems were being set up but the costs to the vendors/employers/TPAs were cost prohibitive in many cases. Vendors started to drop out even as late as the 2009s, since the realization came that they could not cost effectively stay in this marketplace.
- "Sharing Information" with the Employer/TPA/Administrator/Auditor does not have one definition. This term is defined to be what the parties under a plan want it to be! And there are different types of information sharing needed depending on whether:
    - Exchanges are being made between the different investment products;
    - Transfers from one plan to another;
    - Financial reports are being created for the auditor; or
    - Employers/TPAs are reviewing forms, documents, for the required tax side of the plan.

  Without a standard form of sharing data and the lack of a list of information that is needed to administer the plan, employers will continue to have issues with certain vendors under plans. There are "Information Sharing Agreements" in place but they very rarely indicate what information needs to be shared. Most vendors that have remained in the marketplace have made strides in coming to the table with the proper information. But there still remain some non-cooperative vendors. Whereas for auditors, TPAs, Employers that do not comply there are ramifications; for the non-cooperative vendors there is no formal avenue to hold them accountable.

  We believe that this can also be addressed by the committee of industry experts that we believe should be set up to work with the Department on future guidance.

- Another issue was uncovering other plans in the process of the audit and discovering that there are multiple administrators of these plans. Not understanding the "new" 403(b) world, the employer did not understand that a coordinated effort was necessary for most multiple plan scenarios. Additionally Employers have been provided inconsistent information with respect to multiple 403(b) plans, creating ERISA and nonERISA plans for different groups of employees; or attempting to create a nonERISA plan alongside a qualified plan or even a SEP to accept the employer contributions. This is one areas that we believe could easily be addressed with Qs & As by the Department. For example if the Employer maintains two 403(b) plans, and they consider one of them to be nonERISA and the other an ERISA Plan, what are the scenarios that would require both to be considered ERISA. If the Employer maintained a NonERISA 403(b) deferral plan only and then also maintained a 401(a) matching plan, what are the consequences?

  Before even an audit can begin the Employer needs to understand how many plans they have and the interaction that needs to be considered under ERISA. Obviously the wrong answer could result in incorrect filings, incorrect disclosures and penalties and taxes down the road.

As stated above, we continue to believe that in the long term a committee of industry experts should be set up to suggest, review and modify the existing audit guidelines for 403(b)s taking the following into consideration:

a. Comparing administration between 403b and 401(k) – why do we not have these problems in the 401(k) world and how can changes be made to make the audits in 403(b)s look more like those in a 401(k)?The differences between group annuities, individual contracts, and individual custodial agreement and potentially set up different audit requirements for each;
b. Specific clarification that beginning balances as of 1/1/2009 are absolute for all purposes, and relief to auditors so that they may modify their standard procedures and accept data provided as of 1/1/2010;
c. Produce a model “Audit Checklist” for 403(b) Plans;
d. Produce sample lists of Information Sharing elements that can be used for each specific issue. In this specific item, I addition to the other parties mentioned, the SPARK institute should also be involved in these discussions.
e. Set up an email/phone number for 501(c)(3) organizations to call/email their questions on 403(b) ERISA plans. The IRS has such a service but that service stops at the discussion involving ERISA issues.

I thank you for the opportunity to present our views and recommendations. We would be happy to address any questions you may have and also be prepared to participate in any additional committees or assist in any way we can with input, training and educational materials, and/or assistance in developing alternative reporting models.

COMPARING FEATURES OF . . .	ERISA 403(b)	401(k)
Which Types of Businesses may Establish	Educational organizations, nonprofit organizations under 501(c)(3)IRC, and certain church organizations	Sole Proprietor, Partnership, S-Corporation, C-Corporation; and all nonprofit organizations. (including 501(c)(3))
Appropriate For Individuals and Businesses That Have Earnings Which...	Generally fluctuate from year to year	Generally fluctuate from year to year.
Continued Existence of Plan	Permanency must be intended.	Permanency must be intended.
Annual Contribution	Not required.	Not required.
Maximum Annual ER Contribution	Up to 100% of each participant's includible compensation not to exceed $49,000 for 2011.	Same as 403(b), except there is also a deduction limit which is up to 25% of total eligible participants' covered compensation.
ER Involvement	Minimal (Since 1958)	Active, even if a TPA is involved.
What Is "Compensation"?	If you are an employee, compensation is generally your salary reported to you on your Form W-2. If you are a self-employed minister your compensation is your "earned income". Exclusions are permitted. "Includible Compensation" applies for 15 year catch up contribution rule	If you are an employee, compensation is generally your salary reported to you on your Form W-2. If you are self-employed or a partner in a partnership your compensation is your "earned income". Exclusions are permitted.
Do Deferrals Effect Compensation?	Maybe. The plan may allow Employer to either include or exclude salary deferrals from compensation, for basing an ER contribution.	Maybe. The plan may allow Employer to either include or exclude salary deferrals from compensation, for basing an ER contribution.
Eligibility/Participation	All employees except nonresident aliens; employees who work less than 20 hours per week; certain students; and union employees covered under collective bargaining agreements. ER contributions can exclude: NRAs, Collective Bargaining EEs, EEs acquired in a merger, or any others subject to nondiscrim testing.	All employees who are age 21 and have completed 1 year of service must be able to elect to defer (For employer contributions, 2 years, if 100% immediate vesting.)Exclusions can include: NRAs, Collective Bargaining EEs, EEs acquired in a merger, or any others subject to nondiscrim testing.
Vesting Schedules (Employer)	Under most plans the following choices are available for employer contributions: • Full and immediate vesting. • 100% vesting after 1, 2, or 3 years of service. • 6 year graded vesting schedule.	Under most plans the following choices are available for employer contributions: • Full and immediate vesting. • 100% vesting after 1, 2, or 3 years of service. • 6 year graded vesting schedule.
Vesting Schedules (Employee)	Elective Deferrals are 100% vested immediately.	Elective Deferrals are 100% vested immediately.
Emergency Withdrawals	Permitted for hardships only, if provision is adopted.	Permitted for hardships only, if provision is adopted.
Taxation of Withdrawals	Taxed as ordinary income.	Potentially Favorable (10 year income averaging, if age 50 on 1/1/86).
Establishment Deadline	Last day of employer's tax year.	Last day of employer's taxable year (usually December 31st).
Contribution Deadline	Due date for employer's federal income tax return, including extensions. (Note: Tax exempts file Form 990, which is due the 15th day of the 5th month after tax year end (also referred to as a "report year"). For §415 purposes contributions must be made by the 15th day of the 6th month after tax year end.)	Due date for employer's federal income tax return, including extensions.
Safe Harbor Nonelective	Not available/not necessary. ADP Test does not apply. Universal Availability applies instead of ADP.	Yes. 3% X Compensation for each Eligible Employee. Avoids ADP testing. Universal Availability does not apply.

FEATURES OF...(continued)	ERISA 403(b)	401(k)
Safe Harbor Match	Yes. $1 for $1 up to 3% of Compensation plus 50¢ on the next 2% of Compensation (No ACP testing)	Yes. $1 for $1 up to 3% of Compensation plus 50¢ on the next 2% of Compensation (No ACP testing)
Annual Reporting Form 5500	Limited filing required until 2009 year. Full filing and audit for 2009 forward.	Required. However, special rules apply to single participant plans.
Funding	Deferrals by Employees max - $16,500 **plus** $3,000 for long term employees (15 years with same employer) **plus** Age 50 Catch-up - $5,500 Employer Matching /Employer Discretionary Contribution permitted.	Deferrals by Employees max - $16,500 **plus** Age 50 Catch-up - $5,500 Employer Matching/Employer Discretionary Contribution permitted.
Historical Data on Set-up/take –over	Difficult to obtain data at plan level and by source. Deselected vendor contracts/accounts are an issue.	Typically not a problem. Assets are held in a qualified trust under section 501(a) IRC (centralized account)
Top-Heavy Contribution	Not Required	Required up to 3% unless state/local governmental employer (no requirement).
Social Security Integration	Available on employer discretionary contributions.	Available on employer discretionary contributions.
Nondiscrimination Tests for Nonelective (401(a)(4))and Matching (401(m) ACP test)	Applies except for state/local governmental employers, and certain church plans.	Applies except for state/local governmental employers and certain church plans.
Annuity Provisions Required	Yes	Not required.
Required Minimum Distributions	Generally 4/1 of year following later of 70 1/2 or retirement. (Special rule for pre-1987 account.)	Generally 4/1 of year following later of 70 1/2 or retirement for non 5% owners. For 5% owners, generally 4/1 of year following attainment of 70 1/2.
Loans	Yes. Multiple vendor plans need coordination	Yes
IRS Approved Prototype Plan Available	No* (Will be available later in 2011)	Yes
Hardship Distributions Available	Yes	Yes
In-Service Distributions	Age 59 ½ , and hardship (Annuity contracts only, ER contributions only – permits Profit-Sharing in-service (ie, 24 month rule, attained age, etc)	Attained age (usually 59 ½), 24 month rule, 60 month rule, and hardship.
Investment Options	Annuity and Mutual Funds only. For Church plans – any acceptable investment under the Plan. “Multiple vendor environment”- all vendors needed to ‘share data’. Investments held in: individual or group annuity/custodial accounts. Some group accounts starting to emerge. Group contracts/accounts mirror more the 401(k) world if ER is the owner	Any acceptable investment under the plan. No Federal limitations, unless prohibited transaction TPA usually deals with one investment advisor for the plan.
Auto enrollment With or without safe harbor	Available	Available

Provision	ERISA Plan	NonERISA Plan
Form 5500 Filing*	Full filing required after 2008. Additional costs would apply plus the cost of preparing a plan audit report if the plans has more than 100 participants. It is required to have a Fidelity Bond for 10% of the assets as of the first day of the Plan Year.	Not required.
Summary Plan Description (SPD)	Required. Must be provided to all eligible employees within 90 of hire. Required to be provided each time there is an amendment to the Plan, including the change for 2009.	Not required. A summary of plan provisions can be provided but in any format, since there is no legal requirement to provide an official SPD
Summary Annual Report	Required to be given to any participant in the Plan within 2 ½ months after the Form 5500 is filed.	Not required.
Deposit of Elective Deferrals	Required to be made into the Plan as soon as the employer can reasonably segregate the assets from their general assets but no later than the 15th day of the month after the month the amounts were deducted from pay.	As soon as administratively feasible. (No 15 day rule applies). Should review state law for requirement since ERISA does not apply to this Plan. In many States the deposit time is sooner that the ERISA rule.
Annuity Distributions for Spouse	Requires that the EE's spouse receive an annuity distribution or opt out.	Not required.
Employer Responsibilities in Administration	Employer is responsible as "Plan Administrator" of the Plan to make any administrative decisions with respect to the Plan's operations. Typically the ER hires a TPA and other parties to assist in the administration of the plan.	Employer ***may not*** make any administrative decisions regarding the day to day operations of the Plan. If the Employer does the Plan will automatically be subject to ERISA. The ER's Attorney should make this decision. The ER may not hire anyone to assist in the administration of the Plan. Vendors can work together on administration but cannot have ER make any decision or approve the transactions.
Protection from all Creditors	ERISA protects all assets from all creditors (except the IRS).	No federal protection for creditors. State law would apply.
Department of Labor (DOL) Disclosures	Mandates disclosures on statements to employees. Fee Disclosure rules will apply in 2012.	DOL does not have jurisdiction over NonERISA 403(b) Plans, therefore no DOL disclosures are required.
Total Contribution Amounts***	For all contributions (Employer and Employee) limited to $49,000 (if under age 50) and $54,500 (if age 50 or over).	A NonERISA 403(b) that is paired with a 401(a) Plan can depending on design have maximum contributions as follows: 403(b) = $25,000 (EE) 401(a) = $49,000 (ER)**

* Penalties for not filing the form 5500 are: IRS - $25 per day not to exceed $15,000 per year that it was not filed. DOL - $1,100 per day with no cap.
**There is no "415" overall contribution coordination between NonERISA 403(b)s and 401(a) plans unless an employee "owns" a part of the second plan.
*** It has been stated verbally by the DOL, however no citation exists that if the ER maintains a nonERISA 403(b) and another plan that is subject to ERISA (i.e. Profit-Sharing, Money Purchase, an ERISA 403(b), SEP), then the nonERISA 403(b) is really an ERISA Plan.

IMPORTANT NOTE: The Department of Labor has provided safe-harbor criteria required by 501(c)(3) organizations to preserve the non-ERISA status of their 403(b) Plans. This guidance includes a list of the administrative requirements that must be retained by the employer in the day-to-day operations of their plans.

The Employer may:

- engage in a range of activities to facilitate the *operation* of the program
- permit investment providers—including agents or brokers who offer annuity contracts/custodial accounts—to publicize their products
- request information concerning proposed funding media, products, or annuity contractors
- compile investment information to facilitate review and analysis by the employees
- enter into salary reduction agreements and collect annuity or custodial account considerations required by the agreements, remit them to the providers, and maintain records of such collections
- hold one or more group annuity contracts in the employer's name covering its employees and exercise rights as representative of its employees under the contract, at least with respect to amendments of the contract
- limit funding media or products available to employees, or annuity contractors who may approach the employees, to a number and selection designed to *afford employees a reasonable choice in light of all relevant circumstances*
- certify to an annuity provider a statement of facts within the employer's knowledge as employer, such as employee addresses, attendance records or compensation levels
- transmit to the investment provider another party's certification as to other facts, such as a doctor's certification of the employee's physical condition
- identify in the plan the parties that are responsible for administrative functions, including those related to tax compliance. The plan should correctly describe the employer's limited role and allocate discretionary determinations to the vendors/investment provider(s)
- discontinue a provider due to non-compliance with 403(b) regulations or inclusion of optional features
- refuse vendors whose operational practices force an employer to make discretionary decisions

The Employer may not:

- permit any type of employer contributions under the plan.
- have responsibility for, or make, discretionary determinations in administering any part of the 403(b) plan/program, or hire a TPA to do the same
- This prohibition includes:
  - authorizing plan-to-plan transfers;
  - processing distributions;
  - satisfying applicable qualified joint and survivor annuity requirements, and making determinations regarding hardship distributions;
  - determining whether a domestic relations order is a qualified domestic relations order (QDRO);
  - determining eligibility for and enforcement of loans
- limit investments to one provider. (FAB 2010-01 permits "reasonable choice" for cost considerations where for example multiple investments are available under a broker-dealer or an "open architecture program".)

Important Note: New rules apply beginning for years after 12/31/08 with respect to "controlled groups of businesses" when dealing with 501(c)(3) Employers. If there is commonality in directors, trustees, or individuals on boards of directors in multiple organizations, such organizations may need to be treated as one employer. The Employer should check with their legal counsel if such commonality exists.

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