



FIELD ASSISTANCE BULLETIN NO. 2010-01

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MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT
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REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE
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SUBJECT: ANNUAL REPORTING AND ERISA COVERAGE FOR 403(b) PLANS

On July 20, 2009, the Employee Benefits Security Administration issued Field Assistance Bulletin (FAB) 2009-02, addressing the application of certain Form 5500 and Form 5500-SF annual reporting requirements to tax-sheltered annuity programs described in section 403(b) of the Internal Revenue Code (403(b) plans). Specifically, FAB 2009-02, in recognition of compliance challenges facing many 403(b) plans subject to Title I of ERISA, provided transitional relief from the annual reporting and related auditing requirements for plans with respect to certain tax-sheltered annuity contracts and custodial accounts entered into prior to January 1, 2009. The FAB stated that, for purposes of the plan's annual reporting and related audit requirements, an annuity contract or custodial account does not need to be treated as part of the plan or as plan assets if it meets the following conditions: (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 of the employer; and (4) the individual owner of the contract or account is fully vested.

The Department received questions on the scope of and conditions for the relief provided by that FAB, as well as questions concerning the scope of the safe harbor regulation at 29 CFR 2510.3-2(f). This Bulletin supplements FAB 2009-02 by responding to many of those questions.

ANNUAL REPORTING QUESTIONS AND ANSWERS

Q-1. Would an annuity contract or custodial account need to be included in the Form 5500 or Form 5500-SF annual report if the employer provides information to the 403(b) provider concerning an employee's or former employee's employment status in connection with a contract or account that otherwise meets the conditions of FAB 2009-02 for being excluded from the plan's annual report?

No. The annual reporting relief under the FAB will still be available even if the employer provides information to the 403(b) provider. Providing information, such as the contract owner's employment status, does not constitute involvement beyond that permitted under the FAB. On the other hand, where the employer must consent to, or make other discretionary decisions regarding enforcement of the employee rights under the contract, the relief under the FAB is not available. Nor is relief available if, for example, the employer must certify in advance that an employee is eligible for a distribution that is permissible under the Internal Revenue Code (Code). Similarly, the FAB provides no relief if the employer has to approve a hardship distribution or a loan from the contract or account before the loan or distribution is made.

Q-2. If an employer, through salary reduction, forwards an employee's loan repayments to a 403(b) contract provider, does the employee's contract or account to which the loan repayments are being made need to be included in the plan's annual report?

Yes. Even if the loan repayments technically are not "employee contributions," the Department for purposes of FAB 2009-02 would treat ongoing loan repayments forwarded by the employer like salary reduction employee contributions, giving the employer an ongoing role with the contract and provider beyond that envisioned in the FAB. On the other hand, the annual reporting relief in FAB 2009-02 could apply to contracts or accounts that otherwise meet the conditions of the FAB for which employees make loan repayments in 2009 directly to the contract or custodial account providers.

Q-3. If the contract or account is known to the plan administrator and can be identified, must it be included in the annual report if it meets the requirements of FAB 2009-02?

No. The plan administrator is not required to include in the plan's annual report a contract or account that meets the requirements of FAB 2009-02 even if that contract or account is known to the administrator and can be identified.

Q-4. If a plan administrator excludes some contracts or accounts from the plan's annual report because those contracts or accounts meet the requirements of FAB 2009-02, does the administrator have to exclude all such contracts or accounts for reporting purposes?

No. The plan administrator can decide to include contracts or accounts even if they meet the requirements of FAB 2009-02. The plan administrator may decide that it is easier and less expensive for the plan to include such a contract or account in its Form 5500 or Form 5500-SF Annual Return/Report.

Q-5. Does the relief provided by FAB 2009-02 apply to annual reports for both large and small 403(b) plans?

Yes. The relief applies both for determining what annuity contracts or custodial accounts are treated as assets of the plan for purposes of the plan audit and for determining what plan assets must be identified on the plan's financial statements (including the Form 5500-SF or Schedules H or I of the Form 5500).

The relief in FAB 2009-02 also applies for purposes of ascertaining the number of participants for reporting purposes, including the determination of whether or not the plan is a large plan required to submit as part of its Form 5500 the report of an independent qualified public accountant (IQPA). Employees whose only assets in the plan are contracts or accounts that meet the conditions of the FAB, and who are not otherwise eligible to make salary reduction contributions under the 403(b) plan, need not be counted as participants for these purposes.

The Form 5500 and Form 5500-SF relief in the FAB does not address any other reporting or notice requirements under the Code or any other applicable Federal or state law.

Q-6. Are 403(b) annuity contracts and custodial accounts that meet the conditions in FAB 2009-02 treated as plan assets for purposes of ERISA's annual reporting and audit requirements (ERISA section 103(a)(3))?

No. FAB 2009-02 states that, with regard to those annuity contracts and custodial accounts that meet the conditions of the FAB, the administrator of the plan is not required to treat either the annuity contracts or custodial accounts as part of the employer's Title I plan or as plan assets for purposes of ERISA's annual reporting requirements. Thus, the plan administrator may disregard such contracts or accounts for purposes of the reporting requirements under section 103 of ERISA and the Department's regulations issued thereunder. FAB 2009-02 also provides that the Department also will not reject a Form 5500 Annual Report on the basis of a "qualified," "adverse," or "disclaimed" opinion if the plan's IQPA engaged under section 103(a)(3)(A) of ERISA to audit the plan expressly states that the sole reason for such a qualified or adverse opinion or disclaimer of opinion was because such pre-2009 contracts were not covered by the audit or included in the plan's financial statements.

Q-7. Are IQPAs engaged to audit the employee benefit plan required to examine the employer's basis for excluding contracts as meeting the conditions of FAB 2009-02?

Consistent with the obligation of employee benefit plan administrators to file complete and accurate annual reports, it is the obligation of the administrator to determine that the conditions of FAB 2009-02 have been satisfied with respect to excluded contracts from such reports.

Nonetheless, IQPAs engaged on behalf of participants to conduct employee benefit plan audits play an important role in bringing questions, issues, and irregularities discovered during the course of their audit engagement to the attention of the plan administrator. If an accountant, as part of the audit which he or she was engaged to perform, discovers that contracts were incorrectly excluded under FAB 2009-02 from the plan's financial statements, the Department expects that the accountant will alert the plan administrator. Also, plan administrators have an obligation to take reasonable steps to resolve questions concerning the exclusion of such contracts from their annual report. If a plan administrator and accountant do not agree with how to resolve issues relating to excluded contracts, the Department expects these issues to be noted in the audit report.

Q-8. A plan excluded contracts and accounts meeting the conditions of FAB 2009-02 from the Schedule of Assets Held for Investment (Form 5500, Schedule H, Line 4i) and Schedule of Reportable Transactions (Form 5500, Schedule H, Line 4j). Assuming all other required information is included, will these schedules be deemed to be presented in compliance with the Department of Labor's Rules and Regulations for Reporting and Disclosure?

Yes.

Q-9. May contracts and accounts that are excludable from reporting in the 2009 plan year financial statements also be excluded from comparative financial statements included in the plan's 2009 annual report?

Yes.

Q-10. Does FAB 2009-02 provide plan administrators relief with respect to an annuity contract or custodial account exchanged in accordance with Treasury regulations and IRS requirements for another contract or account with a new provider after January 1, 2009?

No. Assume, for example, that an employee has a Code section 403(b) annuity contract or custodial account that meets the conditions of the FAB and the employee decides to exchange that contract for a contract with a new provider after January 1, 2009. If the employer's authorization or approval of that exchange is required, even if just for tax compliance purposes, the new contract or account would not be eligible for annual reporting relief under FAB 2009-02.

The new contract or account also would fail the FAB requirement of having been issued before January 1, 2009.

Q-11. Does the annual reporting relief described in FAB 2009-02 extend beyond the 2009 reporting year?

Yes. The Department will not reject annual reports and accompanying audit reports required to be filed for years subsequent to 2009 solely because such reports exclude annuity contracts and custodial accounts meeting the conditions in FAB 2009-02.

Q-12. If a plan administrator determines that it will not be able to comply fully with ERISA's annual reporting requirements for contracts that do not meet the conditions of FAB 2009-02, what constitutes a "good faith" effort to comply?

What constitutes a "good faith" effort will depend on the facts and circumstances involved. Administrators of Code section 403(b) plans that do not fully comply with the reporting requirements have the burden of demonstrating good faith and thus should document their efforts properly to account for and report on contracts and custodial accounts in their Form 5500 or Form 5500-SF Annual Returns/Reports. Good faith would also generally require the plan administrator to implement internal controls to keep and maintain sufficient records on a going forward basis. In addition, ERISA requires a plan administrator to retain records necessary to verify or support information included in a Form 5500 annual report for six years from the date the annual report was filed (ERISA §107), and also to maintain for as long as necessary records that are sufficient to determine the benefits due or which may become due under the plan (ERISA §209). 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.

Q-13. If an employer makes a final contribution to a contract or account in 2009 that is for 2008, would the contract or account be excludable from the plan's annual report under FAB 2009-02?

The relief provided by FAB 2009-02 requires that the employer ceased having an obligation to make contributions (including salary reduction contributions), and actually ceased making contributions to the contract or account before January 1, 2009. Employers, 403(b) providers, and other service providers have raised concerns that a literal reading of that statement in the FAB would mean the FAB relief would not apply to contracts or accounts where the employer amended the plan to cease all contributions but was legally required to, and did, timely transmit in 2009 final employer contributions that accrued in 2008 or final salary reduction contributions attributable to payroll periods in late 2008. The commenters expressed concern that such a literal

reading of FAB 2009-02 could result in increased administrative costs and burdens for employers and participants. This condition in FAB 2009-02 was intended to ensure that contracts and accounts were not excluded from the plan's annual report where there was an obligation to contribute or there were continuing employer or employee contributions to the contract or account for periods after January 1, 2009. Although FAB 2009-02 read literally would require contracts or accounts to be included in the annual report in the circumstances described above, upon review, the Department has determined that final contributions to the contract or account attributable to 2008 that were not in fact deposited in the contract or account until 2009 will not be treated by the Department as constituting continuing contributions after January 1, 2009, that would make the contract or account ineligible for the relief provided in FAB 2009-02.

COVERAGE QUESTIONS AND ANSWERS

Q-14. May a “safe harbor arrangement” under DOL regulation 29 CFR 2510.3-2(f) make optional features, such as participant loans, available if the 403(b) provider is responsible for any discretionary determinations?

Yes. The employer may also refuse to include 403(b) contracts and accounts in its safe harbor arrangement with such optional features if that limitation is intended to reduce the employer's costs in offering the safe harbor arrangement or is designed to remove features that in operation could result in the employer being forced to take steps that would exceed the employer involvement permitted under the safe harbor.

Q-15. Would an employer exceed the ERISA coverage safe harbor limitations on employer involvement in 29 CFR 2510.3-2(f) if the employer hires a third-party administrator (TPA) to make discretionary decisions?

Yes. The employer's selection of a TPA would be inconsistent with the safe harbor in 29 CFR 2510.3-2(f). The Department's FAB 2007-02 addressed the safe harbor conditions for tax-sheltered annuity arrangements to fall outside of ERISA Title I coverage, and specifically noted that the documents governing the arrangement could identify parties other than the employer as “responsible for administrative functions, including those related to tax compliance.” As FAB 2007-02 further noted, the documents should correctly describe the employer's limited role and allocate discretionary determinations to the annuity provider or other responsible third party selected by a person other than the employer. Moreover, an employer may limit the available providers it will make available in its safe harbor arrangement to those where the 403(b) contracts or accounts or other governing documents prepared by the provider state that the provider or another appropriate third party is responsible for discretionary decisions related to loans and hardship distributions.

Q-16. Must a “safe harbor arrangement” under 29 CFR 2510.3-2(f) offer participants a reasonable choice of both 403(b) providers and investment products?

Yes. To meet the terms of the safe harbor, the arrangement generally must offer a choice of more than one 403(b) contractor and more than one investment product. The preamble to the final regulation at 29 CFR 2510.3-2(f) explained that “[t]his [reasonable choice] provision is designed to prevent an employer not wishing to be deemed to be maintaining a pension plan from restricting products available to employees, or limiting available contractors to one selected by the employer when several seek to make their services and products available to employees, unless even in the presence of such limitation the employees of the employer are afforded a reasonable choice, in light of relevant circumstances.” 44 Fed. Reg. 23525, 23526 (April 20, 1979). Similarly, in addressing public comments on this condition, the preamble said that “[i]f the employer chooses to engage in such limitation, the condition specifies that employees must be afforded a reasonable choice of both products and contractors under the relevant circumstances in order for the Department to consider the employer not to have established or maintained a plan. It may be that in some circumstances it would be reasonable for the employer to limit to one the number of contractors who may deal with employees under the section 403(b) program.” *Id.*

The Department recognizes that the cost of permitting employees to make contributions through payroll deductions may be significantly affected by the number of 403(b) contractors to which the employer must remit contributions. This may be particularly significant for small employers concerned about the administrative complexity of offering access to multiple 403(b) providers under a safe harbor 403(b) arrangement that normally requires a very limited financial commitment on the part of an employer in the form of affording payroll deductions. In the Department’s view, an employer could, consistent with the safe harbor, limit the number of providers to which it will forward salary reduction contributions to one if employees are allowed to transfer or exchange, in accordance with the IRS regulations, their interest to a 403(b) account of another provider. Also, there may be circumstances where an employer can demonstrate that increased administrative burdens and costs to the employer in offering a number of contractors under the arrangement would be sufficient to cause the employer to stop making its payroll system available to collect and remit payroll deduction contributions to any 403(b) contractor. In such cases, limiting available contractors to one offering a wide variety of investment products could be seen as affording employees a reasonable choice in light of all relevant circumstances as described above (e.g., a single insurance company’s 403(b) compliant arrangement with access to a broad range of affiliated investment products or a single 403(b) compliant “open architecture” custodial account platform giving employees access to a broad range of unaffiliated mutual fund investment products).

In any case where the employer limits the availability of providers in a 403(b) safe harbor arrangement, affording the employees a reasonable choice under the circumstances requires that limitations on or costs or assessments associated with an employee’s ability to transfer or exchange contributions to another provider’s contract or account be fully disclosed in advance of the employee’s decision to participate in the program.

Q-17. Would an arrangement that otherwise meets the terms of the safe harbor stay within the safe harbor if the written plan document required by Treasury Regulations under Code section 403(b) provides that salary deferrals will be discontinued to a provider that is not complying with Code requirements?

Yes. If the purpose of the provisions for discontinuing a provider from offering products to participants in the arrangement is necessary to maintain tax code compliance, then including such provisions in the arrangement will not take it outside the safe harbor.

Q-18. May a safe harbor non-Title I arrangement authorize the employer to change 403(b) providers and unilaterally move employee funds from one provider to contracts or accounts of another provider?

No. Although an employer can decide, within the terms of 29 CFR 2510.3-2(f), to limit the providers in a safe harbor arrangement to which it will forward employee salary reduction contributions, discretionary authority to exchange or move employee funds would be inconsistent with the safe harbor requirements.

FOR FURTHER INFORMATION

Questions concerning the information contained in this Bulletin (or Field Assistance Bulletins 2009-02 and 2007-02) may be directed to the Office of Regulations and Interpretations, Division of Coverage, Reporting and Disclosure at 202.693.8523.