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DOL Provides Relief to 403(b) Plans from Form 5500 Reporting Requirements

September 2009

The U.S. Department of Labor (the "DOL") recently released a Field Assistance Bulletin (FAB 2009-02) that provides much needed guidance and relief in response to concerns expressed by 403(b) plan administrators and their accountants regarding the expanded annual Form 5500 reporting requirements for 403(b) plans beginning in 2009. Prior to 2009, 403(b) plans were subject to very limited Form 5500 reporting requirements.

Beginning in 2009, large 403(b) plans (generally plans with 100 or more participants) that are subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") are required to include with their annual Form 5500 filing, audited financial statements prepared by an independent auditor. Small 403(b) plans (generally plans with fewer than 100 participants), while now subject to the same annual Form 5500 requirements as other small retirement plans, are eligible for a waiver of the audit requirement and will generally be able to use the Form 5500-SF (Short Form 5500), a new simplified form for small plans invested in certain types of assets.

Recognizing that administrators of 403(b) plans may face challenges in transitioning to compliance with the heightened filing requirements, the DOL has provided the following transition relief for 403(b) plan administrators that make "good faith efforts" to comply with the expanded annual reporting requirements.

Relief for Pre-2009 Contracts and Accounts

A 403(b) plan administrator may elect not to treat annuity contracts and custodial accounts as part of the employer's ERISA plan or as plan assets for purposes of the annual Form 5500 reporting requirements, provided that:

1. the annuity contract or custodial 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. the employee (or former employee) can legally enforce all of his/her rights and benefits under the annuity contract or custodial account against the insurer or custodian without any involvement by the employer; and

4. the individual owner of the contract is fully vested in the contract or account.

Notwithstanding the enforcement relief announced by the DOL, auditors have noted that FAB 2009-02 does not change the audit requirements for 403(b) plans. The auditor is still required to conduct an audit in conformity with generally accepted auditing standards, and the DOL relief does not appear to extend to the compliance or fiduciary conduct requirements of an audit on a contract.

Owners of Excluded Contracts Not Counted as Participants

In addition, current or former employees with only contracts or accounts that are excludable from the Form 5500 or Form 5500-SF reporting requirements under the above transition relief do not need to be counted as participants covered under the 403(b) plan for Form 5500 reporting purposes. The ability to exclude such current or former employees may cause some plans to be treated as small plans (plans with fewer than 100 participants), relieving these plans from the audit requirement.

Qualified Audit Opinions Due to Pre-2009 Contracts Will Not Be Rejected

The DOL has stated that it 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 a limited opinion was because pre-2009 contracts were not covered by the audit or included in the plan’s financial statements. Except with respect to this relief, an accountant engaged to perform the 403(b) plan audit must perform audit procedures and report in accordance with generally accepted auditing standards as required by ERISA.

Relief Extends Past 2009

Although not specifically stated in FAB 2009-02, the DOL subsequently announced that the transition relief provided under FAB 2009-02 is not intended to be limited to the 2009 plan year, but also applies to future years beyond the 2009 plan year.

Guiding Principles for Compliance Difficulties Regarding Post-2009 Contracts

The DOL also stated that it recognizes that plan sponsors may encounter compliance issues unrelated to pre-2009 contracts in making the transition to the new reporting requirements. 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 DOL stated that "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." The DOL asserts that although ERISA's annual reporting requirements may result in added costs to a plan, an administrator of a 403(b) plan should be able to prepare an acceptable 2009 Form 5500 or Form 5500-SF without undue expense or burden.

Plan Auditors Expected to Notify Plan Administrators of Irregularities

The DOL reiterates in FAB 2009-02 that, as a general rule, it expects 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. The DOL has indicated that it believes that providing plan administrators with such 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.

The DOL relief, which is based on the contract with a participant, is inconsistent with the relief granted by the IRS in Revenue Procedure 2007-71, which provided transitional relief from the written document requirement for contracts that were issued or exchanged before January 1, 2009 by vendors that were no longer being used, as long as the employer made a good faith effort to include those contracts as part of its 403(b) plan. This may pose an auditing challenge, because if a plan sponsor keeps records for IRS purposes, those records would be considered plan records that from the DOL's perspective should be audited.

Related Professionals

- **Jacob I. Friedman**