



Legal Alert: Making it Easy on 403(b) Plans

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Many sponsors of 403(b) plans (also known as tax-sheltered annuities) will be required to file a full-blown Form 5500 for the first time in 2010, with respect to the 2009 plan year. There is concern, however, that numerous questions left unanswered by the Internal Revenue Service's recent Final Regulations in terms of a plan's treatment of its contracts and other investments must be answered in order for these filings to be possible.

Last week, on July 20, 2009, the U.S. Department of Labor (DOL) published guidance and provided certain transition relief for 403(b) plan sponsors that are caught by this requirement to file a more detailed Form 5500 beginning with the 2009 plan year. While the guidance, in Field Assistance Bulletin No. 2009-02 (FAB 2009-02), does not delay the effective date of the reporting requirements, it does permit certain "good faith compliance" and other transition relief designed to assist plan sponsors in meeting their reporting obligations. In 2007, the Internal Revenue Service regulations governing 403(b) plans were finalized, and under those Final Regulations, many 403(b) plans would find themselves responsible for annual reporting obligations under ERISA. The DOL also revised Form 5500 for the 2009 plan year to reflect the additional reporting obligations imposed on 403(b) plans. Like qualified pension and profit sharing plans, 403(b) plans with 100 or more participants are required to obtain and submit an accountant's report and audited financial statements as a part of their Form 5500 filing. (Plans with fewer than 100 participants are eligible for a waiver of the audit requirement, similar to smaller pension and profit sharing plans). Numerous sponsors and practitioners commented to the DOL concerning the reporting requirements, and specifically the requirement that the sponsor submit audited financial statements, pointing out that 403(b) annuity contracts and other investments that may be used for 403(b) plans posed issues that were usually not present for sponsors of qualified plans. In response, the DOL included certain transition relief in FAB 2009-02. Generally, FAB 2009-02 requires sponsors to make a "good faith effort" to comply with ERISA's annual reporting requirements beginning this year. However, 403(b) plan sponsors may choose not to treat certain annuity contracts and custodial accounts as forming part of their plan (or as being plan assets) for purposes of the annual reporting requirements, including the audit requirement, *if* all the following are satisfied:

- The annuity contract (or custodial account) was issued to a current or former employee before January 1, 2009.
- Contributions to the annuity contract (or custodial account) are no longer required, and had ceased before January 1, 2009.

- All rights under the contract (or account) are enforceable by the employee against the insurer (or custodian) without involving the plan sponsor.
- The employee's interest in the contract or account is fully vested at all times after December 31, 2008.

An employee (or former employee) for whom such an excluded annuity contract or custodial account is maintained need not be counted as a plan participant *by reason of that contract (or account)*. As a result, the number of participants in the plan could be reduced, and if reduced below 100, the plan could be exempt from the requirement that it file the accountant's report at all. However, if an accountant's report is required, the FAB also indicates that the DOL will not reject a 403(b) plan's Form 5500 due to a "qualified," a "disclaimer" or even an "adverse" opinion if the report expressly states that the only reason for the inability to issue an "unqualified" opinion is because there are pre-2009 contracts (or accounts) that are permitted by the FAB to be excluded from the financial statements. The DOL also reminded sponsors that, if a 403(b) plan is subject to ERISA, fiduciaries have responsibilities that may not have been adequately followed in the past, and that, going forward, 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 also noted that, although compliance with ERISA's annual reporting requirements add to a plan's administrative costs, it believes that a 403(b) plan administrator should be able to prepare a complete, compliant Form 5500 without undue expense or burden. Finally, the DOL reminded fiduciaries that ERISA's recordkeeping requirements require that the facts or circumstances of each situation dictate 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 costs incurred in connection with the reconstruction of records or other consequences of their loss or destruction. Although 403(b) plans will not be filing a Form 5500 under the new reporting requirements until next year, sponsors should begin to prepare for those filings now, by (i) identifying all annuity contracts and custodial accounts held under the plan, to determine whether the plan will be eligible for the transition relief contained in FAB 2009-02, and whether that relief will be of any assistance, (ii) determining whether participants who hold excludable annuity contracts and custodial accounts may be disregarded, and whether doing so would reduce the number of participants to a level that would simplify the plan's reporting obligations. At this point, sponsors of 403(b) plans should determine whether they are small plans or large plans, and should prepare to file their Forms 5500 for the 2009 plan year. In doing so, the plan sponsor should identify all annuity contracts and custodial accounts to determine whether the transition relief contained in FAB 2009-02 will be of any assistance. Specifically, the plan sponsor should determine whether it can exclude certain annuity contracts and custodial accounts from its reporting and audit obligations, and if doing so in any way reduces the number of participants to a level that would simplify the plan sponsor's reporting obligations. Although 403(b) plans will not file a Form 5500 under the extended reporting requirements until next year, obtaining all of the necessary information and complying with the audit requirement will not be easy for most plan sponsors. Plan sponsors should start their preparations now so that they have sufficient time before the filing deadlines to address any audit contingencies that might arise. The text of the Field Assistance Bulletin can be found on the DOL's website at <http://www.dol.gov/ebsa/regs/fab2009-2.html>. If you have any questions regarding the FAB, or other issues relating to your 403(b) plan, you can contact the author of this Alert, Jeffrey Ashendorf, at 212-453-5926,

jashendorf@fordharrison.com, or any other member of Ford & Harrison's
Employee Benefits practice group.