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LEGAL ALERT

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Department of Labor Introduces New §403(b) Web Page and Provides Additional §403(b) Guidance

The U.S. Department of Labor (DOL) continues to be responsive to the needs of the §403(b) community for additional guidance. Recently, it:

- Launched a §403(b) web page providing links to various pieces of guidance relevant to §403(b) programs, including three DOL Field Assistance Bulletins (FAB) and several IRS resources discussing §403(b) programs, DOL guidance on Form 5500 filing requirements, information on DOL's voluntary correction programs and other helpful publications; and

- Published FAB 2010-01 (February 17, 2010). Comprised of 18 questions and answers, FAB 2010-01:
  - Clarifies the scope of the relief from Form 5500 annual reporting requirements provided to certain ERISA-regulated §403(b) contracts and accounts under FAB 2009-02, and
  - Provides additional guidance under the 29 CFR §2510.3-2(f) safe harbor regulation, which exempts certain §403(b) programs from ERISA.

Clarification of Reporting Relief under FAB 2009-02

FAB 2009-02 provides that §403(b) annuity contracts or custodial accounts issued before 2009 need not be treated as part of the employer's §403(b) program for purposes of the Form 5500 annual reporting requirement if: (1) the employer ceased to have an obligation to make salary reduction or other contributions to the contract/account, and did cease making such contributions, before 2009; (2) all of the rights and benefits under the contract/account are legally enforceable by the individual owner without involvement by the employer; and (3) the individual owner is fully vested in the contract/account.

Responding to questions and comments received following publication of FAB 2009-02, DOL clarified whether the following contracts/accounts (generally, that otherwise would meet FAB 2009-02) should be included or excluded on Form 5500:

	On Form 5500 report, contract/account is:	
	Excluded	Included
Employer provides information to §403(b) provider on employee's or former employee's employment status	X	
Employer must consent to or otherwise exercise discretion over employee's exercise of rights under contract/account		X
Employer must certify employee's eligibility for distribution under tax law, or approve hardship distribution or loan		X
Employee remits loan payments directly to §403(b) provider	X	
Employer forwards employee's loan repayments to §403(b) provider		X
Contract/account meets the requirements of FAB 2009-02 but is actually known to and identifiable by plan administrator		Permitted but not required
Contract/account is received in an exchange after 2008		X
Final 2008 contribution remitted to §403(b) provider in 2009	X	

Among other things, the FAB also addressed the following:

- FAB 2009-02 relief not limited to 2009 reporting year: The relief provided in FAB 2009-02 extends beyond the 2009 reporting year so long as the contracts/accounts excluded from reporting continue to meet the requirements of FAB 2009-02 in subsequent years.

- Good faith efforts to comply: DOL's pragmatic approach to this issue continues to be helpful. With respect to a plan administrator that is unable to comply fully with the annual reporting requirements for contracts/accounts that do not meet the requirements of FAB 2009-02, DOL will evaluate all of the facts and circumstances to determine whether the administrator has made a good faith effort to comply. The plan administrator bears the burden of showing its good faith. Administrators should document their efforts to comply and implement internal controls to maintain sufficient records in accordance with ERISA's recordkeeping requirements going forward.

Guidance under 29 CFR §2510.3-2(f) Safe Harbor Regulation

Under the 29 CFR §2510.3-2(f) safe harbor, nongovernmental §403(b) programs will *not* be considered ERISA employee pension benefit plans if: (1) employee participation in the program is voluntary; (2) all rights under the annuity contract or account are enforceable solely by the employee or beneficiary; (3) the employer's involvement in the program is limited to certain enumerated actions (including but not limited to providing employees a reasonable choice of §403(b) providers and investment products under the program); and (4) the employer receives no consideration or compensation other than reasonable compensation to cover expenses properly incurred in the performance of the employer's duties pursuant to salary reduction agreements under the program. FAB 2010-01 provides some helpful clarifications with respect to these requirements:

	Permitted under safe harbor	Violates safe harbor
Loans and other optional features where §403(b) provider, rather than employer, is responsible for any discretionary decision	X	
Employer prohibition of contracts/accounts that offer optional features where limitation is intended to reduce employer's costs in offering program or to exclude features that could force employer to take steps that would violate safe harbor	X	
Employer's appointment of third-party administrator to make discretionary decisions		X
Employer selects or requires contracts/accounts where provider takes responsibility for discretionary decisions	X	
Plan document de-selects §403(b) provider that does not meet tax requirements	X	
Employer has discretionary authority to exchange or move funds from existing §403(b) provider		X

Reasonable choice of providers and investment products: FAB 2010-01 also provides that a §403(b) program generally must provide employees with a choice of at least two §403(b) providers and at least two investment products in order to meet the "reasonable choice" requirement of 29 CFR §2510.3-2(f). Recognizing the potential employer costs associated with the requirement to forward salary reduction contributions to multiple §403(b) providers, the FAB permits employers to limit a safe harbor program to one §403(b) provider if:

- Employees are permitted to transfer or exchange their accounts to another §403(b) provider in accordance with IRS regulations; or
- That provider offers a wide array of investment products, and the employer can demonstrate that the increased administrative burdens and costs of offering more than one provider would cause the employer to stop making any §403(b) provider available for new contributions.

If an employee's choice of §403(b) providers is so limited, the employer must disclose to the employee, before he or she elects to participate, all limitations and costs associated with an employee's ability to exchange or transfer contributions to an account with a different provider.

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If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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