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LEGAL ALERT

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Two Classes of Annuity Providers Do Not Violate § 403(b) Universal Availability Requirement

In Private Letter Ruling 201142033 (July 25, 2011), the Internal Revenue Service (IRS) ruled that the IRC § 403(b) universal availability requirement was not violated merely because (i) a university system made available two classes of annuity providers and (ii) some employees could access both classes of providers, and other employees could access only one class.

- The university system adopted a consolidated § 403(b) program for all its campuses and selected annuity providers that were available to all employees.

- Previously, each campus in the system administered a separate § 403(b) program with differing annuity providers. An employee with an existing contract with one of these providers was allowed either to continue making salary reduction contributions to that contract (so long as that provider executed the requisite information sharing agreement under the § 403(b) regulations) or to select a new provider under the consolidated program.

The IRS explained that the § 403(b) universal availability requirement – generally, that all employees have an effective opportunity to make elective deferrals pursuant to a salary reduction agreement – is not violated merely because some employees have more deferral options than others. The ruling expressly:

- Did not address whether there might be other facts and circumstances in the arrangement that impermissibly constrained the "effective opportunity" of some or all of the employees, and
- Limited its conclusion to salary reduction contributions, since different nondiscrimination rules apply under § 403(b) to matching and other employer contributions and to after-tax employee contributions.

The ruling was issued two years after it was requested.

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