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Changes to 403(b) Plans: Form 5500 Reporting and Audit Requirements

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By: *Diane Marotta, CPA, Partner*

New government regulations impact 403(b) plans in 2009. [Learn more about what the changes are, why it's different, how these changes affect you and your organization.](#)

Does your organization have a 403(b) plan? In November 2007, the Department of Labor (DOL) issued [amended regulations](#) that remove an exemption previously granted to certain 403(b) plans for annual Form 5500 reporting, disclosure, and audit requirements. A 403(b) tax-sheltered annuity (TSA) plan is very similar to a 401(k) plan, but can only be offered by schools, hospitals, churches, and certain other tax-exempt organizations. It allows contributions to the plan by employees on pre-tax dollars and also may provide for employer contributions.

Which 403(b) Plans Are Subject to the New Requirements?

Effective with the 2009 plan year, 403(b) plans that are not exempt from the Employee Retirement Income Security Act of 1974 (ERISA) will be subject to the same Form 5500 reporting and audit requirements as 401(k) plans. In general, plans sponsored by governments or religious organizations are exempt from ERISA and these new requirements would not apply to those plans. Plans sponsored by schools and charitable organizations are generally subject to the new requirements. However, under DOL "safe harbor" rules, annuity contracts or custodial accounts purchased or provided solely through salary reduction agreements or agreements to forego an increase in salary (i.e. no employer matching contribution) may not be considered to be plans under ERISA; therefore, these programs would be exempt from ERISA and the new requirements (refer to [DOL Field Assistance Bulletin No. 2007-02](#) for specific requirements of the "safe harbor" rule).

Why the Change?

In the November 2007 Regulations, the DOL stated that it believes the new reporting requirements for 403(b) plans "will result in significant improvements in the administration of Code section 403(b) plans covered by Title I of ERISA, reducing the rate of violations currently being found in investigations of Code section 403(b) plans and increasing benefit security for such plans' participants and beneficiaries." Ultimately, the rules are written to increase transparency to participants and regulators regarding these plans, and improve accountability by the employers who sponsor them.

The 5500: Current and Future Forms

The Form 5500, "Annual Return/Report of Employee Benefit Plan", is the primary source for regulators, participants, and beneficiaries regarding the financial condition and operations of a benefit plan. Filing and audit requirements for benefit plans differ based on whether a plan is a small plan (usually fewer than 100 participants) or a large plan. Large plans are generally required to submit audited financial statements along with the Form 5500, while small plans are generally exempt from this requirement. The number of participants in a plan includes actively enrolled participants, as well as other eligible participants who have not enrolled and former employees who have balances

remaining in the plan. Therefore, even if your organization has less than 100 employees, if you have a number of former employees with balances remaining in the plan, you may be subject to large plan filing requirements. Plans that have between 80 and 120 participants as of January 1, 2009, and who filed a Form 5500 as a small plan for the 2008 plan year are eligible to continue filing as a small plan until their participant count exceeds 120.

A new Short Form 5500 is being developed and will be available to most small 403(b) plans that meet certain conditions, including all investments being held or issued by regulated financial institutions and having a readily determinable fair market value. In addition to these developments impacting 403(b) plans, for plan years beginning on or after Jan. 1, 2009, almost all employee benefit plans subject to ERISA will be required to file Form 5500 or its alternative formats electronically. Plans also must be capable of electronic public disclosure beginning with the 2009 plan year.

Steps to Take Now

If you have a 403(b) plan, there are steps you should begin taking now to facilitate the smooth implementation of these new requirements.

- Verify that you have a written plan document and investment policy that is current and in compliance with regulatory requirements. The Internal Revenue Service [issued regulations](#) in July 2007 requiring all 403(b) plans to have a written plan in place by Jan. 1, 2009 that satisfies the requirements of the regulations. [Notice 2009-3](#), issued on December 11, 2008, provides relief from this upcoming deadline if certain conditions are met by December 31, 2009.
- Understand in more detail the new rules, and how they impact your particular plan. Additional sources for background information are listed at the end of this article. Each plan's situation is unique, so plan sponsors should consult their benefit plan service providers, legal counsel, and/or their accountant in regards to their specific situation and the new rules.
- If you determine that your plan no longer meets the requirement for an audit exemption, there are steps to start taking now to prepare for the 2009 audit requirement:
- Determine the location and completeness of the plan's records and begin collecting missing information. Plans that have been in existence for decades and that have used a variety of service providers across time will face immense challenges in this area. A good place to start is with the current operations of the plan: hold discussions with your current vendors as to the nature of records they have for your plan and review personnel files for current employees. Review other available documentation to determine whether other service providers may have been used throughout the history of the plan and contact those vendors you identify; there may be "orphan contracts" that need to be brought into the plan. Document the process you follow for compiling and verifying this information. Your auditors will need to understand how the sponsor has confirmed that participant data and records are complete and accurate.
- Hire an independent auditor for the plan. The AICPA Employee Benefit Plan Audit Quality Center has a [Plan Sponsor Resource Center](#) that provides information on how to approach this process and identify an auditor with employee benefit plan experience. Once you have hired a specific auditor, they can provide you with a listing of the items they will require for the 2009 audit, providing you with sufficient time to gather and prepare information.
- Ensure that you have a financial statement as of the end of the 2008 plan year. ERISA requires the plan's audited financial statements to include a comparative balance sheet from the prior year (i.e. 2008), even in the initial year of the audit requirement. While the 2008 information does not have to be audited, the plan will need to be able to present its assets, liabilities, and net assets available for benefits as of the prior year-end.
- Develop or evaluate internal controls over financial reporting for the plan. Communicate with your existing service providers for the plan, including investment custodians and plan record keepers to understand how they can facilitate the plan's compliance with the new requirements. Ensure that you have a current contract with these service providers, and request their SAS 70 report on internal controls. Someone internally should be appointed to provide adequate monitoring, because a plan sponsor cannot outsource its responsibility for the plan's internal control.

Depending on the size and nature of your plan, the new requirements may take significant time and resources for your organization and/or its service providers to implement. Early identification and resolution of potential issues, especially the matters highlighted above, will make for a smoother implementation process. The DOL and AICPA have indicated that more guidance will be forthcoming across the course of the next year, so check the sources below frequently for updates.

Additional Resources:

- [AICPA Employee Benefit Plan Audit Quality Center – 403\(b\) Plans](#)
- [AICPA Employee Benefit Plan Audit Quality Center - Plan Sponsor Resource Center](#)
- [IRS: IRC 403\(b\) Tax-Sheltered Annuity Plans](#)
- [Department of Labor Employee Benefits Security Administration](#)
- Department of Labor's EFAST Help Line: 1-866-463-3278

Diane Marotta, CPA, is a partner at Johnson Lambert & Co. LLP in Falls Church, Virginia. Email: dmarotta@jlco.com

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