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## Department of Labor

### **Field Assistance Bulletin Provides Guidance to 403(b) Plans Subject to ERISA on Revised Filing Requirements for Form 5500**

On July 20<sup>th</sup>, 2009, the Department of Labor (DOL) issued Field Assistance Bulletin (FAB) 2009-02 providing *limited* transition relief from the newly enhanced Form 5500 reporting requirements for 403(b) plans that are subject to Title I of ERISA, and with respect to contracts issued before January 1, 2009 that meet a specific set of criteria.

As the Form 5500 requirements are not applicable to plans that are not subject to Title I of ERISA, this guidance *does not* impact 403(b) plans of governmental entities, including public schools, non-electing church plans, and those that meet the ERISA-exemption safe harbor under DOL regulation 2510.3-2(f).

#### **BACKGROUND**

In 2007 the DOL expanded the Form 5500 reporting requirements applicable to ERISA 403(b) plans effective for plan years beginning on or after January 1, 2009. This expanded reporting requirement includes providing detailed financial information, applicable schedules and an independent qualified auditors report. The specific plan reporting requirements are contingent upon plan size.

Prior to this time ERISA 403(b) plans were only required to report certain non-financial information, and were not required to prepare schedules or submit an independent qualified auditors report.

#### **TRANSITION RELIEF**

For 403(b) plan administrators who make a good faith effort to transition to the newly enhanced and expanded Form 5500 reporting requirements, the administrator does not need to treat annuity contracts and custodial accounts as part of the employer's Title I plan or as plan assets for purposes of Form 5500 reporting provided that:

- the contract or account was issued to a current or former employee before January 1, 2009;
- the employer ceased to have any obligation to make contributions (including salary reduction contributions), and ceased making contributions to the contract or account before January 1, 2009;
- all of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer. The fact that an individual's contract or account rights are reflected by an individual certificate under a group annuity contract held in the employer's name would not, for that reason alone, make the individual certificate ineligible for the transition relief described in this memorandum

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provided that the certificate gives the individual the ability to enforce all his or her contract or account rights without any involvement by the employer<sup>1</sup>; and

- the individual owner of the contract is fully vested in the contract or account

Secondly, current or former employees with only contracts or accounts that are excludible from the plan's Form 5500 under the above referenced guidelines do not need to be counted as participants covered under the plan.

Lastly, for those 403(b) plans that are required to attach an independent qualified auditors report, the DOL 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 such an opinion is a result of pre-2009 contracts the were not covered by the audit or included in the 403(b) plans financial statement.

### **LIMITED APPLICATION**

The transition relief is *limited* in nature and will require an analysis of a 403(b) plans' specific set of facts and circumstances; however there may be certain scenarios where such relief would have practical application.

For example, a Section 403(b) plan that was terminated prior to 2009 pursuant to Treasury Regulation 1.403(b)-10 and via the issuance of a fully paid individual insurance annuity contract may be able to avail itself of this transition relief.

### **APPLICABILITY CHECKLIST**

1. Was the contract issued in connection with your ERISA 403(b) plan issued prior to January 1, 2009?

\_\_\_\_\_ YES                      ***Continue w/ Applicability Check***

\_\_\_\_\_ NO                        ***STOP - Transition Relief Not Applicable***

2. Has the employer ceased to have an obligation to make contributions (including salary reduction contributions), and has not made contributions to the contract or account on or after January 1, 2009?

\_\_\_\_\_ YES                      ***Continue w/ Applicability Check***

\_\_\_\_\_ NO                        ***STOP - Transition Relief Not Applicable***

3. Are all the rights and benefits under the contract or account legally enforceable against the issuer or custodial by the individual owner (current or former employee) of the contract or account without any involvement by the employer?

\_\_\_\_\_ YES                      ***Continue w/ Applicability Check***

\_\_\_\_\_ NO                        ***STOP - Transition Relief Not Applicable***

4. Is the individual owner (current or former employee) of the contract or account fully vested?

\_\_\_\_\_ YES                      ***Continue w/ Applicability Check***

\_\_\_\_\_ NO                        ***STOP - Transition Relief Not Applicable***

If you have answered NO to **any** of the above questions, transition relief with respect to 403(b) Form 5500 reporting is **not** available.

For additional information please see the DOL website: <http://www.dol.gov/ebsa/regs/fab2009-2.html>

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<sup>1</sup> Please note that rights under individual contracts and accounts generally reside with the participant, whereas rights under group annuity contracts or accounts can reside with either the participant or plan sponsor, depending on the terms of the particular contract.

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## Recent Enforcement Activities

Each month the Department of Labor reports on enforcement activities to protect the rights of participants and beneficiaries of benefit plans that are subject to ERISA. <http://www.dol.gov/ebsa/newsroom/main.html>. Mabel Capolongo, regional director of the department's Employee Benefits Security Administration (EBSA) in Philadelphia, explained recently "The Labor Department is committed to protecting workers' pension plans and will vigorously pursue legal action when they are compromised." In fiscal year 2008, EBSA achieved monetary results of \$1.2 billion related to pension, 401(k), health and other benefits for American workers and their families

According to the DOL, employers with similar problems who are not yet the subjects of investigations by EBSA may be eligible to participate in the department's Voluntary Fiduciary Correction Program (VFCP). Participation in the VFCP, which is explained at <http://www.dol.gov/ebsa>, requires employers to make workers whole but allows them to avoid EBSA enforcement actions and civil penalties as well as any applicable excise taxes.

A significant problem addressed by the DOL is the abandonment of retirement plans before the funds have been distributed to participants and beneficiaries. Below is a list of selected enforcement actions from July 2009, including several related to abandoned plans.

- *DOL obtains consent judgment against Herndon, Virginia company to protect participants of abandoned retirement plan.*

In February, the DOL sued the former company alleging that it violated provisions of the ERISA when it ceased operations but failed to terminate its profit-sharing plan and trust, and ensure that the funds in the plan were appropriately distributed to participants. The DOL obtained a consent judgment and settlement agreement appointing an independent fiduciary to manage and distribute the retirement assets of the defunct company. As explained in the news release, without the court-appointed independent fiduciary to oversee this process, plan participants had no means of obtaining a distribution of their assets.

- *DOL sues to appoint independent fiduciary to manage abandoned 401(k) plan of former Denver area employer.*

The DOL obtained a consent judgment in the U.S. District Court for the District of Colorado appointing an independent fiduciary to oversee the abandoned 401(k) plan of the defunct Colorado Company. The judgment, filed simultaneously with a lawsuit, alleges that the plan trustee and owner of the company, failed to accurately and completely distribute assets of the plan and file required Form 5500 reports after the company ceased operations in April 1998. An independent fiduciary was appointed to administer the plan. As of January 31, 2007, the plan had 13 participants and assets totaling \$35,706.31.

- *DOL obtains appointment of independent fiduciary for profit-sharing plans abandoned by defunct Binghamton, New York, companies.*

The DOL obtained two federal court orders appointing the same independent fiduciary to manage the abandoned profit-sharing plans of two companies under control of the same owner and same fiduciary. The plans' fiduciary ceased administering the plans when the companies went out of business in 2004. As a result, the former employees who participated in the profit-sharing plans were unable to access their plan accounts. As explained in the news release, under ERISA, employee benefit plans must be managed by named fiduciaries. If no one is acting as a plan fiduciary, participants and beneficiaries cannot obtain plan information, make investments or collect retirement benefits.

Under separate lawsuits filed, the DOL alleged that the plans had not filed legally required annual reports since 1994 nor provided their participants with required summary plan descriptions. Since 2004, participants and beneficiaries have not been able to obtain distributions from either plan. An independent fiduciary appointed for both plans has the authority to administer the plans, distribute their assets to eligible participants and beneficiaries, and terminate the plans.

- *Former casino employee sentenced for theft of 401(k) plan assets*

As a result of a criminal investigation by the DOL's Regional Office of the EBSA in Kansas City, Missouri and the U.S. Postal Inspection Service, a former employee of a Kansas City, Mo., gaming casino was indicted in June 2008 on one count each of aggregated identity theft, mail fraud and theft from an employee benefit covered by the Employee Retirement Income Security Act. As detailed in the news release, the indictment contends that the former employee used her co-worker's social security and personal identification numbers to authorize an \$18,000 distribution from her co-worker's 401(k) account. In

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addition, the former employee was alleged to have used the mail to steal a distribution check and forged the participant's signature on the check.

The former employee was subsequently sentenced to one year in federal prison, three years of supervised probation after completion of her prison term and ordered to make approximately \$38,000 in restitution.

"Theft of employee benefit assets jeopardizes the benefits of workers. This case reaffirms the Labor Department's commitment to protect workers' benefits by identifying criminal activity wherever and whenever it occurs," said Steve Eischen, director of EBSA's Kansas City Regional Office.

## Internal Revenue Service

### Recent ALI-ABA Webcast Considered 403(b) Plan Topics

On July 7, 2009 the American Law Institute – American Bar Association (ALI-ABA) sponsored a webcast that considered several thorny topics related to 403(b) plans. As the implementation of the final 403(b) regulations has progressed in 2009, 403(b) plan sponsors, plan providers as well as participants and beneficiaries have found that terminating existing 403(b) plans has been problematic. In addition, the IRS has received many comments about the availability of vesting schedules in certain preapproved plans. The IRS will be issuing determination letters on preapproved 403(b) plans when the program is opened.

Robert Architect, senior tax law specialist in the Office of Employee Plans at the IRS, indicated that if an employer does not have the right to forcibly liquidate and distribute the assets of individual annuity contracts and/or custodial account agreements, then the 403(b) plan has not been terminated.

Aside from the tax issues, Susan Rees, pension law specialist in the Office of Regulations and Interpretations at the Department of Labor (DOL), noted that many existing 403(b) annuity contracts and individual retirement account agreements do not necessarily conform to existing plan termination guidance under Title I of ERISA. The DOL regulates retirement plans subject to ERISA. [Note that governmental plans are statutorily exempt from ERISA.] Rees expects that guidance may be released that will be helpful to address plan termination issues for future 403(b) products developed by providers.

The draft IRS rules would require that all 403(b) preapproved plans guarantee full and immediate vesting of all plan contributions. Numerous requests have been made to allow vesting schedules as a feature of preapproved 403(b) plans. Vesting schedules are more common under nongovernmental 403(b) plans. Louis Leslie, tax law specialist in the IRS Office of Employee Plans, suggested on the ALI-ABA webcast that the IRS hopes to address that and other practitioner concerns fairly quickly so it can issue proposed rules and sample plan language by late summer or early fall.

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