



# Are you now a plan fiduciary under the 403(b) regulations?

You are a “plan sponsor” under the final IRS 403(b) regulations that go into effect on January 1, 2009.

**So, you’ll be operating just like your private sector colleagues who offer a 401(k) plan, right?**

Wrong. While the IRS final 403(b) regulations certainly strive to keep retirement plan sponsors operating under a similar framework, the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA) rules mean that a 403(b) plan still has very real differences that separate it from a 401(k) plan.

Perhaps the most significant difference is that ERISA fiduciary obligations would not apply to 403(b) plans sponsored by public schools and certain 501(c)(3) nonprofit organizations. While the final 403(b) regulations impose more day-to-day oversight on employers offering 403(b) plans, many 403(b) sponsors are under the mistaken impression that these IRS rules will now cause them to be considered plan fiduciaries.

The IRS has debunked this myth as it applies to public schools. Responding to the question, “Does having a written plan cause a non-ERISA 403(b) to become subject to ERISA,” Bob Architect, IRS Senior Tax Law Specialist and the resident expert on 403(b) plans, commented:

*“Let us begin answering this question by stating right up front, particularly where education is concerned, to realize that any form of government is not subject to ERISA. So if we have a 403(b) in a public K-12 school, no matter what they did under that plan, it would not subject them to ERISA. Public universities are also not subject to ERISA*

*So, the answer to this question really addresses those employers in the 501(c)(3) tax-exempt community. There, the very fact that they put in a written plan where in the past they had not been necessarily subject to ERISA, the mere existence of a written plan or the mere compliance with the terms of the regulations, which, of course, contain the written plan requirement, would not, in and of itself, subject them to ERISA.”*  
(<http://www.irs.gov/retirement/article/0,,id=172433,00.html>)

The Department of Labor (DOL) has also weighed in on whether a 501(c)(3) organization would become a fiduciary under ERISA by complying with the IRS final regulations. According to DOL Field Assistance Bulletin 2007-02, a 501(c)(3) employer with a salary deferral only 403(b) plan would not become an ERISA fiduciary simply by developing a written plan document or performing administrative reviews for

## ARE YOU NOW A PLAN FIDUCIARY UNDER THE 403(B) REGULATIONS?

compliance. In fact, if the employer delegates any discretionary decision making (such as authorizing hardships) to a third party – as the final IRS 403(b) regulations specifically contemplate, then that employer's 403(b) plan (funded only by salary deferral contributions) will not be subject to ERISA.

**So, if you have a 403(b) plan that is not subject to ERISA, you are not a plan fiduciary. Just for what exactly are you responsible?**

- Knowing the investment products funding the 403(b) plan

The IRS will expect that you know – and authorize – those vendors who are providing funding vehicles under the 403(b) plan, including those product providers approved only to receive contract exchanges.

Why? The IRS wants to be sure that you can identify where all 403(b) plan assets are at all times. The only way that that can happen is for you to know who your vendors are, both for ongoing contributions and for contract exchanges.

The IRS does not expect that you monitor the investment products for risk and return objectives or to develop an investment policy. If your 403(b) plan is not subject to ERISA, any such requirement would be determined under state/local law.

- Operating your 403(b) plan by the terms of your written plan document

Expect to see the IRS auditing 403(b) plans in the next few years to be sure that you are operating in accordance with the final 403(b) regulations. So, you will want to be sure that the administrative procedures that you are putting in place match both what are required under the IRS rules and under your written plan document.

Why? On audit, the IRS will be looking for operational defects that don't synch up to your plan document. To keep audit issues at bay, you will want to make sure that what your plan document says and what you and your plan administrative service providers are doing are consistent and compliant with the IRS rules.

We know that getting your 403(b) plan ready for the final IRS regulations can be a daunting task and want to reassure you that ING is here to help. Whether explaining what this means to you and your employees or helping you implement your 403(b) solution, ING is ready to help you take the stress out of the 403(b) regulations.

The above discussion highlights issues under the final IRS 403(b) regulations. It is not intended to provide specific legal, tax or other professional advice. The services of an appropriate professional should be sought regarding your individual situation.

IRS Circular 230 Disclosure: Any tax advice contained in this document (including any attachments) was not intended by the author of this document to be used, and cannot be used by the audience or any other person, for the purpose of avoiding any Internal Revenue Code penalties that may be imposed on such person. Any tax advice contained in this document was not intended by the author of this document to be used or referred to, and cannot be used or referred to, in promoting, marketing, or recommending the transaction(s) or matter(s) addressed herein.

[www.ing.com/us](http://www.ing.com/us) [www.ingretirementplans.com](http://www.ingretirementplans.com)

Insurance products, annuities, and retirement plan funding options issued by (third party administrative services may also be provided by) ING Life Insurance and Annuity Company, One Orange Way, Windsor, CT 06095-4774. Annuities issued by ReliaStar Life Insurance Company, 20Washington Avenue South, Minneapolis, MN 55401. Securities offered through ING Financial Advisers, LLC (member SIPC), and other broker-dealers with which it has selling agreements. These companies are members of ING.

Insurance obligations are the responsibility of each individual company. Products and services may not be available in all states.

© 2008 ING North America Insurance Corporation



[WWW.ING.COM/US](http://WWW.ING.COM/US)