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Important News for 403(b) Plan Sponsors

As we enter the final half of 2009, a critical year for 403(b) plan compliance matters, we wanted to call to your attention the following:

Form 5500 Reporting and Plan Audit Requirements – Important Development

On July 20, 2009, the U.S. Department of Labor issued Field Assistance Bulletin No. 2009-02, providing transitional relief for the new Form 5500 reporting and plan audit requirements.

By way of background, a 403(b) plan that is subject to ERISA has always been required to file a Form 5500, but the required content has been very limited. Beginning with the 2009 plan year, 403(b) plans will become subject to much more extensive Form 5500 reporting requirements, including notably, an annual plan audit requirement for plans with 100 or more participants.

These requirements have caused concern among the plan sponsor community, given the difficulties inherent in gathering (and if necessary, auditing) financial information for the multitude of individual annuity contracts and/or custodial accounts that serve as funding vehicles for many 403(b) plans. Further compounding the concern was the question about how to handle individual contracts or accounts for former employees, given that a plan sponsor would often be unaware of the existence of such contracts or accounts.

FAB 2009-02 addresses these concerns as follows:

- A pre-2009 annuity contract or custodial account can be disregarded (i.e., not treated as a plan asset) for purposes of Form 5500 reporting if all of the following conditions are met:
 - The contract or account was issued to a current or former employee before January 1, 2009.
 - The employer ceased to have any obligation to contribute to the contract or account (including to make salary reduction contributions), and in fact ceased making contributions to the contract or account, before January 1, 2009.
 - All rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual contract or account owner, without any employer involvement.
 - The contract or account owner is fully vested.
- Current or former employees who *only* have contracts or accounts that meet these requirements can be excluded from the participant count for purposes of determining whether a plan audit is required.
- A Form 5500 will not be rejected on the basis of a "qualified", "adverse" or "disclaimed" opinion if the accountant expressly states that the sole reason for such an opinion is that pre-2009 contracts and accounts were not covered by the audit or included in the plan's financial statements.
- The Department of Labor acknowledges that plan sponsors may encounter transitional compliance issues unrelated to pre-2009 contracts, and that there may be instances where full annual reporting compliance is not possible for the 2009 plan year. While there is no specific relief provided, it is encouraging that the Department of Labor recognizes the difficulties inherent in this transition.

Plans With Funding Vehicles Issued By Multiple Vendors

Separately, if a 403(b) plan permits participants to invest through multiple investment vendors, it is important to be aware of the compliance challenges that are presented.

- Historically, many plan sponsors have left the matter of tax law compliance to the investment vendors. IRS regulations now require the plan sponsor to be responsible for such compliance. Numerous requirements become difficult to meet with multiple investment vendors (such as properly applying the IRS annual contribution limits, loan limits based on combined account balances and outstanding loan balances, and hardship distribution requirements).
- Form 5500 reporting and plan audits will be more difficult with multiple vendors, because plan information will have to be gathered from multiple sources and combined.

In response to these challenges, some plan sponsors with multiple vendors have decided to consolidate with a single vendor, and others have hired outside third-party administrators. We would be happy to assist you with evaluating and resolving the compliance issues with your multiple vendor arrangement.

Plan Amendment Deadline – December 31, 2009

Finally, it is important to remember that all 403(b) plan documents must be updated by December 31, 2009 to reflect IRS regulations. (Operational compliance with such regulations has been required since January 1, 2009.)

- o Many plan sponsors historically have maintained separate plans for employee salary reduction contributions and employer contributions. Given the escalating compliance expenses (plan document updates, Forms 5500 and plan audits, etc.), it may make sense to combine the plans into a single amended and restated plan document. The year-end plan amendment deadline presents a natural opportunity to consolidate plans in this manner.

We are happy to discuss any of these issues with you, as well as any other questions or concerns that you may have with your 403(b) or other employee benefit programs.

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