



Pension Analyst

# Compliance Bulletin

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## Department of Labor provides reporting relief for 403(b) plans

### Background

In November 2007, the Department of Labor (DOL), IRS, and Pension Benefit Guaranty Corporation (PBGC) published [final annual reporting rules](#) that removed the limited filing exemption for 403(b) plans effective for plan years beginning on or after January 1, 2009. Under the new reporting rules, 403(b) plans covered by ERISA are subject to standard Form 5500 filing requirements. Large 403(b) plans (generally plans with 100 or more participants) must have their plans audited by an independent qualified public accountant. Small 403(b) plans (generally, fewer than 100 participants) are commonly eligible for a waiver of the audit requirement. However, these small plans will still be required to report more detailed financial information regarding the plan than they had to provide in the past. Governmental and church plans and certain other 403(b) plans not subject to Title I of ERISA have generally been exempt from the Form 5500 reporting requirement. That exemption continues to apply.

Some 403(b) plan administrators have expressed concerns regarding the difficulty and cost involved in identifying and obtaining financial information on contracts and custodial accounts to which contributions have not been made since 2008 (pre-2009 contracts). On July 20, 2009, the DOL responded to these concerns by providing relief in [Field Assistance Bulletin \(FAB\) 2009-02](#).

### Relief Guidelines

FAB 2009-02 acknowledges that administrators of ERISA 403(b) plans face challenges in complying with the new Form 5500 filing requirements. To address these concerns, the DOL has provided relief for sponsors of 403(b) plans that make good faith efforts to follow the Form 5500 filing requirements.

Under FAB 2009-02, an ERISA 403(b) plan sponsor does not need to treat annuity contracts and custodial accounts as part of the employer's plan for purposes of the Form 5500 filing requirements as long as 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 make contributions (including employee salary reduction contributions), and in fact stopped making contributions to the contract or account before January 1, 2009;
- All the rights 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; and
- The individual owner of the contract is fully vested in the contract or account.

Employees and former employees with contracts and accounts that are excludable under the above conditions do not need to be counted as "participants" under DOL rules for determining whether a plan is considered a large or small plan.

Many accountants who audit benefit plans may issue "qualified," "adverse," or disclaimed opinions for large 403(b) plans subject to the audit requirements due to the plan administrator's inability to identify all participant contracts and accounts. The DOL historically rejected Form 5500 filings with these disclaimer opinions. However, the FAB indicates that the DOL will not automatically reject the Form 5500 for that purpose if the accountant expressly states that the reason for the opinion was solely because the pre-2009 contracts were not covered by the audit or included in the plan's financial statements.

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The DOL also acknowledged that ERISA 403(b) plans may encounter other issues that are unrelated to pre-2009 contracts when attempting to comply with the Form 5500 rules for the 2009 plan year. When full annual reporting compliance by ERISA 403(b) plans is not possible, the DOL has stated that the guiding principle must be to ensure that appropriate efforts are made to act reasonably, prudently, and in the interest of plan participants and beneficiaries. However, the DOL does not identify the types of full reporting failures that may be excluded or the standard that would allow plan sponsors to use this good faith standard.

### Next steps

While the first expanded Form 5500 filings generally will not be due for the 2009 plan year until 2010, sponsors of ERISA 403(b) plans should determine whether they have a large or small plan and identify a Form 5500 service provider. In addition, sponsors of large ERISA 403(b) plans are encouraged to take action very soon to obtain the services of an independent qualified accountant, as it is expected these services will fill quickly. For more information on selecting an independent qualified accountant, please see the DOL publication titled, "[Selecting An Auditor For Your Employee Benefit Plan.](#)"



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