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COMPLIANCE ADVISORY

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DOL issues guidance on non-ERISA 403(b) plans

The Department of Labor (DOL) recently issued Advisory Opinion 2012-02A to provide guidance regarding the status of a non-ERISA 403(b) plan where the employer also maintains a separate qualified plan into which matching contributions are made based on the employee's salary deferrals to the 403(b) plan.

Background

An accountant who represented several clients sponsoring non-ERISA 403(b) plans asked the DOL to provide an opinion as to whether the non-ERISA status of a 403(b) plan would be adversely affected if the employer also maintains a separate qualified money purchase plan into which the employer makes matching contributions based on employee salary deferrals to the 403(b) plan. None of the 403(b) plans are governmental or church plans.

Safe Harbor Exemption

To be exempt from ERISA Title I reporting and disclosure requirements, a 403(b) plan sponsored by a private tax-exempt employer must meet the following requirements:

- Employee participation must be completely voluntary.
- All rights under the annuity contracts or custodial accounts must be enforceable solely by the employees or their beneficiaries.
- Employer involvement must be limited to specified activities.
- The employer must not receive any direct or indirect consideration or compensation other than reasonable reimbursement to cover the expenses incurred in performing required duties.

Employer activities that are acceptable under this ERISA safe harbor exemption include:

- Permitting annuity providers to publicize their products;
- Requesting information concerning proposed funding media, products, or annuity providers, and compiling that information to assist employees in their reviews and analysis;
- Entering into salary reduction agreements, collecting contributions, remitting contributions to annuity providers, and maintaining records of these transactions;
- Holding one or more group annuity contracts in the employer's name to cover its employees, and exercising its rights as the employees' representative with respect to contract amendments; and
- Limiting funding media or products available to employees to a number and selection that provide employees with a reasonable choice.

Conclusion

The DOL concluded that a 403(b) plan's status as a non-ERISA plan is not adversely affected merely because the employer also maintains a separate qualified plan. The safe harbor exemption does not prohibit an employer from taking employee participation in the 403(b) plan (including salary reduction contributions) into account in guaranteeing that employee contributions to the other plan satisfy tax qualification requirements.

However, the DOL did conclude that conditioning employer contributions to the separate pension plan on the employee making salary reduction contributions to the 403(b) plan would violate both the safe harbor requirement regarding limited employer involvement and the requirement that employee participation be completely voluntary. As a result, the 403(b) plan would no longer satisfy the safe harbor ERISA exemption and would be subject to Title I disclosure and reporting requirements.

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