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Pension ANALYST

Compliance Bulletin

August 2007

DOL Guidance Preserves Non-ERISA 403(b) Programs

Recently-published IRS regulations require 403(b) arrangements to have written plans in place by January 1, 2009. This requirement has caused concern among employers (other than governmental and certain church employers) that have traditionally made non-ERISA 403(b) programs available to their employees. Historically, these employers have not adopted or maintained formal plan documents, in order to qualify under the Department of Labor (DOL) safe harbor exemption from ERISA reporting and disclosure rules.

DOL Field Assistance Bulletin (FAB) 2007-02 addresses these and related concerns and concludes that it will still be possible to offer non-ERISA 403(b) programs under the new IRS rules.

Safe Harbor Exemption

To be exempt from ERISA Title I requirements, a 403(b) arrangement 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 contractors to publicize their products;
- Requesting information concerning proposed funding media, products, or annuity contractors, 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.

Impact of the New Regulations

The DOL acknowledges that the new IRS regulations require a certain level of employer involvement in the operation of 403(b) arrangements. For example, if individual contracts or accounts do not satisfy tax qualification requirements, the employer can be liable for potentially substantial penalty taxes, correction fees and employment taxes on salary deferrals, even if the error was not caused by the employer. However, the

DOL believes that these oversight responsibilities will not disqualify a 403(b) arrangement from eligibility for safe harbor treatment.

According to FAB 2007-02, under a safe harbor non-ERISA 403(b) program, an employer may:

- Conduct administrative reviews of the program structure and operation for tax compliance defects;
- Perform nondiscrimination testing and monitor compliance with maximum contribution limits;
- Fashion and propose corrections under the Employee Plans Compliance Resolution System (EPCRS);
- Develop improvements to administrative processes to prohibit the recurrence of disqualifying defects;
- Work with service providers to make needed corrections; and
- Keep records of compliance and correction activities.

In addition, a safe harbor non-ERISA 403(b) program may require employers to:

- Certify employee census data (e.g., addresses, attendance records, compensation levels) to annuity providers; or
- Transmit another party's certification (such as a doctor's certification of an employee's physical condition) to annuity providers.

However, an employer *may not* make discretionary administrative determinations such as:

- Authorizing plan-to-plan transfers;
- Processing distributions;
- Satisfying qualified joint and survivor annuity rules;
- Making hardship withdrawal determinations;
- Qualifying domestic relations orders; or
- Determining eligibility for or the enforcement of plan loan provisions.

Written Plan Requirement

The DOL also believes that an employer can comply with the written plan requirement of the new IRS regulations and not jeopardize a 403(b) arrangement's non-ERISA status. In this situation, the written plan would consist of:

- The separate contracts and related documents supplied by the annuity providers, account trustees and custodians; and
- A separate document that coordinates administration among the different issuers and addresses applicable tax matters, such as the universal availability requirement.

The DOL expects that these documents will:

- Identify the parties that are responsible for various administrative functions;
- Correctly describe the employer's limited role; and
- Allocate discretionary activities to the annuity providers or other selected third parties.

In addition, the employer may periodically review these documents to ensure there are no conflicting provisions and that they comply with the applicable tax laws and regulations.

Finally, the DOL does not believe that an employer's decision to terminate a non-ERISA 403(b) program would cause it to become an ERISA 403(b) plan.

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