Management Alert

DOL Issues Form 5500 and Audit Relief for 403(b) Plans

2009 is a big year for tax-exempt employers that maintain plans subject to Internal Revenue Code Section 403(b). Final Treasury regulations go into effect that essentially treat 403(b) plans the same as other qualified retirement plans. As such, 403(b) plans are now generally subject to the existing qualified plan testing and written plan documentation requirements. In addition, the Department of Labor (DOL) has modified the reporting rules under the Employee Retirement Income Security Act (ERISA) so that 403(b) plans are now required to file full annual Forms 5500, and in some cases, include a report of an independent qualified public account (an "audit report") certifying the Form 5500 financial statements. As described more fully below, on July 20th the DOL issued transition relief that will make the Form 5500 filing and audit report less burdensome for 403(b) plans for 2009.

The Problem for 2009

Prior to 2009, 403(b) plans had very limited Form 5500 filing obligations under ERISA.[1] Financial statements and audit reports were not required. However, starting with the 2009 plan year, large ERISA-covered 403(b) plans (generally those with 100 or more participants) are now required to file the annual Form 5500 along with audited financial statements. Small ERISA-covered 403(b) plans (generally less than 100 participants) have abbreviated financial disclosure requirements, and are exempt from the requirement to obtain an audit report.

Historically, tax-exempt employers engaged several 403(b) vendors, often with each vendor maintaining a collection of individual annuity contracts under the 403(b) plan. To make matters worse, the annuity contract vendors did everything including running the contracts without plan sponsor involvement.

Before 2009, there was only an abbreviated Form 5500 filing requirement (that included no financial statement or audit report requirements). Because of this, many tax-exempt employers never tracked, on a plan aggregated basis, the amount of plan assets held by the 403(b) plan. However, now that a complete Form 5500 which reflects all assets held by the plan is needed, tax-exempt employers are now forced to understand which annuity contract or custodial account vendors are holding 403(b) plan monies, how much, and for whom. This identification is quickly becoming a costly and monumental, if not impossible, task for many organizations.

Whether audited financial statements are required or not for an organization, the Form 5500 financial statement requires the plan sponsor to report annual opening and closing balances. Unless an organization knows where all its 403(b) plan assets are (including those from acquisitions or mergers), an organization maybe unable to verify the accuracy of the opening and

[1] In fact, if no employer contributions were made to the 403(b) plan, then ERISA might not even apply to the 403(b) plan (unless the plan sponsor elected to have it apply).

closing balances that are required to be reported. Further, if an audited report is required, it is likely that the independent auditor will be forced to issue a conditional (qualified, adverse or disclaimed) opinion since there simply is no way for the auditor to verify the accuracy of those financial balances.

Relief Guidelines to Form 5500 Annual Reporting Requirements

In response to concerns raised by the American Institute of Certified Public Accountants (AICPA), on July 20th the DOL issued Field Assistance Bulletin No. 2009-02 (FAB 2009-02) to provide some relief with respect to this issue. This relief is limited to the 2009 Form 5500 annual reporting requirements, including the requirement for large plans to include an audit report with the 2009 Form 5500.

Specifically, a 403(b) plan now does not need to treat annuity contracts and custodial accounts as part of the plan assets of a 403(b) plan if all of the following are met:

- the annuity contract or custodial 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 ceased making contributions to the annuity contract or custodial account, before January 1, 2009;
- all of the rights and benefits under the annuity contract or custodial 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 annuity contract or custodial account.

What this means is that if an organization had a 403(b) contract provider that stopped receiving contributions from the plan sponsor before January 1, 2009, so long as the participant is 100% vested and his/her rights and benefits are all against the 403(b) contract provider and not the plan sponsor, then the organization may ignore that provider and the assets held by that provider for purposes of the Form 5500 reporting and audit requirements.

Additionally, current or former employees with only contracts or accounts that are excludable from the 403(b) plan's Form 5500 or Form 5500-SF under the above transition relief do not need to be counted as participants covered under the plan for Form 5500 annual reporting purposes. The practical implication of this is that a "large" 403(b) plan may be permitted to file as a "small" plan and take advantage of the less burdensome financial reporting requirements applicable to small plans. Further, the DOL also stated that it will not reject a Form 5500 on the basis of a "qualified," "adverse," or disclaimed opinion if the accountant expressly states that the sole reason for such an opinion was because such pre-2009 contracts were not covered by the audit or included in the plan's financial statements. Notwithstanding this exception, accountants engaged pursuant to ERISA to perform audits of 403(b) plans must perform audit procedures and report in accordance with generally accepted auditing standards.

Lastly, the DOL has acknowledged that there may be instances when full annual reporting compliance by 403(b) plans may not be possible for the 2009 plan year. Consequently, the DOL has provided that the guiding principle must be to ensure that appropriate efforts are made to act reasonably, prudently, and in the interest of the plan's participants and beneficiaries.

What to do Next

Given the difficulties that many tax-exempt employers could face in gathering data and complying with the new Form 5500 filing obligations, we generally recommend that such employers now meet with their auditors to establish precisely which contracts will be subject to financial statement disclosure and the audit report, and what information the auditor will need in this regard. Although 2009 closing balances cannot be determined until after 2009, it may be appropriate to establish 2009 opening balances at this time, so as to make the process of developing the financial statement and obtaining the audit report next year more manageable.

For more information about FAB 2009-02 and its application, please contact the Seyfarth attorney with whom you work, or any Employee Benefits attorney on our website.

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