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DOL Provides Form 5500 Transition Relief for 403(b) Programs

In [Field Assistance Bulletin 2009-02](#) (July 20, 2009), the U.S. Department of Labor (DOL) provided helpful guidance for sponsors of § 403(b) programs subject to ERISA in complying with new Form 5500 annual reporting requirements.

By way of background, § 403(b) programs sponsored by § 501(c)(3) organizations may be subject to Title I of ERISA and in particular its annual reporting requirement on Form 5500. (Section 403(b) programs of public schools and many churches are exempted from ERISA and thus do not have this issue.)

- Section 403(b) programs subject to ERISA had for many years been eligible for special limited reporting.
- Pursuant to changes adopted by DOL in 2007 and effective for the 2009 plan year, however, such plans with 100 or more participants generally are required to file Form 5500 with audited financial statements; smaller plans also have to file an annual report but may qualify for a simplified reporting form and/or waiver of the audit requirement. These are the same reporting rules to which § 401(k) plans, for example, are generally subject.

Many § 403(b) plan sponsors anticipate substantial difficulties in complying with a Form 5500 requirement in any of its iterations, primarily because of the flexibility historically afforded participants in managing and transferring their § 403(b) balances without employer involvement or notification. (Effective January 1, 2009, tax regulations adopted by the Treasury Department in 2007 substantially curtail that flexibility. Click here for discussions of the [tax regulations](#), related [2007](#) and [2009](#) tax transition guidance, a [proposed § 403\(b\) prototype program](#), and [conforming changes to prior tax rulings](#).) Those compliance difficulties could result in incomplete Forms 5500 and/or qualified or disclaimed audit reports, either of which might be expected to result in rejection of the filing by DOL and potentially the assessment of reporting penalties.

In response to those concerns, Field Assistance Bulletin 2009-02 provides that § 403(b) annuity contracts or custodial accounts issued to current or former employees prior to 2009 need not be treated as part or assets of the employer's § 403(b) program, solely for purposes of the annual reporting requirement, provided that:

- The employer ceased to have an obligation to make salary reduction or any other contributions to the contract or account, and did in fact cease making contributions, prior to 2009;
- All of the rights and benefits under the contract (which may be a certificate under a group annuity contract) or account are legally enforceable against the insurer or custodian by the individual owner without any involvement by the employer; and
- The individual owner is fully vested in the contract or account.

In addition, (1) current or former employees with only such excluded pre-2009 contracts or accounts may be disregarded in the program's participant headcount for Form 5500 purposes, including for purposes of determining whether audited financial statements are required; and (2) DOL will accept audit reports that

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are qualified, adverse or disclaimed solely and expressly because such excluded pre-2009 contracts are not covered by the audit or included in the program's financial statements.

DOL further recognized that full compliance with Form 5500 reporting requirements for the 2009 plan year may not be possible for other reasons, unrelated to pre-2009 contracts or accounts, and articulated a "guiding principle" that "appropriate efforts are made to act reasonably, prudently, and in the interest of the plan's participants and beneficiaries." In this respect, DOL noted that a facts and circumstances analysis may be indicated to evaluate whether the plan administrator should undertake (or cause some other person to undertake at that person's expense) the reconstruction of lost or destroyed records. DOL also asked auditors to notify the plan administrator of any questions, issues or irregularities discovered in the audit engagement that could materially affect the audit or other costs to the plan in the transition to the Form 5500 annual reporting and audit requirements, for the plan administrator's use in making decisions about the use of plan assets to defray annual reporting costs in a manner consistent with ERISA.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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