

IRS GUIDANCE FOR 403(b) PLANS

PAST, PRESENT AND FUTURE



FINAL 403(b) REGULATIONS

EFFECTIVE DATES

- Issued July 26, 2007
- The effective date under the final regulations was generally *January 1, 2009*



FINAL 403(b) REGULATIONS WRITTEN PLAN REQUIREMENT

- No exemptions for governmental, most church, or non-ERISA salary reduction plans
- Had to be in place on 1/1/09 under final regulations
 - Has been delayed until 12/31/09 (discussed later)



DOL BULLETIN 2007-2

GUIDANCE FOR NON-ERISA PLANS

- DOL Regulation 2510.3-2(f) safe harbor for salary reduction-only plans
- DOL Field Assistance Bulletin 2007-2
 - A written plan will not necessarily cause a 403(b) plan to become subject to ERISA
 - Essential that employer not make discretionary determinations (like hardship determination)
 - Reasonable choice of funding options



FINAL 403(b) REGULATIONS

TRANSFERS TO UNAPPROVED VENDORS

- Revenue Ruling 90-24 permitted participant to do a direct transfer between 403(b) contracts even if the contract was not approved under the plan (“90-24 transfers”).
- After 9/24/07, transfers to contracts issued by unapproved vendors prohibited unless the vendor agrees to share information necessary for compliance with the employer
 - Information Sharing Agreement (“ISA”) needed.
 - Loans, hardships, termination of employment
 - Can’t rely on employee representation
- Transfers to unapproved vendors after September 24, 2007 must have an ISA in place by January 1, 2009.



FINAL 403(b) REGULATIONS

INFORMATION SHARING WITH APPROVED VENDORS

- Employer and approved vendors must also share information related to tax compliance requirements to ensure plan's operational compliance
 - No separate ISA required
- Vendors (approved or unapproved with ISA) cannot rely on employee representation
 - loans, hardships, termination of employment



REV PROC 2007-71

TRANSITIONAL RULES FOR INFORMATION SHARING

- “Grandfathered” Contracts –
 - No information sharing required
 - Vendors deselected prior to 2005
 - 90-24 transfer to unapproved vendor prior to 9/25/07
- “Orphan” Contracts
 - “reasonable good faith effort” to share information required
 - vendors deselected after 2004 and prior to 2009
 - 90-24 transfers to unapproved vendor between 9/25/07 and 1/1/09



REV PROC 2007-71

TRANSITIONAL RULES FOR INTERIM CONTRACTS

- Transfers to unapproved vendors after 9/24/07
 - If no ISA on 1/1/09, re-exchange into contract of approved vendor or contract of unapproved vendor with ISA
 - Up until 6/30/09 to re-exchange
 - No information sharing required for interim contract
 - Alternatively, reasonable good faith standard available



REV PROC 2007-71

MODEL PLAN

- Basic salary reduction plan
- Governmental employers (not ERISA)
- Not designed for employer contributions
- No reliance unless adopted word-for-word



NOTICE 2009-03

Under final regulations, plans had to be in writing by 1/1/09

NOT SO FAST!

On December 11, 2008, the IRS issued Notice 2009-03

- Delayed written plan requirement to December 31, 2009,
- During 2009, the employer must operate the plan in accordance with a reasonable interpretation of 403(b) and the related regulations.
- By the end of 2009, the employer makes its best effort to retroactively correct any operational failure during the 2009 calendar year to conform to the written plan.



NOTICE 2009-03

- Announced upcoming guidance for 403(b)
 - Prototype Program
 - Determination Letter Program
 - Update of IRS Correction Program (EPCRS)



ANNOUNCEMENT 2009-34

PROPOSED PROTOTYPE PROGRAM

- Pre-approved Prototype Program for 403(b)
 - Issued April 14, 2009
 - Proposed Sample plan language
- For salary reduction plans (Roth and non-Roth), non-elective and matching retirement plans, and after tax employee contributions
- TIAA comments submitted June 1
 - Program expected to finalized in Fall 2009
 - Program expected to open in Spring 2010



2009 COMPLIANCE

- Plans must be operated in compliance with a “reasonable interpretation” of the IRC and regulatory requirements
- Clear that certain rules in the final regulations that have to be followed today:
 - Notice 89-23 special nondiscrimination rules repealed
 - No transfers to unapproved funding vehicles unless ISA
 - Re-exchange of interim contract into approved vendor?
 - Information Sharing -- approved and unapproved vendors
- Written plan needed by 12/31/09

Notice 2009-3 is not a “free pass”



WRITTEN PLAN REQUIREMENT

TYPES OF 403(b) PLANS

- **Prototype Plans**
 - IRS Approval
 - Sponsored/updated by vendors
- **Model Plans**
 - IRS approval if adopted word for word
 - Rev Proc 2007-71 model still available
- **Individually Designed Plans (Specimen Plans)**
 - No IRS Approval
 - More flexible than a prototype or model plan
 - Ascensus Documents



COMPLIANCE ASSISTANCE FROM VENDORS

PLAN DOCUMENTS

- Specimen Plan Documents (through Ascensus)
 - Must be reviewed by your legal counsel
 - SPDs available for ERISA plan
- Develop and sponsor a Prototype Plan once IRS program finalized
- Reviewing existing specimen plans
 - make any necessary changes for IRS guidance when final



INFORMATION SHARING REQUIREMENT

HOW IS IT ACCOMPLISHED?

- Plan Sponsor coordinates information sharing
- Many major vendors have compliance services
 - designed to help plan satisfy loan and hardship requirements of the final 403(b) regulations
 - TIAA-CREF's Compliance Coordinator
- Plan Sponsor hires a third-party administrator
 - Vendors will agree to share participant information with TPA's
 - Technical data sharing standards
 - Protection of confidential participant information



COMPLIANCE ASSISTANCE FROM VENDORS

INFORMATION SHARING

- Example: TIAA-CREF's Compliance Coordinator
 - Web-based tool
 - Vendors submit participant data to data aggregation company
 - Vendor checks database for participant information when a participant requests a loan or hardship withdrawal
 - Vendor confirms or rejects participant request based on consolidated vendor data
 - As part of plan due diligence, plan sponsor checks reports to review loan and hardship distribution activity



THE FUTURE FOR 403(b) PLANS??

- Prototype Program Finalized
 - Prototype plans available in 2010?
- IRS Correction Program (EPCRS)
 - Update for common 403(b) plan violations
 - Best efforts to correct for 2009 required
- Determination letter program for individually designed 403(b) plans



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