



Pension Analyst

# Compliance Bulletin

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## DOL provides additional Form 5500 guidance for ERISA 403(b) plans

In November 2007, the Department of Labor (DOL), IRS and Pension Benefit Guaranty Corporation (PBGC) published final annual reporting rules. Under the new reporting rules, 403(b) plans covered by ERISA are subject to standard Form 5500 filing requirements for plan years beginning on and after [January 1, 2009](#).

Some 403(b) plan administrators expressed concerns regarding the difficulty and cost involved in identifying and obtaining financial information on contracts and custodial accounts to which contributions have not been made since 2008 (pre-2009 contracts). The DOL responded to these concerns by providing transitional relief in [Field Assistance Bulletin \(FAB\) 2009-02](#). FAB 2009-02 provided that an ERISA 403(b) plan sponsor does not need to treat annuity contracts and custodial accounts as part of the employer's plan for purposes of the Form 5500 annual reporting and related auditing requirements as long as all of the following conditions are met:

- The contract or account was issued to a current or former employee before January 1, 2009;
- The employer ceased to have any obligation to make contributions (including salary reduction contributions), and in fact stopped making contributions to the contract or account before January 1, 2009;
- All the rights under the contract or 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 contract or account.

The DOL received numerous questions on the scope of and conditions for this relief. As a result, the DOL recently issued [FAB 2010-01](#), which responds to many of those questions. This new guidance appears to be effective immediately.

### FAB 2010-01

#### Applicability

FAB 2010-01 confirms that the reporting relief provided in FAB 2009-02 applies to all 403(b) plans, regardless of size. An employee whose only assets in the plan are contracts or accounts that meet the conditions of the FAB, and who is not eligible to make salary reduction contributions under the 403(b) plan, need not be counted to determine whether or not the plan is a large plan. In addition, this guidance provides that this relief extends beyond the 2009 reporting year. As a result, the DOL will not reject Forms 5500 filed for years after 2009 simply because they exclude annuity contracts and custodial accounts that are eligible for reporting relief.

#### Scope of annual reporting relief

In its new guidance, the DOL concludes that the annual reporting relief is available even if the employer provides factual information, such as the contract owner's employment status to the 403(b) provider.

However, the relief is not available if the employer:

- Consents to, or makes discretionary decisions regarding enforcement of the employee rights under the contract;
- Certifies in advance that an employee is eligible for a distribution permitted under the Internal Revenue Code;
- Approves a hardship distribution or a loan from the contract or account before the loan or distribution is made;
- Transmits loan repayments to the 403(b) contract provider; or
- Exchanges a pre-2009 contract for a new contract after January 1, 2009, even if for tax compliance purposes.

If employees make loan repayments in 2009 *directly* to a contract or custodial account provider, the reporting relief would still be available for those contracts or accounts, as long as they satisfy the other conditions for relief.

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With respect to reporting requirements, the plan administrator:

- Is not required to include in the plan's Form 5500 a contract or account that meets the reporting relief requirements even if the plan administrator can identify that contract or account;
- Can include in the Form 5500 some pre-2009 contracts or accounts even if they meet the relief requirements;
- Can exclude from the Schedule of Assets (Schedule H) and various other schedules a pre-2009 contract that meets the relief conditions;
- Can exclude contracts and accounts that are excludable in the 2009 plan year financial statements from comparative financial statements; and
- Is not required to treat as plan assets contracts and accounts that are excludable under this relief.

### Audit requirement

Large 403(b) plans (plans with 100 or more participants) must be audited by an independent qualified public accountant. The DOL recognizes that accountants auditing plans play an important role in bringing questions, issues, and irregularities discovered during the course of their audit to the attention of the plan administrator. If the accountant, as part of the audit, discovers that contracts were incorrectly excluded from the plan's financial statements, the DOL expects the accountant to alert the plan administrator. Plan administrators have an obligation to take reasonable steps to resolve the matter. If the plan administrator and accountant do not agree as to how to resolve issues relating to excluded contracts, the DOL expects these issues to be noted in the audit report.

### Good faith compliance

If a plan administrator determines that it will not be able to comply with the annual reporting requirements for contracts that do not meet the conditions of FAB 2009-02, the DOL requires a "good faith" effort to comply. A "good faith" effort will depend on the relevant facts and circumstances. Plan administrators have the burden of demonstrating good faith and should document their efforts to properly account for and report on contracts and custodial accounts in the Form 5500.

A good faith effort requires a plan administrator to:

- Retain the necessary records to verify or support information included in the Form 5500 for six years from the date the annual report was filed; and
- Maintain for as long as necessary records that are sufficient to determine the benefits due or which may become due under the plan.

### Final 2008 contributions

This reporting relief requires that the employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact stopped making contributions to the contract or account before January 1, 2009. In response to employer concerns, the DOL has now clarified that final contributions to the contract or account attributable to 2008 that were not in fact deposited in the contract or account until 2009 will not be treated by the DOL as continuing contributions after January 1, 2009.

### DOL compliance assistance

The DOL's Employee Benefits Security Administration (EBSA) has recently announced new outreach and compliance assistance efforts for ERISA 403(b) plans subject to ERISA. As part of this effort, EBSA is sending letters to administrators of the approximately 16,000 ERISA 403(b) plans to remind them that their 2009 Form 5500 annual reporting requirements have changed and to direct them to various EBSA resources for help in understanding and complying with the new requirements. The letter also directs administrators to a toll-free Form 5500 help desk that is available from 8:00 a.m. to 8:00 p.m. (ET) at 866.463.3278.

The DOL has also published a brochure entitled [Getting Ready for Changes in Filing Your Plan's Annual Return/Report Form 5500](#). This brochure and related materials are available on a newly created EBSA Web site at [www.dol.gov/ebsa/403b.html](http://www.dol.gov/ebsa/403b.html) that focuses on Code 403(b) plan issues.



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