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**U.S. Department of Labor Provides Further Guidance
Regarding Transition Relief
May 2010**

Background

- The U.S. Department of Labor (DOL) has published Form 5500 revisions and related final regulations that eliminate special limited reporting for Section 403(b) plans, effective for plan years beginning on or after Jan. 1, 2009. Under the new annual reporting rules, beginning with their Form 5500 filing for the 2009 plan year, "large" ERISA-covered 403(b) plans (generally plans with 100 or more participants) are required to file audited financial statements with their Form 5500.
- Some plan administrators have expressed concern that the historical treatment of 403(b) plans as a collection of individual contracts with respect to which employees could engage in a range of actions without the consent or involvement of an employer or plan administrator could make it costly, and in some cases impossible, to identify and obtain financial information about certain pre-2009 contracts and custodial accounts to which the employer is no longer making employer contributions or forwarding employee salary-reduction contributions to a 403(b) provider.
- In the absence of transition relief, some 403(b) plans might have filed a Form 5500 or

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Form 5500-SF that was subject to rejection because the filing would be incomplete due to the administrator's inability to identify all participant contracts and accounts to be included as plan assets and obtain other financial information required to be included in the plan's financial statements.

Transition relief

- Given the circumstances described above, the DOL issued Field Assistance Bulletin No. 2009-02 ("FAB 2009-02") on July 20, 2009. On Feb. 17, 2010, the DOL issued Field Assistance Bulletin No. 2010-01 ("FAB 2010-01") to supplement FAB 2009-02. FAB 2010-01 answers questions received by the DOL related to FAB 2009-02.
- The transition relief allows certain annuity contracts and custodial accounts issued before Jan. 1, 2009, not to be treated as part of the employer's Title I plan or as plan assets for purposes of ERISA's annual Form 5500 reporting requirements. The transition relief allows contracts and accounts to be excluded not only from plan assets in 2009, but also with respect to comparative financial statements included in the plan's 2009 annual report. The relief continues to apply to the contracts and accounts that meet the conditions of FAB 2009-02 beyond the 2009 reporting year.

Qualifying for the transition relief

The transition relief provides that the administrator of a 403(b) plan does not need to treat annuity contracts and custodial accounts as part of the employer's Title I plan or as plan assets for purposes of ERISA's annual reporting requirements, if certain conditions are met.

Employers and plan administrators may use the table below to determine whether a contract or account qualifies for the exclusion from plan assets. All of the conditions in the table must be met in order for the exclusion to apply.

Conditions	Condition met?	
	Yes	No
The contract or account was issued to a current or former employee before Jan. 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 contract or account before Jan. 1, 2009. The following situations do <i>not</i> cause a failure to meet the condition: <ul style="list-style-type: none"> • Employees continue to make loan repayments directly to the contract or custodial account providers. • Final contributions to the contract or account attributable to 2008 were not deposited in the contract or account until 2009. The following situation <i>does</i> cause a failure to meet the condition: <ul style="list-style-type: none"> • The employer, through salary reduction, forwards an employee's loan repayments to a 403(b) contract provider. 		
All of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the		

<p>contract or account without any involvement by the employer.</p> <p>The following situation does <i>not</i> cause a failure to meet the condition:</p> <ul style="list-style-type: none"> • The employer provides information to the 403(b) provider concerning an employee's or former employee's employment status in connection with the contract or account. <p>The following situations <i>do</i> cause a failure to meet the condition:</p> <ul style="list-style-type: none"> • The employer must consent to, or make other discretionary decisions regarding enforcement of, the employee rights under the contract (e.g., the employer must certify that an employee is eligible for a distribution, or the employer has to approve a hardship distribution or a loan). • The annuity contract or custodial account meets the conditions for transition relief, but is exchanged for another contract or account with a new provider after Jan. 1, 2009, and the employer's authorization or approval of the exchange is required (even if just for tax compliance purposes). Neither the old contract/account nor the new contract/account qualifies for the relief. 		
<p>The individual owner of the contract is fully vested in the contract or account.</p>		

A contract or account that meets the requirements above qualifies for the transition relief, even if the contract or account is known to the plan administrator and can be identified.

The plan administrator can decide to include some contracts or accounts that qualify for the transition relief in the plan's annual report, and at the same time, decide to exclude other contracts or accounts that qualify for the relief.

Transition relief – applicability to participant count

Current or former employees with only contracts or accounts that are excludable from the plan's Form 5500 or Form 5500-SF under the above transition relief, and who are not otherwise eligible to make salary reduction contributions under the 403(b) plan, do not need to be counted as participants covered under the plan for Form 5500 annual reporting purposes. This may impact whether a plan is a "large" plan (generally plans with 100 or more participants) or a "small" plan (generally plans with fewer than 100 participants).

Other important matters addressed in the transition guidance

- In 1979, the DOL issued a "safe harbor" regulation stating that a program for the purchase of annuity contracts or custodial accounts in accordance with Section 403(b), and funded solely through salary reduction agreements or agreements to forego an increase in salary, are not "established or maintained" by an employer under ERISA; therefore, they are not employer pension benefit plans that are subject to Title I of ERISA, provided that certain factors are present.
- FAB 2010-01 provides that a plan can maintain its safe harbor status under the following circumstances:
 - The plan offers optional features, such as participant loans, and the 403(b) *provider*

(rather than the employer) is responsible for any discretionary determinations.

- The arrangement generally offers a choice of more than one 403(b) contractor and more than one investment product.
 - However, an employer can limit the number of providers to one if employees are allowed to transfer or exchange their interest to a 403(b) account of another provider.
 - There may be circumstances where an employer can demonstrate that increased administrative burdens and costs to the employer in offering a number of contractors would be sufficient to cause the employer to stop making its payroll systems available to collect and remit payroll deduction contributions to any 403(b) contractor. In such cases, limiting available contractors to one offering a wide variety of investment products could be seen as affording employees a reasonable choice in light of all relevant circumstances (e.g., a single insurance company's 403(b)-compliant arrangement with access to a broad range of affiliated investment products or a single 403(b)-compliant "open architecture" custodial account platform giving employees access to a broad range of unaffiliated mutual fund investment products).
 - Limitations on, or costs or assessments associated with, an employee's ability to transfer or exchange contributions to another provider's contract or account must be fully disclosed in advance of the employee's decision to participate in the program.
- FAB 2010-01 provides that a plan does *not* maintain its safe harbor status under the following circumstances:
 - The employer hires a third-party administrator to make discretionary decisions.
 - The plan authorizes the employer to change 403(b) providers and unilaterally move employee funds from one provider to contracts or accounts of another provider.

Additional resources

The list below provides links to additional information regarding 403(b) plans:

- [Department of Labor Employee Benefit Security Administration 403\(b\) website](#)
- [Employee Benefit Plan Audit Quality Center 403\(b\) Plan Resource Center](#)
- [DOL FAB 2007-02](#)
- [DOL FAB 2009-02](#)
- [DOL FAB 2010-01](#)
- [IRS 403\(b\) Resources](#)

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