403(b) Update: DOL Provides Relief as Plans Transition to New Reporting Requirements

Recent amendments to Department of Labor (DOL) and IRS regulations have made ERISA-covered 403 (b) plans subject to the same reporting and audit requirements as 401(k)s.

That means plan administrators must file a more detailed Form 5500, which is due by July 31, 2010, for 2009 calendar-year plans. This filing can be extended to October 15th if desired. In addition, plans with 100 or more eligible participants must file an audited financial statement.

Challenges Ahead

As these new rules move the regulation of 403(b) plans onto a similar level as 401(k) plans, plan sponsors will undoubtedly face challenges.

Up until now, regulation of 403(b) plans has been somewhat informal. With only minimal reporting required, plan sponsors typically maintained little or no documentation. But the regulators now require plan sponsors to draft a formal plan document that outlines all of the vendor contracts (typically with mutual funds and insurance companies), as well as participants' rights and administrative responsibilities.

Desperately Seeking Information

Many plans have assets spread among a variety of vendors and across a variety of investments. As sponsors begin tracking down investment information required by the more in-depth Form 5500, they may find that they have numerous and outdated annuity contracts and custodial accounts that they have no control over or even knowledge of.

The problems start when the auditors arrive to certify the plan's financial statement (large plans must submit audited financial statements with their Form 5500 filing).

Auditors are understandably hesitant to issue a "clean" opinion on a plan's finances when all the required records are not available. In this case, the auditor may render a "qualified" audit opinion or may even have to "disclaim" an opinion on the financial statements. And, if the amounts of excludable contracts (defined below) are known to be material to the financial statements and are indeed excluded from the financials, the auditor may have to issue an "adverse" opinion on the financials.

Of course, many organizations view a clean, unqualified audit report as critical to demonstrating sound management and stewardship — particularly publicly funded non-profits. So while there may be some cost savings opportunities (as described below) in recordkeeping and fulfilling the reporting requirements for these plans, ultimately the non-profit's governing body needs to be satisfied with the adequacy of the reporting on these plans.

Employee Benefit Plans cont...

Some Relief

Fortunately, the DOL has provided some relief. Under the DOL's Field Assistance Bulletin (FAB) 2009-02, plan sponsors are freed from having to collect and report information for Form 5500 purposes on certain individual annuity contracts and mutual fund custodial accounts of current and former employees for which the employer has no ongoing contribution obligation.

This allows plan administrators to avoid what could, in some cases, be a substantial administrative burden and expense.

Under the FAB, an annuity contract or custodial account does not need to be treated as part of the plan (solely for purposes of reporting on the Form 5500) if it meets these requirements:

- It was issued before January 1, 2009.
- The employer ceased to have any obligation to make contributions (including employee deferrals) and in fact stopped making contributions to the contract or account before January 1, 2009.
- 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 contract or account without any involvement by the employer.
- The individual owner of the contract is fully vested in the contract or account.

In addition, the DOL has said that it will not reject a plan's Form 5500 on the basis of a "qualified, adverse, or disclaimed audit opinion if the accountant expressly states that the sole reason for such an opinion was because the pre-2009 contracts were not covered by the audit or included in the plan's financial statements."

In other words, a plan will not be found in noncompliance simply for submitting something other than an unqualified audit of its financial statement as long as a qualified accounting firm was retained to perform the audit and proper accounting and audit procedures were followed.

To Report … or Not

It is clear from the DOL guidance that an employee or former employee who maintains an annuity contract or custodial account that is exempt from the reporting requirements does not need to be included as a participant in the plan. Here, there are valid reasons for plan fiduciaries to consider excluding these employees (and their assets) from Form 5500 reporting.

Cost — Tracking down information for pre-2009 contracts can be costly and difficult, if not impossible, to do. Taking advantage of the relief offered by the DOL can help keep costs under control.

Availability of data — Some vendors may not even be prepared to provide asset information. For example, vendors issuing contracts primarily in non-ERISA markets don't have systems in place to perform appropriate reporting for ERISA plans.

Employee Benefit Plans cont...

Plan size — Removing participants with exempt annuity contracts/custodial accounts can impact a plan's reporting and audit obligations (i.e., it may make the difference between being considered a large plan or a small plan for purposes of filing the Form 5500.)

A Discussion of Fees

In the past, 403(b) plans have not had to incur many administrative expenses for such things as recordkeeping or accounting fees. Moving forward, plan administrators will need to be aware of the potential for increased costs associated with the transition to Form 5500 reporting.

In its Field Assistance Bulletin, the DOL is clear that plan sponsors don't have to spend their last dime tracking down lost or destroyed records. But they are expected to make a "good faith effort" to collect the information necessary to complete Form 5500.

Next Steps

It is critical to note that while the DOL guidance allows for reasonable good faith compliance during the transition, it *does not* delay a plan sponsor's annual reporting requirements.

As they prepare to file their Annual Report Form 5500 for the 2009 plan year, plan sponsors will need to complete the following steps:

- Determine whether the plan is a small plan or a large plan.
- Identify all annuity contracts and custodial accounts.
- Determine whether certain annuity contracts and custodial accounts can be excluded from reporting and audit obligations (and if doing so reduces reporting obligations).

Both the DOL and the AICPA are expected to issue further guidance on 403(b) plan accounting and audit considerations in the near future, and it is important that you and your auditor keep a close eye on these developments.

You can rest assured that our firm has the expertise and experience you need during this shift to expanded annual reporting requirements — including providing an independent audit of your 403(b) plan.

San Diego
2020 Camino del Rio North
Suite 500
California 92108
1.619.238.1040

Glendale
550 North Brand Boulevard
Suite 950
California 91203
1.818.630.7630

San Francisco
425 California Street
Suite 1600
California 94104
1.415.421.5378

or visit us at www.pkfcalifornia.com