

Section 403(b) Retirement Plans

Form 5500 Reporting and Independent Audit Requirements

The AICPA Employee Benefit Plan Audit Quality Center has prepared this analysis of Form 5500 reporting and audit requirements for 403(b) retirement plans to help understand the U.S. Department of Labor's Notice of Adoption of Revisions to Annual Return/Report Forms issued on November 16, 2007. The DOL Notice eliminated an exemption granted to 403(b) plans from the annual Form 5500 reporting, disclosure and audit requirements under Part 1 of Subtitle B of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). The removal of this exemption subjects ERISA-covered 403(b) plans to the same Form 5500 reporting and audit requirements as 401(k) plans effective with their 2009 plan year Form 5500 filings. The DOL Notice is available at the DOL's Employee Benefit Security Administration Web site at www.dol.gov/ebsa/regs/fedreg/final/20071116.pdf.

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1. **Does the sponsoring employer provide annuity or custodial contracts purchased or provided under a program under section 403(b) of the Internal Revenue Code?**

YES – Proceed to Question #2.

NO – The sponsoring employer is not affected by the elimination of the filing exemption granted to 403(b) plans.

2. **Are the 403(b) annuity contracts or custodial accounts purchased or provided under a program covered by Title I of ERISA?**

- a) **Are the Section 403(b) contracts or custodial accounts purchased or provided under a program that is either a “governmental plan” under ERISA section 3(32) or a “church plan” under ERISA section 3(33)?**

GOVERNMENTAL PLANS - ERISA section 4(b)(1) provides that Title I of ERISA does not apply to any employee benefit plan that is a “governmental plan” as defined in ERISA section 3(32). Section 3(32) of ERISA defines the term “governmental plan” as “a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.”

CHURCH PLANS - ERISA section 4(b)(2) provides that Title I of ERISA does not apply to any church plan as defined in section 3(33) of ERISA. The term “church plan” is defined in section 3(33) of ERISA, unless the plan made an election under 410(d) of the Internal Revenue Code, in pertinent part, as follows: (A)...a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986.

YES – *No Form 5500 filing or independent audit required.*

NO – *Form 5500 filing required. See general filing and audit requirements below.*

b) Are the 403(b) annuity contracts or custodial accounts purchased or provided solely through salary reduction agreements or agreements to forego an increase in salary, and do the contracts or accounts meet the required factors in the DOL “safe harbor” rules?

DOL “safe harbor” rules in 29 C.F.R. § 2510.3-2(f) state that a program for the purchase of annuity contracts or custodial accounts in accordance with provisions set forth in section 403(b) of the Code, and funded solely through salary reduction agreements or agreements to forego an increase in salary, are not “established or maintained” by an employer under section 3(2) of the Act, and, therefore, are not employee pension benefit plans subject to Title I, provided that certain factors are present. These factors are:

- (1) Participation of employees is completely voluntary,
- (2) All rights under the annuity contract or custodial account are enforceable solely by the employee or beneficiary of such employee, or by an authorized representative of such employee or beneficiary,
- (3) The involvement of the employer is limited to certain optional specified activities, and
- (4) The employer receives no direct or indirect consideration or compensation in cash or otherwise other than reasonable reimbursement to cover expenses properly and actually incurred in performing the employer’s duties pursuant to the salary reduction agreements. In this latter regard, if an employer, or a person acting in the interest of an employer, receives, for example, other consideration from an annuity contractor, the employer could be deemed to have “established or maintained” a plan.

[DOL Field Assistance Bulletin No. 2007-02 addresses how Treasury/IRS regulations issued in July 2007 governing 403(b) tax-sheltered annuity programs affect the status of such programs under the DOL’s safe harbor regulation. See <http://www.dol.gov/ebsa/regs/fab2007-2.html>]

YES – *No Form 5500 filing or independent audit required.*

NO – *Form 5500 filing required. See general filing and audit requirements below.*

General filing plan requirements

LARGE PLANS - ERISA-covered plans with 100 or more eligible participants generally will be required to file audited financial statements beginning with their 2009 Form 5500 filing as a “large plan.”

SMALL PLANS - ERISA-covered plans with fewer than 100 eligible participants may be able to use a new Short Form 5500 as a “small plan.”

In years subsequent to the initial filing year, a plan that covers between 80 and 120 eligible participants at the beginning of the plan year may elect to complete the Form 5500 in the same category (“large plan” or “small plan”) as was filed for the previous year. [DOL Reg. 29 CFR 2520.103-1(d)]

General audit requirements

ERISA-covered plans with 100 or more eligible participants at the beginning of the plan year that file the Forms 5500 as a large plan are required to have an annual audit of their financial statements.

General exemptions from audit requirements

ERISA-covered plans with fewer than 100 eligible participants at the beginning of the plan year that file the Form as a “small plan” are generally exempt from the audit requirement. DOL regulations in 29 CFR 2520.104-46 establish conditions for small plans to be exempt from the general audit requirement under Title I of ERISA (refer to http://www.dol.gov/ebsa/faqs/faq_auditwaiver.html#section3). In addition to being a small plan filing the Schedule I, there are three basic requirements for a small plan to be eligible for the audit waiver:

1. As of the last day of the preceding plan year at least 95% of a small pension plan’s assets must be “qualifying plan assets” or, if less than 95% are qualifying plan assets, then any person who handles assets of a plan that do not constitute “qualifying plan assets” must be bonded in an amount that at least equal to the value of the “non-qualifying plan assets” he or she handles. (“Qualifying assets” include investment and annuity contracts issued by any insurance company qualified to do business under the laws of a state.)
2. The plan must include certain information (described below) in the Summary Annual Report (SAR) furnished to participants and beneficiaries in addition to the information ordinarily required.
3. In response to a request from any participant or beneficiary, the plan administrator must furnish without charge copies of statements the plan receives from the regulated financial institutions holding or issuing the plan’s “qualifying plan assets” and evidence of any required fidelity bond.

In years subsequent to the initial filing year, a plan that files the Form 5500 as a “small plan” pursuant to the 80/120 rule is not required to have an audit of their financial statements [DOL Reg. 29 CFR 2520.104-46]. Note: The Department advised in its Notice of Adoption of Final Forms Revision that 403(b) plans that were eligible to file as a small plan under DOL Reg 29 CFR 2520.103-1(d) in the previous year and that have participant counts of fewer than 121 in the beginning of the 2009 plan year can file as small plans under the new filing rules.

FORM 5500 FILING CALENDAR

<u>Plan Year End</u>	<u>Form 5500 due date</u>	<u>Form 5500 due date with extension</u>	<u>Financial statement periods to be presented*</u>
December 31, 2009	July 31, 2010	October 15, 2010	December 31, 2009 plan year (with comparative December 31, 2008 statement of net assets available for benefits)
June 30, 2010	January 31, 2011	April 15, 2011	June 30, 2010 plan year (with comparative June 30, 2009 statement of net assets available for benefits)
September 30, 2010	April 30, 2011	July 15, 2011	September 30, 2010 plan year (with comparative September 30, 2009 statement of net assets available for benefits)

Note: The Department of Labor requires comparative financial periods to be presented for the statement of net assets available to pay benefits

Questions about the Form 5500 filing and audit requirements for section 403(b) retirement plans?

Visit the Department of Labor's Employee Benefit Security Administration Web site at <http://www.dol.gov/ebsa> or contact the DOL's EFAST Help Line at 1-866-463-3278

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