

**DOL Issues Transitional Relief for 403(b) Plan
Form 5500 Annual Reporting and Audit Requirements**

July 22, 2009

On July 20, the U.S. Department of Labor (DOL) released Field Assistance Bulletin 2009-02 (the FAB), which included certain transitional relief for 403(b) plan administrators who make a good faith effort to comply with the Form 5500 annual reporting requirements.

Background

Prior to 2007, 403(b) plan administrators were, depending on the plan size, either not required to file annual information reports with the DOL, or were required to make a limited informational filing that did not require an audit or the inclusion of financial schedules and disclosures. However, from 2002 to 2006, when there were minimal reporting requirements, the DOL found violations in 78% of its investigations of 403(b) plans. In response, the DOL announced new annual reporting rules for many 403(b) plans, including a Form 5500 filing requirement for plan years beginning on or after January 1, 2009. Governmental and church 403(b) plans are generally exempted from the reporting requirements.

Pursuant to these changes, both large and small 403(b) plans were subjected to heightened reporting requirements for plan years beginning on or after January 1, 2009. Large 403(b) plans—generally plans with 100 or more “eligible participants” as of the beginning of the plan year—were required to have an independent audit conducted as part of the plan’s Form 5500 filing, and small 403(b) plans were subject to the somewhat less burdensome reporting requirements applicable to other small retirement plans and are eligible for a waiver of the audit requirement.

Under the new reporting regime, all plan administrators—regardless of plan size—are required to communicate and coordinate with vendors to track the pertinent financial information for the filing.

After the release of the heightened reporting obligations, numerous 403(b) plan administrators 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. Moreover, employers and investment providers feared that in many cases they would not be able to obtain the information necessary to include these contracts and accounts in the expanded

Form 5500, particularly in cases where there are multiple vendors that offer investment alternatives under the plan. Plan administrators also noted that the cost of an audit would be greater where there is no centralized repository for financial information, but rather multiple vendors that the auditors would have to review.

Transitional Relief

Pre-2009 Contracts

In response to these concerns, the DOL released the FAB, which provides transitional relief for 403(b) plan administrators who make “good faith efforts” to comply with applicable annual reporting requirements for the 2009 plan year. Specifically, the FAB exempts from the reporting requirement certain accounts or contracts for which an employer has no ongoing contribution obligation (Pre-2009 Contracts). Under this relief, a 403(b) plan administrator does not need to treat annuity contracts and custodial accounts as part of the employer’s 403(b) plan, provided that the following criteria are met:

1. The contract or account was issued to a current or former employee before January 1, 2009
2. 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 January 1, 2009
3. 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
4. The individual owner of the contract is fully vested in the contract or account

In addition, the FAB states that the DOL will not reject a Form 5500 on the basis of a “qualified,” “adverse,” or disclaimed opinion if the accountant “expressly states that the sole reason for such an opinion was because such Pre-2009 Contracts were not covered by the audit or included in the plan’s financial statements.”

Delayed Audit for Plans with 100-120 Participants

The FAB also clarified that plans eligible for the so-called “80-120 rule” would be eligible for a waiver of the audit requirement for the first reporting year. The “80-120 rule” generally provides that if a plan has between 80 and 120 eligible participants as of the beginning of the plan year, the plan administrator may elect to file the same category of annual report (typically the annual report for plans with fewer than 100 participants) that was filed for the previous years. Accordingly, 403(b) plan administrators whose plans have between 100 and 120 eligible participants will be eligible for a waiver of the audit requirement for the first reporting year.

Obligation to Get Information from Current Vendors

Unlike the broad relief provided for Pre-2009 Contracts, the DOL did not provide comparable reporting relief to accounts or contracts that received contributions on or after January 1, 2009 (Active Accounts). Therefore, employers who have ongoing contribution obligations and relationships with vendors must continue to work with those vendors to identify the applicable Active Accounts for which reporting is

necessary, and obtain the requisite financial information to complete the expanded Form 5500. While it is unlikely that a current vendor will not be able to provide information on Active Accounts, where this problem does arise, the FAB provides no specific relief. Unlike with Pre-2009 Contracts, the DOL will reject a Form 5500 if it is accompanied by a “qualified,” “adverse,” or disclaimed auditor’s opinion resulting from incomplete information regarding Active Accounts.

The DOL did recognize, however, that there may be instances where vendors are unable to furnish such information. The FAB suggests that although increased expenses and administrative burdens will result from the filing requirement, the DOL does not intend for employers to undertake excessive expenses in obtaining such financial information. Further, the FAB suggests that vendors may be responsible and liable for the costs associated with recreating participant financial records where such records were lost or destroyed.

In effect, the FAB implies that if an employer follows the “guiding principle” that “appropriate efforts are made to act reasonably, prudently, and in the interest of the plan’s participants and beneficiaries” relief may be available if needed information is unavailable. However, because the FAB does not explicitly provide any relief, it will be left to the DOL to determine whether relief is warranted based on the relevant facts and circumstances.

For more information about the transitional guidance discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Chicago

Brian D. Hector 312.324.1160 bhector@morganlewis.com

Dallas

Riva T. Johnson 214.466.4107 riva.johnson@morganlewis.com

New York

Craig A. Bitman 212.309.7190 cbitman@morganlewis.com

Philadelphia

Robert L. Abramowitz 215.963.4811 rabramowitz@morganlewis.com

Amy P. Kelly 215.963.5042 akelly@morganlewis.com

Pittsburgh

John G. Ferreira 412.560.3350 jferreira@morganlewis.com

R. Randall Tracht 412.560.3352 rtracht@morganlewis.com

Washington, D.C.

Althea R. Day 202.739.5366 aday@morganlewis.com

Gregory L. Needles 202.739.5448 gneedles@morganlewis.com

About Morgan, Lewis & Bockius LLP

Morgan Lewis is an international law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San

Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis, please visit www.morganlewis.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend, please see <http://www.morganlewis.com/circular230>.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2009 Morgan, Lewis & Bockius LLP. All Rights Reserved.

