

Implementation Quick Steps
Solutions for Private Tax-Exempt 403(b) Organizations

This Implementation Quick Steps guide is designed to assist you in the final phase of transitioning your plan to meet the January 1, 2009, regulatory deadline.

**Contact your information source on 403(b) regulations
at 1-877-403(b)REG (2734) or 403bUniversity.com**

STEP 1: Determine Your Plan Status

The requirements of the Employee Retirement Income Security Act (ERISA) can sometimes change the status of an organization's 403(b) plan, inadvertently subjecting some plans to a different set of compliance rules. Here, you will find a series of questions developed to assist with determining the status of your organization's 403(b) plan and to make you aware of some important considerations.

ERISA

The key ERISA consideration for plans of private tax-exempt employers is that for sponsors of non-ERISA voluntary-only programs, the exercise of certain discretionary acts may trigger the requirement to comply with Title I of ERISA.

Options for ERISA 403(b) plans sponsored by a private tax-exempt entity

403(b) plan sponsors may choose to maintain the plan under the new guidelines, freeze the plan (i.e., cease all contributions to the plan but continue to update the plan in compliance with the regulations) or terminate the plan and distribute assets in accordance with the requirements of the new regulations.

Maintaining an active or frozen plan

Any plan in existence on or after January 1, 2009, must maintain a written document even if it is frozen. This can be a single document or a collection of documents which when taken together, satisfy the plan requirement. The plan must continue to comply with all applicable laws as long as there are plan assets. Such laws include—but are not limited to—the withdrawal restrictions. Information sharing agreements will be needed if exchanges will be allowed to providers outside the plan. Participant communication is important for plan compliance. For example, an active plan must meet the universal availability requirements. Also, freezing a plan may entail communication about new retirement planning opportunities in another plan.

Compliance with the laws under 403(b) and Title I of ERISA is essential, and generally administration may be accomplished with either centralized or decentralized administration, or a combination. Beginning with reporting in the 2009 plan year, ERISA compliance will include preparation of financial information for the annual Form 5500 filing, and compliance administration planning should take this into consideration.

Terminating a 403(b) plan

The final regulations introduced rules enabling a plan sponsor to terminate a 403(b) plan and distribute a plan's assets, subject to some very important limitations. One is that all plan assets must be distributed within a reasonable period. As a result, before beginning such a termination, it will be important to check with your vendors and your legal counsel to understand which products may be forced out of the plan to participants and which will require participant consent to ensure all assets may be distributed in accordance with requirements of the regulations. One key consideration is that contributions to all 403(b) plans of the employer—not just the terminating plan—must be stopped for a period starting on the termination date and ending 12 months following the date of last distribution. Until all assets are distributed, remember that compliance with all laws must continue and participant communication is needed.

Non-ERISA

The key ERISA consideration for plans of private tax-exempt employers is that ERISA Title I will apply unless employer involvement is significantly limited. While employer involvement may include the making of employer non-elective contributions, other discretionary acts may also trigger ERISA. Although products and vendors may be limited to a number and selection, such selection must be designed to provide a reasonable choice in light of relevant circumstances. A private tax-exempt entity seeking to retain non-ERISA status for its plan should review the DOL Field Advisory Bulletin 2007-02 with its legal counsel.

Non-ERISA 403(b) plans sponsored by a private tax-exempt entity

403(b) plan sponsors may choose to maintain the plan under the new guidelines, freeze the plan (i.e., cease all contributions to the plan but continue to update the plan in compliance with the regulations) or terminate the plan and distribute assets in accordance with the requirements of the new regulations.

STEP 1: continued

Maintaining an active or frozen plan

Any plan in existence on or after January 1, 2009, must maintain a written document even if it is frozen. This can be a single document or a collection of documents which when taken together, satisfy the plan requirement. The plan must continue to comply with all applicable laws as long as there are plan assets. Such laws include—but are not limited to—the withdrawal restrictions. Information sharing agreements will be needed if exchanges will be allowed to providers outside the plan. Participant communication is important for plan compliance. For example, an active plan must meet the universal availability requirements. Also, freezing a plan may entail communication about new retirement planning opportunities in another plan.

Close attention to the information in DOL Field Advisory Bulletin 2007-02 is important. In order to maintain compliance with the requirements of Code Section 403(b) and the final Treasury regulations while maintaining limited employer discretion, you should address certain plan features with your legal counsel such as non-elective contributions, automatic enrollment and the allocation of compliance functions.

Within the limitations of the applicable rules, an employer maintaining a non-ERISA voluntary 403(b) plan generally may have several options for that plan in light of the final 403(b) regulations.

- Maintain it as a non-ERISA 403(b) plan, taking special care in any plan decisions to make sure they are consistent with the plan's ERISA exemption and available DOL guidance.
- Convert your non-ERISA program to an ERISA plan beginning in 2009, subject to certain limits on the plan sponsor's authority with regard to existing account values. It could continue to be maintained either as a separate plan, or merged into an existing ERISA 403(b) plan.
- Freeze the non-ERISA plan (i.e., cease the contributions to the plan, but continue to operate the plan in compliance with the regulations).
- Terminate the non-ERISA plan and distribute the assets in accordance with the requirements of the new regulations.

Terminating a 403(b) plan

All plan assets must be distributed within a reasonable period beginning with the termination date and ending 12 months following the date of the last distribution. It will be important to check with your vendors and your legal counsel to understand which products may be forced out of the plan to participants and which will require participant consent to ensure all assets may be distributed in accordance with requirements of the regulations. One key consideration is that contributions to all 403(b) plans of the employer—not just the terminating plans—must be stopped for a period starting on the termination date and ending 12 months following the date of last distribution. Until all assets are distributed, remember that compliance with all laws must continue and participant communication is needed.

STEP 2: Finalize Qualified Service Provider Agreements

The new 403(b) regulations generally consider all accounts with active contributions in the plan from January 1, 2009, to have the highest sense of compliance obligation from a plan sponsor perspective. Thus, it's critical that both the documents and the generic Service Provider Agreements requested from active providers be carefully crafted to support that requirement.

The Qualified Service Provider Agreement in the Compliance Essential Kit was carefully crafted to support your plan's form and operation as it relates to the model plan document provided. It is imperative that each provider that will be active and receiving contributions after January 1, 2009, sign this agreement prior to receiving contributions. Non-ERISA plans should consider such an agreement carefully with their legal counsel to ensure adherence with FAB 2007-02.

In addition to the careful consideration of the plan's form and operation, the plan document and Qualified Service Provider Agreement found in Compliance Essential can have other key benefits to your organization. The Qualified Service Provider Agreement asks for a signature from an officer of the company and contains basic provisions to create accountability from your vendor(s) of choice. This can help ensure that vendor(s) are accountable for ongoing compliance operations and will be held to the standards set forth in your document.

Q&A: Finalize Qualified Service Provider Agreement

What is the difference between an Information Sharing Agreement (ISA) and a Qualified Service Provider Agreement?

Information Sharing Agreements are generally designed to provide guidelines for sharing of information between the plan sponsor and providers that have accounts "outside the plan" under Revenue Procedure 2007-71. Information Sharing Agreements are not prohibited for accounts inside the plan but may be useful to help formalize procedures, information flow, etc.

A Qualified Service Provider Agreement takes the concept a step further and provides specific guidance, direction and accountability for your selected vendors to maintain the compliance integrity of your plan. Again, non-ERISA plans must carefully review such agreements with their legal counsel to ensure decentralized administration.

Can I use Compliance Essential with only ISAs and not Qualified Service Provider Agreements?

Generally, no. A provider that may affirmatively sign an ISA may not be held to critical form and operation requirements set forth specifically through the Qualified Service Provider Agreement. It should be noted that the Qualified Service Provider Agreement makes strong efforts to accommodate different vendors and product types and is available for contributions only as a stand alone, or contributions, loans and hardships as a vendor.

What if a vendor refuses to sign the agreement?

Plan sponsors and vendors alike generally recognize that compliance with the employer's plan document and entering into a Service Provider Agreement consistent with the plan's requirements are essential to an ERISA-covered plan's form and operation. Many plan sponsors are clearly directing vendors that if they are not willing to sign the agreement, they will not be included in the plan going forward. Non-ERISA plans should consult with their legal counsel regarding the need to require Service Provider Agreements.

Should I keep the agreements on file for future use?

Yes, you will want to maintain copies of your document and all vendor agreements in a secure location for future use. You may need to refer to those agreements in the future as you consider design or vendor changes, or if you receive notice of inquiry from the IRS on an examination of your plan.

Can I keep our ISAs together with the Qualified Service Provider Agreements?

Yes. Information Sharing Agreements are generally required for all exchanges outside the approved providers in the plan and are a way to formalize communication with all providers if additional information is needed. Information Sharing Agreements with all providers can be stored in the kit and used for future reference. Note that they might not contain the key requirements needed for active vendors after January 1, 2009.

STEP 3: Execute Plan Document and Send Copy of Document and Approved Vendor List to Approved Vendors

For non-ERISA plans with limited employer involvement, the Compliance Essential Kit includes a sample of the adoption agreement for the 403(b) plan document for your review with counsel; these documents can help you put in place the key document governing your plan. Included are copies of IRS Revenue Procedure 2007-71 and DOL FAB 2007-02. For plans subject to ERISA, you should already have a plan document in place. You should check with your current document provider for updates to your plan. Included in the Essential Kit is a checklist of key items to consider. If you desire information regarding receiving plan document services from VALIC, including services for ERISA-covered plans, church plans and governmental plans, contact us at 1-877-403(b)REG (2734) or at www.403bUniversity.com.

- Sign plan document, adoption agreement (if applicable) or amendment to your existing plan.
- Update your approved vendor list.
- Print copy of signed agreement, document and amendments if applicable and include in compliance file kit for future reference.
- Provide a copy of the updated documents and approved vendor list to your providers of choice.

Q&A: Plan document and approved vendor list

Where do I get an updated copy of the plan document or updated adoption agreement?

- The most recent updates to the private tax-exempt non-ERISA plan document can be found on our dedicated Web site, 403bUniversity.com. 403(b) University is designed to be a single point of reference for ongoing administration of your organization's program. For ERISA-covered plans, a document checklist is also available.

Does my document need to be reviewed or approved by the IRS?

- Currently the IRS does not review prototype 403(b) plan documents, however they may in the future. The Essential plan documents consist in large part of the model plan document language used in Revenue Procedure 2007-71 and also found in certain public ASBO documents, and according to that Revenue Procedure use of the model language affords certain public plan sponsors direct reliance to the extent of the model language incorporated into the plan. A signed adoption agreement (if applicable) and document is required under current guidelines, and a copy of both with an approved vendor list should be forwarded to your providers.

How does the document handle loans and hardships and what are my responsibilities as the administrator?

- The Compliance Essential documents are designed to maximize flexibility with these programs and to allow both the plan sponsor and the approved vendors reasonable choice and accommodation in their roles supporting the plan.

Loans and hardships may be included or excluded on a plan level (i.e., no loans or hardships under the plan; or, loans and hardships are available under all products that otherwise permit them) or may be restricted to a subset of "loan or hardship" approved vendors inside the plan (i.e., only three of the five approved vendors are permitted to offer loans and hardship withdrawals, because the remaining two vendors did not agree to administer those transactions as required under the plan). The document, Service Provider Agreement and approved vendor lists are all designed to support both the plan's election here and the vendors preferred position inside the plan.

Will a vendor that doesn't allow loans and hardships be excluded from the plan?

That is up to the plan sponsor. Plan sponsors have the ability, subject to any additional legal restrictions, to set reasonable compliance administrative requirements for all providers in the plan. A plan sponsor may allow or disallow providers that don't make loans or hardships available for administrative, operational or other reasons. Such vendors can be included in the plan together with any other population of loan or hardship approved vendors.

It should be noted that there is no additional direct fee layering to participants for these services as they are delegated to providers at no cost in the Qualified Service Provider Agreement.

What changes should I make to my plan as circumstances change?

Will an updated document be available?

- Compliance Essential Kit includes both current documents and ongoing document availability through our dedicated Web site, 403bUniversity.com. Plan sponsors also have access to a self-audit checklist and compliance manual which can help with technical questions. Additionally, the 403(b) regulations resource center stands available to answer questions at 1-877-403(b)REG (2734). We offer ongoing support and guidance to plan administrators using the Compliance Essential Kit.
- We encourage plan sponsors to meet with all providers in the plan at least annually to review administrative procedures and operations.

STEP 4: Review and Finalize Ongoing Administrative Procedures

- The last point is to finalize ongoing administrative procedures for your plan including day-to-day operational issues, universal availability communication plan, completion of a plan self-audit checklist and other items. Remember, private tax-exempt employers maintaining non-ERISA plans should discuss decentralized administration with their legal counsel and vendors.
 - Finalize operational issues: Make sure that your payroll and benefits staff have a record of salary reduction agreements and are storing them for future reference.
 - When your Universal Availability policy is set, make sure you are using the included materials, or alternate materials that you might develop for your employees, to communicate the plan availability to all eligible employees. Use payroll stuffers, building mailbox stuffers, posters, and e-mail blasts for effective notification. Also, you will want to maintain records of the notifications provided, as well as of the distribution list for those notifications, for future reference in the event of a review or audit.
 - You will want to know how contribution limits are being monitored for compliance. *Example: Many employers will incorporate the basic participant deferral limit (\$16,500 for 2009), across providers, into their system, and require providers to supply completed calculations to support any additional contributions.* In addition, you will want to have a procedure to ask employees about outside employment that they control, to identify possible plan contributions that may need to be aggregated with contributions to your plan in applying the overall dollar limit under Code Section 415(c).
 - For ERISA, governmental and church plans, review loan and hardship administration with each vendor on an ongoing basis. The Qualified Service Provider Agreement and document delegate specific responsibilities and work flow to providers in the plan using loans and hardships.
- The Compliance Essential Kit includes both a self-audit checklist and compliance manual for use with your benefits and payroll staff. This is a sample checklist, and you may identify additional items for review as well as desired changes to the sample checklist. Encourage a periodic meeting to review your organization's checklist and document those efforts. Also, document and keep communications with providers and participants for future reference.

Q&A: Ongoing administrative procedures

What administrative procedures should we include in our plan?

Key procedures include operational items such as payroll dates, approved vendor lists, etc., and for ERISA-covered, governmental or church plans will include decisions on universal availability, contribution limit monitoring, loans and hardships, and self-audits.

What if we make a mistake?

The IRS has provided favorable guidance recognizing an employer's ability to self correct certain identified plan defects, or to request IRS review of certain corrections. An important requirement for relying upon such guidance is the employer having important compliance procedures in place. As a general matter, that does not require that the procedures be perfect. After all, if they were perfect, there likely would be no defects. The Compliance Essential Kit provides many tools that you can use, in consultation with your organization's counsel as appropriate, to help document those key compliance procedures.

Is a self-audit checklist a positive for us even if our plan is not audited?

Yes. Performing your own review can help you confirm the areas that are already in good shape, and identify areas that may need additional attention.

UPDATE: The IRS extended the deadline for employers to adopt a written plan until December 31, 2009, subject to specific requirements which include general compliance with the final 403(b) regulations on and after January 1, 2009.

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