# Final IRS Regulations Make Major Changes In The 403(b) World

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For many years, IRS guidance on Internal Revenue Code ("Code") section 403(b) plans ("403(b) plans") has been a hodgepodge of regulations, exam guidelines, revenue rulings, and notices dating back to the 1960s. (Unless otherwise indicated, all section references are to the Code.) Several years ago, the IRS began to tackle the process of updating and consolidating most of this guidance into one unified set of regulations reflecting current law—issued in proposed form in November 2004—and including guidance under the controlled group rules of section 414(c). Although there were objections and concerns to many of the major changes contained in the proposal, the general thrust was to follow section 401(k)-like rules to the extent possible. The restatement of the 403(b) rules also followed in the footsteps of similar IRS/Treasury efforts to update and consolidate other major pension regulations, including under section 457(b) (eligible deferred compensation plans), section 401(k), and section 415 limits.

The IRS and Treasury have now published final rules, which, fortunately, generally will not be effective until January 2009. 72 Fed. Reg. 41128 (July 26, 2007).

The final rules make major changes in the 403(b) world, including (1) imposing broad written plan document and operational compliance requirements on all 403(b) programs; (2) repealing the nondiscrimination safe harbors of IRS Notice 89-23 and imposing a set of "controlled group" rules; (3) adding new restrictions on distributions; (4) prohibiting the use of separate life insurance (and certain other incidental benefits) in 403(b) arrangements; (5) restricting annuity exchanges; and (6) allowing plan terminations (and concurrent distributions) under rules similar to those for 401(k) plans.

Our summary of the final rules follows.

## A. Plan And Contract Terms

1. *Written Plan Requirement*—Historically, a few 403(b) terms have been required by statute to be in the underlying 403(b) contract (a term that in this context includes custodial account agreements and church retirement income accounts), and the Employee Retirement Income Security Act (ERISA) has always imposed a written plan document requirement on 403(b) plans subject to that law. However, the final regulations impose, for the first time, a requirement under the Code that there be a written plan containing all material terms and conditions for eligibility, benefits, limitations, the contracts available under the plan, and the time and form of distribution. In addition, any optional provisions (such as for loans and hardship distributions) must be set forth in the plan.

   a. Significantly, the final regulations do not require a single plan document—the "plan" may incorporate by reference other documents, including separate contracts and related documents supplied by the annuity providers and account trustees or custodians. For example, a "wrap document"—similar to the concept used in many ERISA-covered welfare plans—could supplement an annuity contract that contained certain terms. However, the onus is on the employer to ensure that there are no gaps and that conflicts among documents are addressed. This will be challenging when there are numerous investment providers.

   b. The IRS intends to help address the potential costs associated with satisfying the written plan requirement for many employers that do not already have a written plan. In this regard, the IRS expects to publish additional guidance including model plan provisions that may be used by employers to ease the administrative burdens of satisfying the written plan requirement. The final rules also provide that a plan may allocate administrative responsibilities to the employer or another person—but not participants—to ease administrative burdens. Those persons responsible for compliance with the applicable Code requirements should be identified in the relevant documents.

   c. In conjunction with the final regulations, the Department of Labor (DOL) issued a Field Assistance Bulletin No. 2007-02 ("FAB") to provide additional guidance on the extent to which compliance with the final regulations would cause employers to exceed the limitations on "employer involvement" permitted under the DOL's longstanding safe harbor for tax-sheltered annuity programs. DOL Reg. §2510.3-2(f). In general, the DOL believes that complying with the final 403(b) regulations does not *per se* convert a salary-reduction-only plan relying on the safe harbor into a plan subject to ERISA—that analysis continues to be done on a case-by-case basis. As discussed further below in our review of the FAB, the new written plan requirement may cause non-ERISA 403(b) plan sponsors relying on that regulatory exemption to look at it more closely to determine whether their plans have been or will continue to be exempt from ERISA.

2. *What Must Be In A 403(b) Contract*

a. The regulations indicate that certain 403(b) provisions must be in the contract, including:

i. Nonforfeitability (which the final rules define by reference to the regulations under section 411 vesting rules for qualified plans, though, during the initial period the contract is unvested, the contract must at all times satisfy the 403(b) requirements);

ii. Nontransferability (§401(g));

iii. Limits on elective deferrals (the final regulations require a section 403(b) contract to include this limit) (§402(g));

iv. Minimum required distribution rules (including the incidental death benefit rule) (§401(a)(9));

v. Direct rollover rules (§401(a)(31)); and

vi. Limits on incidental benefits (§401(a)).

b. It is unclear whether the plan document could include one or more of those rules instead, especially in the case of a "wrap document."

3. *What Must Be In The Plan*—The final regulations require that certain other 403(b) provisions be in the plan document, including:

a. Identification of the contracts and accounts available under the plan;

b. Coverage and contribution provisions;

c. Section 415 limits on annual additions;

d. Optional provisions (such as loans, hardships, and transfers); and

e. Provisions coordinating and allocating compliance responsibilities.

4. *Annuity Contracts Treated As Single Contract*—As under current law, all annuity contracts purchased for an individual are treated as a single contract, but contributions in excess of the section 415 limits are treated as made to a separate, non-403(b) contract as long as they are separately accounted for. If not, the entire contract (i.e., all contracts) fails to meet 403(b).

5. *Effect Of Failures*—In general, an entire 403(b) plan may be disqualified if it fails to meet the plan document, eligible employer, or nondiscrimination requirements. In this regard, the final regulations clarify that certain operational failures, such as the failure to operate the plan in accordance with its coverage provisions, will cause all contracts issued under the plan to fail to be 403(b) contracts. However, most operational failures, such as contribution limits, distributions, etc., that affect a particular employee generally will not adversely affect the contracts issued to other employees that qualify in form and operation with 403(b). The IRS's Employee Plans Compliance Resolution System (EPCRS), Rev. Proc. 2006-27, already reflects these general principles.

6. *Exclusive Benefit Requirement*—The Code does not refer to an exclusive benefit requirement for 403(b) plans. Nevertheless, the final regulations add an exclusive benefit requirement for all assets held in 403(b) custodial accounts, as well as retirement income accounts maintained by a church-related organization, whether covered by ERISA or not. The final regulations do not appear to impose the exclu-

sive benefit rule on annuity contracts (although ERISA programs are subject to the same requirement under section 403(c).

7. *Incidental Benefits Restricted*—The final regulations take a very restrictive approach on the provision of any benefits other than retirement benefits under 403(b) programs. In particular:
   a. The final rules prohibit the use of term and permanent life insurance and endowment contracts to fund 403(b) programs, even if the premiums are limited under the longstanding 25 percent/50 percent incidental tests—subject to a grandfather rule for contracts issued before September 24, 2007. This reflects a strict interpretation of what funding vehicles or investments section 403(b) permits.
   b. The final rules do not allow (subject to the same grandfather rule) the provision of health or accident insurance benefits—a practice that was much less frequently used, but nevertheless permitted, in the past.
   c. Death benefits that are part of an annuity contract issued by an insurance company are permitted, assuming that the death benefits do not cause the contract to fail to satisfy any requirement applicable to 403(b) plans, and that the incidental death benefit rules are satisfied.
   d. Waiver of premium provisions that continue contributions during long-term disability under an annuity contract are permitted if they satisfy (together with any death benefits) the incidental test.
8. *Defined Benefit 403(b) Plans Not Permitted*—The final regulations provide that a 403(b) plan must be maintained pursuant to a "written defined contribution plan." An exception exists for Tax Equity and Fiscal Responsibility Act (TEFRA) church defined benefit plans in existence on September 3, 1982.

## B. Eligible Employers

1. *Clarification Of Dual Governmental And 501(c)(3) Status*—The regulations clarify that an organization that is both a governmental entity and a 501(c)(3) tax-exempt organization cannot maintain a 401(k) plan, though it can maintain a 403(b) plan. Such "dual status" governmental (but non-public school) 403(b) plans are typically seen in the case of governmental hospitals that are separately incorporated and have obtained 501(c)(3) approval by the IRS.
2. *Public School Employees*—To participate in a 403(b) program as performing services for a public school, the employee's compensation must be paid by the state (or political subdivision), and a person occupying an elective or appointed public office must have received training in, or be experienced in, the field of education. Existing guidance continues to apply in this area.
3. *Indian Tribal School Employees*—For purposes of determining whether an individual is an employee performing services for a public school, an Indian tribal government is treated as a state (subject to certain Code requirements and 1996 transition provisions).

## C. Permissible Funding For 403(b) Arrangements

1. The regulations reflect the general requirement that 403(b) amounts be invested exclusively in insurance company annuity contracts and mutual fund custodial accounts. They also address several other situations, discussed below.

2. *Timeliness Of Contributions*—Similar to the final 457(b) regulations and following the proposed regulations, the final 403(b) regulations impose an ERISA-type rule that contributions should be transferred to the insurance company or entity holding the custodial or retirement income account within a period that is no longer than reasonable for the proper administration of the plan, using the example of transferring elective deferrals within 15 business days following the month in which the amounts would otherwise be paid to the participant. However, it appears that this is not a safe harbor for contributing salary reduction amounts subject to ERISA, and the ERISA rules (if the plan is subject to ERISA), as well as the section 415 rules coordinating the timing of contributions with limitation years, must also be followed.

3. *Grandfather For Certain Self-Insured State And Local Plans*—Revenue Ruling 82-102 clarified that 403(b) plans had to be invested in commercial annuity contracts, but permanently grandfathered certain self-insured state and local government annuity plans in existence on or before May 17, 1982, including for new participants. As was proposed, the final regulations continue this grandfathered state when (1) benefits under the contract are provided from a separately funded retirement reserve subject to supervision by the state insurance department, or (2) benefits are provided from a fund separate from the fund used to provide statutory benefits under a state retirement system that is part of a state teachers retirement system (including a state university retirement system) to purchase benefits that are unrelated to the basic benefits provided under the state retirement system, and the death benefit provided under the contract at no time exceeds the larger of the reserve or the employee's contributions.

4. *Church Retirement Income Account Plans*—The final regulations also reflect provisions of the proposed regulations that incorporated a number of rules for church retirement income account plans under section 403(b)(9) that were previously found only in the legislative history to TEFRA, the 1982 law which created them. Perhaps the most important of these is an "exclusive benefit" rule. The final regulations incorporate language previously found in the preamble to the proposed regulations that, for example, employers may not borrow assets from a church retirement income account. A special effective date provides that in the case of a loan or other extension of credit to the employer that was entered into under a church retirement income account before July 26, 2007, the plan will not fail to satisfy the exclusive benefit requirement of the regulations on account of the loan or other extension of credit if the plan takes reasonable steps to eliminate the loan or other extension of credit to the employer before the applicable effective date for the regulations for the plan or as promptly as practical thereafter (including taking steps after July 26, 2007, and before the applicable date).

   a. The final regulations also follow the proposed regulations by clarifying that a church retirement income account will be subject to the 403(b)(1) annuity rules (for example, for distribution restrictions) rather than the 403(b)(7) rules, even though invested in mutual funds.

   b. The final regulations also allow a life annuity to be provided from a church retirement income account without purchase of a commercial annuity contract if the distribution has an actuarial present value at the annuity starting date equal to the participant's accumulated benefit and the plan sponsor guarantees the annuity. Such self-annuitization is common among older church 403(b)(9) plans.

5. *Commingling Of Assets*—The final regulations also follow the proposed regulations to provide that, to the extent permitted by future IRS guidance, assets held in custodial accounts and church retirement income accounts may be invested in a group trust with trust assets held under a qualified plan or IRA. This follows several private letter rulings issued in the past, and hints at a future solution to the omission of 403(b) plans in Revenue Ruling 2004-67, the most recent update of the IRS's "group trust" ruling (Rev. Rul. 81-100).

   a. The final regulations also reflect the rule under the legislative history to TEFRA that church retirement income account assets may be commingled in a common trust fund with amounts devoted exclusively to church purposes (giving as an example a fund from which pension payments can be made), but provide that no assets of the plan sponsor other than retirement income account assets can be combined with custodial account, qualified plan, or individual retirement plan assets. As with the proposed regulations, it remains unclear whether this is intended to restrict practices among church plans, based on the TEFRA legislative history, of commingling retirement account plan assets with church endowment funds and church 401(a) plans, provided that the amounts belonging to each can be separately accounted for and the plans are subject to the exclusive benefit rule.

6. *Tax-Exempt Status Of Church Retirement Income Account Trust*—The final regulations also clarify that a trust holding church retirement income account assets is tax-exempt.

## D. Contribution Limits

1. *What Is An Elective Deferral?*—The final regulations clarify that, for purposes of applying the limit on elective deferrals (section 402(g)), an elective deferral does not include a contribution pursuant to a one-time irrevocable election made on or before an employee's first becoming eligible to participate, or a contribution made as a condition of employment. According to a temporary regulation under section 3121(a)(5)(D) that reflects the IRS's longstanding position, FICA taxes, however, apply to all salary reduction contributions, whether elective or non-elective. This temporary regulation, which was published on the same day as the proposed regulations, is set to expire on November 16, 2007. However, the preamble to the final regulations specifically cites this temporary regulation, confirming its applicability. (It is not clear why that temporary regulation was not finalized with these final regulations.)

   a. The final regulations clarify that an elective deferral can be either a pre-tax elective deferral or a Roth contribution. This is helpful recognition that Roth 403(b) contributions are allowed.

2. *Excess Contributions And Deferrals*—Excess elective deferrals (deferrals that exceed the limits described in section 402(g) or 415(c), disregarding catch-up contributions under section 414(v) and the special 403(b) catch-up contributions described in the regulations) will not result in a 403(b) failure if distributed, with allocable net income, by April 15 of the following year, or another correction method available under the same rules as apply to 401(k) excess deferrals. If excess deferrals are not distributed, but instead are retained in the contract, the portion of the contract that includes the excess amounts must be treated as a separate account that is a nonqualified annuity contract under section 403(c).

3. *Interaction Of Age 50 Catch-Up Contributions And Special 15-Year Catch-Up/Expansion Of Applicability Of The Special Catch-Up*—The final regulations adopt the unpopular position that, if an employee is eligible for both the age 50 catch-up and the special 403(b) catch-up for certain employees with 15 years of service, any catch-up contribution is first applied as the special 15-year 403(b) catch-up, and to the extent that is exceeded, it is treated as age 50 catch-up. This can result in inadvertent under-utilization of the special catch-ups. The special 403(b) 15-year catch-up rules apply only to certain employees who work for "qualified organizations." The final regulations expand the list of qualified organizations listed in the proposed regulations to also include a tax-exempt organization controlled by a church-related organization, an adoption agency, and a home health service agency that provides help to the disabled or to persons with substance abuse problems.

4. *Years Of Service For "Includible Compensation" And 15-Year Catch-Up Rules*—The final regulations continue the prior guidance (and the proposed regulations) on determining "includible compensation" for the section 415 limit of 100 percent of includible compensation, and for determining if an employee has 15 years of service with a qualifying employer for the special 403(b) catch-up rule. This guidance includes aggregating part-time and seasonal service into full years, using the employer's annual work period (such as an academic year) and not necessarily the calendar year, and determining a year of service based on common-law employment, not on a controlled group basis (except in the case of church plans, which have a special aggregation rule).

5. *Definition Of "Includible Compensation"*—The final regulations also follow prior rules on defining includible compensation. Generally, includible compensation includes an employee's compensation that is includible in gross income, including amounts deferred under a cafeteria plan, a qualified transportation fringe, or a 401(k), 403(b), or 457(b) plan. It does not include any compensation an employee received while the employer was not an eligible employer.

6. *Post-Employment Contributions*—The final regulations incorporate the special, favorable rule added by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) that deems a former employee to have includible compensation for the period through the end of the taxable year in which the employee ceases to be an employee and for the next five taxable years. The regulation applies this rule to section 415 as well, but only permits non-elective employer contributions. In addition, the final rules contain an example indicating that post-employment compensation is cut off after a former employee dies. It is unclear what happens to the amounts that would have been contributed after death (for example, may they be paid to the beneficiary as a death benefit?).

## E. Nondiscrimination Rules

1. *Repeal Of Notice 89-23 Safe Harbor*—Consistent with the proposed regulations, the final regulations repeal the nondiscrimination safe harbors of IRS Notice 89-23 and generally impose the qualified plan nondiscrimination rules on all employer contributions (other than elective deferrals) and after-tax employee contributions to 403(b) plans. Thus, minimum coverage, nondiscrimination in contributions and section 401(m) testing will generally apply to tax-exempt employer plans (other than churches). However, the final regulations clarify that, in certain cases, students and employees working less than 20 hours per week may still be excluded in applying the qualified plan nondiscrimination rules.

a. Governmental 403(b) plans are only subject to the nondiscrimination rules that limit the maximum amount of compensation taken into account for a year ($230,000 in 2008). Church plans are exempt from the nondiscrimination testing rules (including the "universal availability" rules) entirely. Many tax-exempt entities will need to revisit and possibly modify their contribution formulas by 2009.

2. "*Universal Availability" Testing Rules*—A "universal availability" rule has long applied to all 403(b) plans with elective deferrals, excluding church plans, but including plans of governmental employers. The "universal availability" rule requires that, with certain exceptions, all employees normally working more than 20 hours a week must be able to make salary reduction contributions of at least $200. The rules go on to require that employees have an "effective opportunity" to participate at least on an annual basis. Lack of guidance in this area, and the dire consequences of error, have caused many employers to apply the test fairly conservatively in the past.

a. The final regulations are generally consistent with the proposed regulations, although they clarify that certain employees who work less than a threshold established by the employer that is less than 20 hours worked per week may be excluded from the application of the "universal availability" rule.

b. The proposed regulations planned to eliminate the following Notice 89-23 safe harbor exclusions from the universal availability rule:

i. Employees who make a one-time election to participate in a governmental plan instead of a 403(b) plan.

ii. Employees covered by a collective bargaining agreement.

iii. Visiting professors for up to one year under certain circumstances.

iv. Employees affiliated with a religious order who have taken a vow of poverty.

c. Notwithstanding numerous objections, the final regulations eliminate these exclusions. To address some of the comments, the IRS notes that:

i. Individuals who have taken a vow of poverty, who work for a church-controlled organization, and whose compensation from the organization is not treated as wages for income tax reporting purposes may be excluded from the universal availability rule in certain cases because they have no compensation.

ii. A visiting professor who continues to receive compensation from the professor's home university, and who continues to make elective deferrals under the home university plan, may be excluded from the visiting university's application of the universal availability rule.

iii. Delayed effective date rules are provided for the elimination of the IRS Notice 89-23 safe harbor exclusions (generally January 1, 2010, or, in the case of the IRS Notice 89-23 collective bargaining safe-harbor, a date between January 1, 2009, and July 26, 2010). Also, 403(b) plans maintained by governmental entities, if a legislative body has the ability to amend the plan, must be amended to comply by the earlier of the close of the legislative session that begins on or after January 1, 2009, or January 1, 2011.

d. These exceptions, and the delayed effective date rules, provide limited comfort to 403(b) plan sponsors that they will not need to rush to revise their "universal availability" provisions by January 1, 2009. However, significant changes may be necessary for certain organizations, especially educational organizations, to comply with these new rules. In this regard, the IRS is stepping up its audit activities in this area, so caution is indicated.

3. *"Anti-Conditioning" Rule*—Despite an apparent lack of statutory authority, the final regulations retain a rule similar to the statutory 401(k) rule that rights or benefits under other employer plans (such as health benefits) cannot be conditioned directly or indirectly on an employee's participation (or non-participation) in the 403(b) plan.

4. *Controlled Group Rules*—The final regulations include rules governing the determination of a tax-exempt entity's controlled group that supersede the "reasonable, good faith" interpretation rules in IRS Notice 96-64, generally effective for the 2009 plan year. These rules generally apply to all tax-exempt entities (including their for-profit subsidiaries), although certain church entities and state or local government public schools are permitted to continue to apply the IRS Notice 89-23 rules for determining their controlled groups. Also, a helpful "common payroll" rule applies to the universal availability rule under governmental plans.

   a. The final regulations are generally consistent with the proposed regulations and retain the rule (reflected in Notice 96-64, Notice 89-23, and section 512(b)(13)) that common control exists when 80 percent or more of the directors or trustees of one entity are either representatives of, or directly or indirectly controlled by, the other organization. However, in response to comments on the proposed regulations:

      i. The open-ended anti-abuse rule in the proposed regulations is clarified by an example that provides additional insight into when the anti-abuse rule might be used to aggregate two less-than-80 percent controlled organizations.

      ii. The IRS is granted authority to issue guidance on aggregating entities in other situations not addressed by the regulations when there are "substantial business reasons" that do not violate the anti-abuse rule for aggregating two entities, such as when two entities are highly integrated in their operations.

      iii. The power to appoint or remove a trustee or director is based on the facts and circumstances of a situation such that a legally required trusteeship for a labor union does not necessarily establish control of an organization.

## F. Distributions, Transfers, And Exchanges

1. *Qualified Profit-Sharing Plan Distribution Restrictions Imposed*—Elective deferrals to 403(b) annuity contracts—and all contributions, elective and non-elective, to 403(b)(7) custodial accounts—are generally subject to distribution restrictions before age 59½, death, disability, financial hardship, or severance from employment (subject to a grandfather rule for the December 31, 1988, account balance). However, non-elective employer contributions to 403(b) annuity contracts have not been subject to statu-

tory restrictions on distributions, although, of course, the 10 percent excise tax on early distributions can be a disadvantage to taking such distributions.

a. Unfortunately, the final regulations track the proposed regulations and impose the qualified profit-sharing plan distribution rules (contained in various longstanding regulations and rulings under section 401(a)) on 403(b) plans. This generally means that the plan must provide a predetermined formula for distributing the funds in the plan after a fixed number of years (generally at least two), upon the attainment of a stated age (such as 59½), or after the occurrence of an event such as a layoff, illness, disability, retirement, death, or severance from employment. However, this restriction does not apply to insurance contracts issued before January 1, 2009. A plan amendment adopted before January 1, 2009, to comply with these rules will not violate ERISA's anti-cutback rules.

b. The final regulations clarify that, as under profit-sharing plans, these restrictions do not apply to after-tax employee contributions (and earnings thereon), which can be distributed at any time.

2. *Severance From Employment*—The final regulations, like the proposed regulations, generally follow the 401(k) rules for determining whether there is severance from employment that permits distributions (or cuts off the ability to make elective deferrals). However, for purposes of distributions from a 403(b) plan, they provide that a severance occurs when an employee ceases to be employed by an eligible employer that maintains the 403(b) plan. Thus, for example, an employee transferring from a tax-exempt parent to a for-profit subsidiary, an employee of a public school transferring to another agency of the state, or a minister employed by a non-501(c)(3) organization entity ceasing to perform services as a minister but continuing to be employed by the same entity will all be considered to have severed employment. Conversely, the final regulations provide that a severance from employment is not triggered when an employee transfers from one 501(c)(3) entity to another that is treated as the same employer, or from one public school to another public school of the same state employer.

3. *Plan Termination Permissible*—The final regulations, like the proposed regulations, provide for the first time that 403(b) plans can be terminated, and that benefits can be distributed upon plan termination. However, this does not apply if another entity in the same controlled group makes contributions to another 403(b) plan under which two percent or more of the employees in the terminated 403(b) plan participate within 12 months before and after the date of plan termination. This "successor plan" concept is adopted from the 401(k) rules, but does not prohibit the maintenance or establishment of a 401(k) plan. To be considered terminated, all accumulated benefits must be distributed as soon as administratively practicable; for example, this can be satisfied by delivery to participants and beneficiaries of fully paid individual annuity contracts. (Presumably, ERISA programs will need to follow the rules under section 411(a)(11), which also apply pursuant to ERISA.)

a. The final regulations go on to add the requirement of vesting as of the date of plan termination (100 percent vesting).

b. Taxpayers can rely on this provision starting July 26, 2007, if all of the contracts issued under the plan at that time satisfy all of the applicable requirements of the final regulations (other than the written plan requirement). Accordingly, there is an opportunity to terminate 403(b) plans before the general effective date if certain steps are taken. Some organizations may use this as an opportunity to substitute 401(k) plans for their 403(b) plans.

4. *Employer Ceasing To Be An Eligible Employer*—The final regulations, like the proposed regulations, provide that if an employer ceases to be eligible to maintain a 403(b) contract, the plan can either be frozen (no further contributions made, but no immediate distributions) or terminated.

5. *Tax-Free Transfers And Exchanges*—The final regulations provide for three specific kinds of non-taxable exchanges or transfers of amounts in section 403(b) contracts, which are not subject to the distribution restrictions: (1) change of investments within the same plan (contract exchange); (2) plan-to-plan transfer with another employer plan receiving the exchange; or (3) transfer to purchase permissive service credit (or repayment to a governmental defined benefit plan). Any other transfer or exchange is (1) a taxable distribution, unless rolled over, if the exchange occurs after a distributable event, or (2) a taxable conversion to a section 403(c) nonqualified annuity contract if a distributable event has not occurred. However, the regulations authorize the IRS to issue future guidance of general applicability allowing contract exchanges in other cases, when the resulting contract has procedures that are reasonably designed to ensure compliance with section 403(b) (which will generally not include procedures that rely on employee certifications). Moreover, any contract exchanges that were permitted under Revenue Ruling 90-24 (and other existing legal requirements) and that occur on or before September 24, 2007, are not subject to these rules.

   a. *Contract Exchanges*—As under the proposed regulations, contract exchanges under the same plan may be made if conditions similar to the conditions for transfers are met. The preamble explains that this is intended for mere change of investment within the same plan. However, the final regulations expand the requirements—including to allow exchanges outside the plan—if (1) the other contract includes distribution restrictions that are no less stringent than those imposed on the contract being exchanged, and (2) the employer enters into an agreement with the issuer of the other contract to provide information in the future to comply with the Code, including information regarding employment status, severance from employment, hardship withdrawal, and deemed distribution of a loan.

   b. *Plan To-Plan Transfers*—The final regulations, like the proposed regulations, permit transfers between 403(b) contracts in separate plans, provided that both plans permit it, and generally reflect the rules of Revenue Ruling 90-24 that the benefit is not reduced and the transferee contract impose restrictions on distributions no less stringent than those imposed on the transferor.

      i. The final regulation does not address whether the distribution restrictions can be applied only to the amounts transferred (for example, if an amount is transferred from a custodial account to an annuity contract) and seems to suggest that the new contract rules apply to all amounts. If a transfer does not constitute a complete transfer of the participant's or beneficiary's interest in the 403(b) plan, the transfer must be treated as involving a pro-rata portion of the participant's or beneficiary's after-tax contributions. The final regulation also includes a safe harbor rule that the prohibition on reducing the accumulated benefit is satisfied if the exchange would satisfy section 414(l)(1) as a transfer of assets.

      ii. In a significant change from prior guidance, transfers by employees and beneficiaries may only be made to 403(b) contracts of the individual's employer. The final regulations expand this provision to include a former employer if the participant (or decedent, in the case of a beneficiary transfer) is an employee or former employee of the employer (or business of the employer) for the receiving plan.

c. *Permissible Service Credit Transfers*—The final regulations track the proposed rules and include only a "barebones" statement of the EGTRRA rule that permits 403(b) plan transfers to purchase permissive service credit under a governmental defined benefit plan (or to repay a prior cashout under such a plan). The preamble confirms that such a transfer will not violate the general in-service distribution prohibition for elective deferrals and earnings.

6. *Mergers And Transfers With Non-403(b) Plans Prohibited*—The final regulations reiterate the proposed regulations that 403(b) assets may not be merged with, or transferred to or from, other types of tax-favored retirement arrangements (such as 401(k) plans, 457 plans, defined benefit plans, etc.).

7. *401(a)(9) Grandfather For Pre-1987 Monies*—As under prior guidance, pre-1987 monies may be grandfathered from the statutory minimum distribution rules, but only if the amount is separately accounted for. The final regulations, like the proposed regulations, also indicate that the pre-1987 account balance will cease to be treated as such if it is distributed and rolled over to another 403(b) contract, but will be preserved if it is directly transferred to another 403(b) contract and separately accounted for. As with the proposed regulations, there is no mention of an age 75 beginning date for the pre-1987 portion, but this may continue to be permitted under interpretations of the regulatory "incidental death benefit" requirement.

a. The final regulations preserve the current rule that the required minimum distribution rules must be separately determined for each separate contract, but that distributions required under one 403(b) contract can be satisfied by a distribution from another 403(b) contract (similar to the rules for IRAs).

## G. DOL Guidance On Impact Of Final IRS Rules On Non-ERISA Programs

1. Under the DOL's longstanding safe harbor regulation (29 C.F.R. §2510.3-2(f)), annuity programs under section 403(b) that are funded entirely through salary reduction agreements generally are not subject to the provisions of ERISA if (1) employee participation in the arrangement is completely voluntary, (2) all rights under the annuity contract or custodial account are enforceable solely by the employee (or beneficiary or representative of either), (3) involvement by the employer is limited, and (4) the employer does not receive consideration other than reasonable amounts to cover proper expenses.

2. DOL Field Assistance Bulletin 2007-02 addresses the effect of the final 403(b) regulation on the status of 403(b) programs under the DOL's safe harbor regulation. In essence, the safe harbor regulation remains in effect and DOL emphasizes that compliance with the new regulation will not necessarily cause an annuity program to become covered by Title I of ERISA. Whether a 403(b) program is subject to ERISA will continue to be determined on a case-by-case basis.

3. DOL recognizes that the final IRS regulations require employers to engage in certain administrative activity that raises concerns regarding compliance with the safe harbor. Consistent with its past position on permissible activities to ensure IRS operational compliance (including participation in

EPCRS), the DOL notes that an employer's performance of required administrative functions, such as testing for compliance with nondiscrimination rules and contribution limitations, will not violate the safe harbor. Also, an employer's decision to discontinue a 403(b) program because it no longer intends to perform the administrative functions required by the IRS regulations will not result in a plan not otherwise covered by Title I of ERISA becoming covered. However, an employer's taking responsibility for, or exercising certain discretionary authority in, areas such as making plan-to-plan transfers; processing distributions; negotiating the program's terms with annuity providers; and making hardship distribution, qualified joint and survivor, loan eligibility, and QDRO determinations, would not be consistent with the safe harbor.

4. The FAB generally confirms that employers may comply with the new written plan document requirement without running afoul of the safe harbor. The DOL points out that a plan document may incorporate other documents, including insurance policies and custodial account agreements, by reference. The DOL expects that the written plan document requirement will be satisfied in this manner and specifies that an employer's development and adoption of a single document to coordinate administration among different issuers (without reference to a particular document) would not conflict with the safe harbor. Plan documents should identify the parties responsible for administrative functions, describe the employer's limited role, and allocate discretionary authority to the providers, the participants, or another third party.

5. Written plans may limit employees to exchanges of contract funds only among providers who have adopted the written plan, or transfers from the program of a former employer to that of a current employer. An employer may limit the number of providers to which it will forward salary reduction contributions provided that employees are permitted to transfer some or all of their contributions to any provider whose annuity contract or custodial account complies with the requirements of the Code and who agrees to the plan's division of tax compliance responsibilities between the employer and the provider.

6. We suspect that many employers who want to maintain the position that ERISA does not apply to their 403(b) programs may wish to take a "minimalist" approach to the plan document and other aspects of complying with the new IRS rules. However, it may be difficult to do this and also ensure that all tax compliance and administrative responsibilities are adequately delegated and followed.

## H. Effective Dates

1. The final regulations contain a hodgepodge of effective date rules.

   a. *General Rule*. The final 403(b) regulations are generally effective for taxable years beginning after December 31, 2008, and the final controlled group regulations are generally effective for plan years beginning after December 31, 2008. As noted above, the IRS Notice 89-23 "universal availability" safe harbor exclusions (other than the collective bargaining exclusion) may continue to be used in 403(b) plans that had them in place on July 26, 2007, until the taxable year beginning after December 31, 2009.

   b. *Collectively Bargained Plans*. 403(b) plans maintained pursuant to a collective bargaining agreement that is ratified and in effect when the final regulations were issued (July 26, 2007) are not subject to the regulations until the earlier of the date on which the bargaining agreement terminates (determined without any extensions after July 26, 2007), or July 26, 2010. This same rule applies to the elimination of the IRS Notice 89-23 "universal availability" collective bargaining safe harbor, but in no event will be prior to taxable years beginning after December 31, 2008.

c. *Church Plans*. 403(b) plans maintained by church-related organizations, if a church convention has the authority to amend the plan, must be amended by the first day of the plan year beginning in 2010. Good faith transition rules are also provided for loans made from a church plan retirement income account to a church employer before July 26, 2007.

d. *In-Service Distribution Rules In Insurance Contracts*. 403(b) insurance contracts issued before January 1, 2009, are not subject to the final regulations' new in-service distribution requirements. However, a contract may be amended (without violating any ERISA anti-cutback requirements, as applicable) to eliminate or reduce a right or benefit to comply with the final regulations' in-service distribution requirements.

e. *Restriction On Non-Annuity Contracts*. The final regulations' provisions restricting the use of life insurance, endowment, accident and health insurance, or property, casualty, or liability insurance contracts do not apply to contracts issued before September 24, 2007.

f. *Contract Exchanges Within A Plan*. The final regulations governing an exchange of contracts within the same plan do not apply to contracts received in an exchange on or before September 24, 2007, if the exchanges complied with existing IRS guidance in effect at the time of the exchanges.

g. *Coordination With Other Final Regulations*. Certain provisions in the final regulations relating to the section 415 maximum benefit limits and Roth contributions are made effective as of July 1, 2007, and January 1, 2007, respectively, to conform with recently issued final regulations in these two areas.

## I. Action Steps

1. Now that the final rules are out, employers and their advisors need a "game plan" to achieve compliance. We suggest the following 10 steps:

    a. Determine what the 403(b) "plan" is—identify all current contracts, custodial accounts, summary plan description-like documents, enrollment forms, distribution forms, collective bargaining agreements, service agreements, etc.

    b. Review and compare those documents for compliance with the regulations.

    c. Consider contacting providers to determine the availability of new plan documents and administrative support to comply with the regulations.

    d. Consider use of the IRS model 403(b) plan document (when issued).

    e. If changes or consolidation of providers is necessary to help achieve document and operational compliance with the 403(b) regulations—or to streamline overall administration—consider the fiduciary duties involved in selecting providers (note that this is always true for ERISA plans, but non-ERISA plans may be subject to common law or state law duties, as well as request-for-proposal process requirements).

f. If relying on the non-ERISA "safe harbor," consider whether the plan has satisfied it in the past and whether the plan will continue to satisfy it after changes to meet the final regulations. This assessment should reflect consideration of the benefits and burdens of ERISA compliance. We note in this regard that expanded Form 5500 reporting requirements are likely to apply beginning with 2009 plan years, and compliance with ERISA fiduciary requirements can be onerous.

g. Consider how the plan will satisfy the "universal availability" rule.

h. If the plan relies on the Notice 89-23 safe harbors, consider how to satisfy nondiscrimination rules after the final regulations are fully effective.

i. Determine the effective dates applicable to your plan and finalize all documents, service agreements, and investment changes before the applicable effective dates.

j. Stay tuned for further 403(b) guidance from the IRS, including the Employee Plans website (which already includes educational material on the new rules).

## Appendix

## Guidance On Transition To Final 403(b) Regulations, 403(b) Transfers And Exchanges, And Model 403(b) Plan Document

On November 27, 2007, the IRS issued additional 403(b) plan guidance in Rev. Proc. 2007-71 (Effective date: Dec. 17, 2007) that addresses a number of issues raised after the final 403(b) regulations were issued, including detailed guidance on "exchanges" between 403(b) contracts and custodial accounts, model plan document language for public school employers (which nonprofit employers may also be able to utilize, but without the same level of reliance), and guidance on when plan documents and amendments must be in place. Our understanding of this guidance is summarized below.

The Rev. Proc. also requested comments by March 16, 2008, on: the model language provided; additional model language that would be helpful to reflect plan features that are widely used; additional model language that would specifically address circumstances applicable to public schools; and model language on the vendor list requirement, and whether it should reflect the exchange transition rules contained in the Revenue. Procedure; and any other additional model language that might be added to the Revenue Procedure.

### A. Additional Transition Guidance On Exchanges

1. The final 403(b) regulations would eliminate the current, lenient Rev. Rul. 90-24 rules permitting transfers of 403(b) plan benefits (for both active and terminated participants) to and from other 403(b) contracts and accounts. Instead, the final 403(b) regulations allow two types of ongoing transfers or exchanges:

    a. *Exchanges*. An exchange is where one insurance contract is exchanged for another insurance contract. However, both contracts are considered part of an employer's 403(b) plan. As such, a 403(b) plan must enter into an information-sharing agreement to permit administration of the contract in accordance with the 403(b) requirements with any insurance contract provider with whom a contract exchange occurs (unless the provider is already eligible to receive ongoing contributions to the 403(b) plan and thus already coordinating such information).

b. *Transfers*. A transfer is where one insurance contract or custodial account under one 403(b) plan is transferred to another insurance contract or custodial account under another 403(b) plan. Unlike an exchange, a transfer is the actual transfer of assets from one 403(b) plan to another 403(b) plan, similar to a 401(a) to 401(a) plan-to-plan transfer.

2. The final 403(b) regulations specifically exempt pre-September 25, 2007, transfers and exchanges that were compliant with Rev. Rul. 90-24 from the new requirements. The new Rev. Proc. does not address those grandfathered contracts, but the Preamble to the final regulations indicated that they cannot be further subjected to another Rev. Rul. 90-24 exchange after September 24, 2007, without coming back under the new requirements. Otherwise, the original plan sponsor does not need to treat them as part of its plan, and they are not subject to the new requirements, although they remain subject to the statutory 403(b) requirements generally.

3. Perhaps more importantly, though, the final 403(b) regulations did not clearly address the extent to which the following types of contracts in existence before 2009 are subject to the exchange, transfer, and information sharing rules set forth in the final 403(b) regulations:

   a. *Contracts Issued By Former 403(b) Plan Providers*. From time to time, employers may elect to switch their 403(b) plan providers. Unlike 401(k) plans, where a change in provider typically results in a "mapping" over of investments from the old provider to the new, when this happens in a 403(b) plan, existing 403(b) contracts would typically be "left behind" with the prior provider ("Prior Provider Contracts") and new contracts established with the new provider. Because there was no Rev. Rul 90-24 transfer or exchange of the pre-existing contracts during the vendor transition, they did not fall within the grandfather of Rev. Rul. 90-24 transfers and exchanges under the final 403(b) regulations.

   b. *90-24 Transfers And Exchanges After September 24, 2007*. Some 403(b) plans and issuers have continued to permit transfers and exchanges after the end of the Rev. Rul. 90-24 grandfather period. These transfers and exchanges on and after September 25, 2007, but before January 1, 2009 ("Post-9/24/07 Contracts"), are not automatically exempt from the final 403(b) regulations requirements because they fell outside the Rev. Rul. 90-24 grandfather period.

   c. *Contracts Still Receiving Contributions But Which Will Not Be Compliant With 403(b) Final Regs By The Effective Date*. Many contracts and custodial accounts are currently part of 403(b) plans and receiving contributions, but, before the effective date of the final regulations, will not be in compliance (or cannot practically be brought into compliance) with the final regulations—most importantly the requirement that the employer (or its delegate) administer the contracts in the aggregate in compliance with 403(b).

   d. *Orphan Plans*. Many issuers currently maintain contracts for 403(b) plan participants who participate in 403(b) plans maintained by employers who have gone out of existence. Because there has been no grandfathered Rev. Rul. 90-24 transfer or exchange of these contracts, they are not exempt from the final 403(b) regulations.

4. The Rev. Proc. clarifies the rules applicable to these types of contracts as follows.

a. *Prior Provider Contracts*. Under Rev. Proc. 2007-71, the treatment of Prior Provider Contracts will depend upon several factors: when the contract was issued, when and whether contributions ceased, and whether the participant is a current or former employee.

i. *Prior Provider Contracts Issued Before 2005 Which Have Received No Contributions Since 2004*. Contracts or custodial accounts issued before 2005, and which have received no contributions since 2004, are essentially grandfathered. The plan sponsor need not take any actions with respect to such contracts. Presumably, the issuer has whatever responsibilities for 403(b) compliance (and reporting of loans and distributions) that it may have had before the final regulations, although the Rev. Proc. does not address that (except for former employees and beneficiaries).

ii. *Prior Provider Contracts Issued After 2004 And Before 2009—Current Employees.* These are grandfathered only if they do not receive contributions in a year after the year the contract was issued. (Though somewhat vague, it is understood that this is intended to mean that contributions have ceased at some point. For example, a contract issued in 2005 for which contributions cease in 2007.) The Rev. Proc. provides that an employer should make a "good faith effort" to include these Prior Provider Contracts in its 403(b) plan. "Good faith effort" can be evidenced by (1) an employer making an effort to collect information concerning the issuers of Prior Provider Contracts and notifying these issuers of the person in charge of administering the 403(b) plan for purposes of coordinating the 403(b) plan requirements, or (2) alternatively, an issuer making a reasonable, good faith effort to contact the person in charge of administering the 403(b) plan to exchange the information necessary to comply with the final 403(b) regulations before making a distribution or a loan.

b. *Prior Provider Contracts Issued Before Or After 2004 But Before 2009—Former Employees And Orphan Plans.* The Rev. Proc. provides that a 403(b) plan need not include contracts which (1) cease to receive contributions prior to January 1, 2009, and (2) are held on behalf of a person, who, on January 1, 2009, is a former employee of the employer or a beneficiary. For this purpose, an issuer can rely on the participant as to whether the participant is a former employee, assuming that reliance on that information is not unreasonable under the facts and circumstances. However, there is also a special rule for loans from such contracts. If a participant or beneficiary requests a loan from such a contract, the issuer may only make a loan after the issuer has made reasonable efforts to determine (1) whether the participant or beneficiary has in the prior 12 months had any other outstanding loan from any other qualified employer plan, and (2) if the participant or beneficiary has any such loan, the highest outstanding balance, so that the issuer can determine the 72(p) loan limits. If the employer is still in existence at the time of the loan, the issuer cannot merely rely on information from the participant or beneficiary about other outstanding loans. Arguably, this transition relief also means that non-loan distributions from contracts or accounts held for those who are former employees and beneficiaries as of January 1, 2009, are permitted without coordination with the employer if a participant makes the same certification of employment status applicable to loans described above (presumably because a termination of employment generally permits distributions).

c. *Post 9/24/07 Rev. Rul. 90-24 Exchanges; Other Contracts.* The Rev. Proc. clarifies that contracts and accounts which, after September 24, 2007, were the subject of a Rev. Rul. 90-24 exchange (referred to as an "intermediate contract"), may be re-exchanged by July 1, 2009, into a contract that is either part of an employer's 403(b) plan or issued by an issuer that has an information-sharing agreement in effect with the employer's 403(b) plan. In that case, the intermediate contract is not subject to the information-sharing requirements in the final 403(b) regulations, and is essentially outside the plan. Notably, this ability to correct by "re-exchange" into a compliant contract or account by mid-2009 is not expressly extended to contracts which otherwise fall out of these additional rules in Rev. Proc. 2007-71, for example, a contract issued in 2006 which ceased to receive contributions in 2007, but has not been the subject of a Rev. Rul. 90-24 exchange. However, because such contracts did not violate the prior transition relief regarding Rev. Rul 90-24 exchanges (*i.e.*, there was no Rev. Rul. 90-24 exchange), it is understood that the Service believes that such contracts did not need any transition relief, so long as they are compliant or are no longer in existence due to a re-exchange by January 1, 2009.

## B. Model Plan Language

1. The final 403(b) regulations require that 403(b) annuity contracts be issued under a written plan document that satisfies the final 403(b) regulations in both form and operation. When the final 403(b) regulations were issued, the IRS indicated that it would be publishing a "model" plan for use by public schools. The Rev. Proc. provides this model 403(b) plan.

2. Although the model 403(b) plan is intended for use by public school employers maintaining 403(b) plans, it can also be used by other employers maintaining 403(b) plans, although certain modifications may be necessary. The IRS has attempted to assist with this process by annotating the model 403(b) document to flag certain potential issues for public school employers.

3. The model language and its explanatory comments address a number of significant issues specific to public schools, including the following:

    a. *Reliance On Model Plan*. A public school employer's adoption of model language on a word-for-word basis or adoption of an amendment that is substantially similar in all material respects may be relied on as compliance with the final 403(b) regulations' written plan document requirement.

    b. *Public School Plan Private Letter Rulings*. As is the case with 457(b) eligible deferred compensation plans, a public school employer that requests a private letter ruling must clearly highlight which, if any, of its 403(b) plan provisions differ from the model plan language. Notably, a public school employer that adopts model language on a word-for-word basis or adopts an amendment that is substantially similar in all material respects is accorded the same enforcement protection status as the recipient of a private letter ruling.

4. The IRS also notes the following with respect to the model language as it relates to 403(b) plan sponsors in general:

    a. *Lack Of Incorporation By Reference*. The model language intentionally does not generally incorporate legal requirements by reference, although it does simplify certain language used in other IRS model documents or listings of required modifications, such as the rules governing rollover distributions.

It is not clear whether this rejection of incorporation by reference has broader implications for the drafting of non-model 403(b) plans.

b. *Scope Of The Model Language.* Public school and non-public school employers will want to review the model language carefully before adopting it to ensure that only relevant model plan provisions are included in their 403(b) plans.

c. *Adoption By Non-Public School Employers*. Non-public school employers may use model language to assist in their compliance with the written 403(b) plan document requirement. However, because the model plan does not address a number of potential 403(b) plan requirements, including ERISA requirements (for those employers subject to ERISA), matching contributions, or certain church plan issues, individual sponsors may need to modify and add to the model language.

d. *Non-Public School Plan Private Letter Rulings*. A non-public school employer that adopts the model plan language is not treated as if it has a private letter ruling on its 403(b) plan. However, the addition of model language to an employer's 403(b) plan that already has received a favorable private letter ruling will not affect reliance on the favorable private letter ruling before the effective date of the final 403(b) regulations.

5. The model plan document provides helpful model language in a number of areas, including the following:

a. *Automatic Enrollment (Model Plan Section 2.2(b))*. The IRS recently issued proposed regulations on eligible and qualified automatic contribution arrangements. The model plan document appears to provide the first IRS "approved" version of automatic enrollment language consistent with these proposed regulations, although it caveats that additional guidance may require further changes.

b. *Contract Exchanges—Information Sharing (Model Plan Section 6.4).* The model plan document provides further explanation when an information-sharing agreement is required and when and what specific information must be exchanged. A distinction is drawn between changes in investments within the plan (where there may be no formal information-sharing agreement, but it is being done *de facto*), and an exchange to a vendor not otherwise eligible to receive contributions under the plan, for which an information-sharing agreement will be required. The employer and the vendor must from time to time provide each other with information necessary for the contract or account to satisfy 403(b), including:

i. The employer providing information as to whether the participant is still an employee and notifying the vendor when the participant has terminated;

ii. The vendor notifying the employer of any hardship withdrawal so that the six-month suspension of deferrals (when applicable) can be imposed;

iii. The vendor providing information to the employer or other vendors concerning the participant's or beneficiary's other 403(b) accounts or qualified plan benefits to enable the vendor to determine the amount of any plan loans or rollover accounts that are available to satisfy the financial need requirement of the hardship distribution rules;

iv. Information necessary to satisfy other tax requirements, including (but presumably not necessarily limited to) (1) the amount of any plan loan outstanding in order for a vendor to determine whether an additional plan loans satisfies the 72(p) limitations, and (2) the amount of after-tax employee contributions in order for the vendor to determine the amount of a distribution that is includable in gross income.

v. In addition, if a vendor ceases to be an approved vendor eligible to receive deferrals, it will be required to enter into an information-sharing agreement.

c. *Documentation Of Vendors (Model Plan Section 7.3).* The model plan document provides for the maintenance of a separate list of current and former vendors. This list is considered part of a 403(b) plan. Notably, and similar to 401(k) plans, the list need not be in the formal "document" itself, which may provide flexibility to plan sponsors who decide to adopt a liberal contract exchange policy or who change vendors from time to time.

d. *Missing Participants (Model Plan Section 9.7).* The model plan document provides missing participant language that is similar to the missing participant correction rules described in the most recent update of the Employee Plans Compliance Resolution System.

6. *Issues For Issuers*. The model language may raise issues for providers to the extent it provides terms different from the contract. Such areas may include the extent to which separate accounting is required for separate plan beneficiaries, and the extent to which the payment to incompetents and lost participant provisions may conflict with the contract. And, of course, the information-sharing agreement provisions go beyond what many issuers may currently be providing.

## C. Timing Of Amendments

1. The final 403(b) regulations do not provide a "remedial amendment period" during which 403(b) plan amendments may be adopted retroactively.

2. Unlike the transition rules provided when the final 457 regulations were put into effect, amendments must be:

   a. Adopted before a relevant requirement goes into effect, but no earlier than the first day of the first taxable year beginning after December 31, 2008 (in most cases January 1, 2009 would be the deadline); and

   b. Effective as of their required effectives date under the final 403(b) regulations (with operational compliance commencing as of that date).

3. In other words, there is no remedial amendment period for plan amendments, unless specifically provided by a change in the law. In that regard, the Rev. Proc. specifically states that 403(b) amendments related to the Pension Protection Act of 2006 amendments are subject to the PPA amendment timing rules (generally 2009 for most plans, 2011 for governmental plans).