403(b) Perspectives

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Insights into the Administration of §403(b) Tax-Sheltered Arrangements

WINTER 2012

Form 8955-SSA and ERISA 403(b) Plans

The IRS extended the deadline for filing Form 8955-SSA for both the 2009 and 2010 plan years and also released guidance that provides relief for reporting certain separated participants. As with Form 5500, the Form 8955-SSA filing requirements apply to 403(b) plans that are subject to ERISA. The annual filing is used to report former employees who are participants that have a deferred vested benefit under the plan. This type of reporting is a new requirement for 403(b) plan sponsors and applies for plan years beginning on or after December 31, 2008.

Deadline

Form 8955-SSA must be filed for each plan year by the last day of the seventh month following the last day of that plan year (plus extensions). In order to provide plan sponsors with additional time to complete the new Form 8955-SSA (and since the Form was not available from the IRS until recently), the due date for filing the 2009 and 2010 Forms 8955-SSA was extended by the IRS until the later of (1) January 17, 2012 or (2) the due date that generally applies for filing the Form 8955-SSA for the 2010 plan year. The January 17, 2012 due date may not be extended by filing Form 5558.

IRS Relief

In regard to reporting pre-2009 assets on a Form 8955-SSA, 403(b) plan sponsors were hopeful the IRS would offer the identical relief granted by the DOL for reporting pre-2009 assets on Form 5500. This is due to the difficulty plan sponsors face in gathering financial information on old annuity contracts and custodial accounts, especially since they may have been transferred elsewhere by a RR 90-24 transfer without employer knowledge prior to the final 403(b) regulations of 2007. The IRS recently issued an FAQ relating to Form 8955-SSA that contained two clarifications that should ease the Form 8955-SSA reporting requirements for 403(b) plan sponsors. The following is a summary of the IRS's guidance.

1) Does the Form 8955-SSA filed for 2009 by a 403(b) plan sponsor have to report participants who separated from service prior to 2008 with a deferred vested benefit under the plan?

Generally, no. 2009 Form 8955-SSA should only report participants that separated from service in 2008. Participants with a 403(b) contract, who separated prior to 2008, are not required to

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be reported on the 8955-SSA Form being filed for 2009 (or for any subsequent year).

However, a participant should be reported on the Form 8955-SSA filed for 2009 if that participant separated from service in a year before 2008 and began receiving payments under the contract or account, but the payments stopped in 2008 before all of the participant's benefits were paid.

2) Does a 403(b) plan sponsor have to report all participants who separated from service after 2007 with a deferred vested benefit under the plan?

No. The reporting relief set forth in DOL Field Assistance Bulletin (FAB) 2009-02 that exempted certain annuity contracts and custodial accounts from being treated as 403(b) plan assets for Form 5500 purposes will also apply for Form 8955-SSA purposes.

For this exception to apply:

- The contract or account would have to have been issued to a current or former employee before January 1, 2009;
- The employer would have ceased having 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;
- All of the rights and benefits under the contract or account would be legally enforceable against the issuer or custodian by the participant without any involvement by the employer; AND
- The participant would have to be fully vested in the contract or account. ■

Comparative Investment Chart under ERISA 404(a)(5)

The following paragraph is a quotation from the preamble of the ERISA 404(a)(5) Final Regulations, Federal Register of October 20, 2010, pages 64921 and 64922 that is applicable to ERISA 403(b)s.

"One procedural question raised by commenters, for example, on behalf of Code section 403(b) plans, was whether each issuer of designated investment alternatives could prepare its own comparative chart for distribution and send it directly to participants and beneficiaries, such that, for example, a participant in a plan with three investment issuers would receive three charts, stating that this would greatly simplify the plan administrator's task in meeting the comparative format requirement. It is the view of the Department that nothing in the final regulation precludes plan administrators from combining multiple documents for purposes of satisfying their obligation to provide the information required by this rule in a comparative form. For example, a chart could be divided such that one part presented stock funds while another part presented bond funds, as in the Department's model format. Similarly, a chart could group investment alternatives by issuer. On the other hand, the Department also is of the view that permitting individual investment issuers, or others, to separately distribute comparative charts reflecting their particular investment alternatives would not be furnishing information in a form that would facilitate a comparison of the required investment information and, therefore, would not comply with the requirements of paragraph (d)(2)."

For Further Information, Contact: Michael Del Conte, Office of Regulations and Interpretation, Employee Benefits Security Administration, (202) 693-8510.

Richard Hochman, President of McKay Hochman, contacted Mr. Del Conte and discussed the issue of providing the comparative chart when there is more than one vendor. Mr. Del Conte stated that if each of the vendor's charts is in a format that satisfies the regulations, the employer may provide the various vendor charts to his/her employees, as long as the employer provides all the vendor's charts in one envelope to the employee. ■

403(b) Questions on Your Mind

Following are some **Frequently Asked Questions** we thought would make an interesting article.

1) Can a 403(b) plan be merged into a 401(k) plan?

No, 403(b) plans cannot be merged into 401(k) plans. 403(b) plans can be terminated under Revenue Ruling 2011-7. Then, if the 401(k) plan permits rollovers from 403(b) plans, the individuals can roll the 403(b) assets into the employer's 401(k) plan.

2) Can participants with individually owned annuity contracts be forced out of a 403(b) plan upon plan termination?

Yes. Revenue Ruling 2011-7 provides that the employer may "deliver" a fully paid annuity contract to a 403(b) participant upon the plan's termination. In effect, this renames the contract as the individual's 403(b) since the employer's name is removed. This is not a distributable event unless the individual takes payment from the annuity.

3) An employer sponsors a 403(b) plan to allow for elective deferrals and a profit sharing plan for making employer contributions. Do plans need to be aggregated for top-heavy testing?

No, the 403(b) plan is not subject to top-heavy testing.

4) My 501(c)(3) entity sponsors a 403(b) and we want to exclude "employees who normally work less than 30 hours per week" from being eligible to contribute elective deferrals, as opposed to the "less than 20 hours per week" exclusion listed in the adoption agreement. Is that allowable?

No, the "less than 20 hours per week" exclusion is the maximum hours exclusion that can be set for excluding employees from making elective deferrals under the universal availability rules.

5) I have a client who sponsors both a 403(b) and a 457(b) plan and can contribute elective deferrals to both plans (albeit one at a time). A participant took a hardship withdrawal from the 403(b) plan and was suspended from participating in the plan for six months as a result. Can the participant contribute to the 457(b) plan in the meantime?

No. The participant is restricted from contributing to "all plans maintained by the employer" for the six months. In cases where the 457(b) plan is sponsored by the same entity (or related company as part of a controlled group), the participant cannot contribute to either plan until the suspension expires.

6) If a not-for-profit that currently has a 403(b) plan were to start up a business unit that is not tax-exempt, could they maintain their 403(b) plan, or would they have to switch to a 401(k) plan?

They can still maintain the 403(b) plan, but the new "for profit" business unit they created will not be allowed to participate in the 403(b). They could start a 401(k) plan for the new business unit, and can either keep the 403(b) plan active, or terminate the 403(b) plan, and make the 401(k) eligible to everyone in order to avoid maintaining two separate plans. ■

2012 COLA Limits

The IRS has released the cost-of-living adjustments applicable to the dollar limitations for pension plans (and other items) for the 2012 tax year. Limits related to retirement plans increased for the first time since 2009.

IRS Limits	2012	2011
403(b), 401(k), SARSEP, and 457 plan deferrals/catch-up	$17,000/$5,500	$16,500/$5,500
SIMPLE plan deferrals/catch-up	$11,500/$2,500	$11,500/$2,500
Compensation defining highly compensated employee*	$115,000	$110,000
Compensation defining key employee/officer	$165,000	$160,000
Defined benefit plan limit on annual benefits	$200,000	$195,000
Defined contribution plan limit on annual additions	$50,000	$49,000
Maximum compensation limit for allocation and accrual purposes	$250,000	$245,000
IRA contributions/catch-up	$5,000/$1,000	$5,000/$1,000

* 2011 amount for use in 2012 plan year tests

Traditional IRA Changes

There also are changes in 2012 to the adjusted gross income (AGI) "phase-out" limits for determining what portion of contributions to a traditional IRA is deductible. For taxpayers who are active participants filing a joint return [or a qualified widow(er)], the deduction begins to phase out with a combined AGI of $92,000 (up from $90,000). For taxpayers other than "married filing separate returns," the deduction phase-out begins at $58,000 AGI (up from $56,000). For a taxpayer who is not an active participant but whose spouse is an active participant, the deduction phase-out begins at a combined AGI of $173,000 (up from $169,000).

Roth IRA Changes

There is also an AGI-based limitation for determining the maximum Roth IRA contribution. For married taxpayers filing a joint return [or a qualified widow(er)], the contribution phase-out begins at $173,000 (up from $169,000). The AGI phase-out for single taxpayers begins at $110,000 (up from $107,000).

Saver's Credit

The AGI limit for eligibility for the Saver's Credit goes from $56,500 to $57,500 for married couples filing jointly, while the same limit goes from $28,250 to $28,750 for married individuals filing separately and single taxpayers.

430 Election

For those employers with defined benefit plans who make the special election under Internal Revenue Code Section 430, the definition of excess compensation goes from $1,014,000 to $1,039,000. ■