

Section 403(b) Final Regulations: A Compliance Outline

The final Section 403(b) regulations require compliance by all subject tax deferred annuity arrangements maintained for the benefit of employees of tax-exempt and governmental organizations. The general compliance deadline is the first taxable year beginning on or after December 31, 2008, which will typically be January 1, 2009.

While revised plan documents incorporating numerous provisions responsive to the 403(b) final regulations will of course be required, there are a number of related administrative issues involving plan service providers that also need to be considered. Of primary concern is the requirement that all 403(b) annuity contracts and custodial account agreements comply with separate requirements of the 403(b) final regulations. Plan administrators and HR staff will have to deal with 403(b) service providers to make sure this requirement is satisfied. Because the administrative challenge can be substantial, consider each of the following as an outline of action steps to be followed between now and the end of the year to help assure 403(b) compliance:

1. Determine if *all* annuity contracts and custodial account agreements incorporate required provisions on (a) vesting, (b) nontransferability, (c) limits on elective deferrals (currently \$15,500), (d) minimum required distributions (Code Section 401(a)(9)), (e) direct rollover options for participants, and (f) limits on any permissible annuity contract death benefits. Also make sure current annuity contracts do not include life insurance or endowment contracts (pre-September 24, 2007 arrangements are grandfathered).
2. Determine if service providers will assist in the preparation of compliant plan document(s) to assure implementation by December 31, 2008. No retroactive plan amendments are permitted under the final Section 403(b) regulations, so the revised plan documents *must* be formally adopted by the compliance deadline, typically December 31, 2008.
3. Determine if service providers will make written disclosures in accordance with Department of Labor fee disclosure regulations proposed on December 12, 2007 *in advance of entering into any service agreement*. These disclosures will assist plan fiduciaries who are

charged with determining that the plan pays only fees which are “reasonable” in amount. Such disclosures include:

(a) All services provided and, with respect to each service, the compensation and manner of payment (will compensation be billed to the plan or deducted, either directly or indirectly, from plan investments, through “revenue-sharing” with mutual funds or otherwise);

(b) The identity of any affiliates, subcontractors and any other parties that receive any compensation charged against plan investments or charged on a transactional basis (such as finder’s fees, brokerage commissions and “soft dollar” expenditures) and the amount of such compensation;

(c) Whether or not the provider (or an affiliate) has a financial, referral or other relationship with a money manager, broker, other client of the provider, other service provider to the plan or any other party that may create a conflict of interest in performing services for the plan;

(d) A description of any incentive, performance based, float or other contingent compensation that the provider may be able to earn; and

(e) A disclosure of the provider’s policies or procedures to address conflicts of interest and to prevent those conflicts from being a factor in performing services for the plan.

4. Determine if service providers will warrant compliance with fee disclosure regulations and the reasonableness of fees in any service agreement, and indemnify employer and other plan fiduciaries with respect to any noncompliance.

5. Determine if any service provider will assist with the selection and monitoring of plan investment options as the plan’s designated “investment manager.” Consider engaging a financial institution to serve in this capacity in order to diminish the fiduciary responsibilities of the employer or plan administrator who are otherwise charged with selecting and monitoring plan investment options.

6. Determine if any service provider is rendering investment advice to participants and, if so, will provider agree to formally act as a fiduciary advisor pursuant to an “eligible investment advice arrangement” including a requirement that the provider render “objective” investment advice not tied to incentive compensation.

7. Section 403(b) plans subject to ERISA that have 100 or more participants must have an annual financial audit beginning with the 2009 plan year. This audit will be a component of the plan’s annual report on IRS Form 5500. Private auditors need to begin

compiling comparable data before the end of the 2008 plan year. Determine if any internal procedures need to be changed to facilitate the compilation of data for purposes of the annual audit.

Andrew S. Williams
330 N. Wabash Avenue
Suite 1700
Chicago, IL 60611
(312) 755-3145
awilliams@agdglaw.com
www.benefitslawgroupofchicago.com

Andrew S. Williams has practiced in the employee benefits and ERISA arena since ERISA was passed in 1974. He has been recognized by his peers through a survey conducted by Leading Lawyers Network as among the top 5 percent of employee benefit lawyers practicing in Illinois. He maintains a website at www.benefitslawgroupofchicago.com with additional updates, commentary and analysis of benefits and employment topics. The above material is intended for general information and promotional purposes, and should not be relied on or construed as professional advice. Under the Illinois Rules of Professional Conduct, the above information may be considered advertising material. The transmission of this information is not intended to create, and receipt of it does not create, a lawyer-client relationship.