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## **Does Your 403(b) Plan Need an Audit?**

*Is your 403(b) a Large Plan? What does this mean for you and your Plan?*

By Janet Nahorney, CPA  
Partner  
BlumShapiro

The IRS has significantly modified regulations for 403(b) tax sheltered annuity plans for years beginning after December 31, 2008. Under the new regulations, 403(b) plans no longer have the limited reporting exemption which they have had for years. ERISA 403(b) plans will be subject to many additional requirements including full Form 5500 reporting and financial statement audits for large plan filers. Generally, plans with more than 100 participants (large plans) at the beginning of the plan year must engage an independent auditor and are required to attach the audited financial statements to their Form 5500.

Completing the full Form 5500 and, if required, the audited financial statements will increase the internal administrative time needed to administer your plans as well as increase external fees to Third Party Administrators (TPAs) and, if required, the auditors. In some cases, plan sponsors are engaging independent consultants to assist them in establishing administrative procedures and preparing necessary documents to comply with the new regulations. This comes at a time when internal resources are already stretched and budgets are extremely tight.

As if the burden and learning curve associated with the increased fiduciary and reporting requirements are not enough, this is the first year for mandatory e-filing for all plans. Plan years beginning after December 31, 2008 are required to file electronically with the Department of Labor's (DOL's) new EFAST2 system. As this is the first year, plan sponsors will have to work with their TPAs to sign up for the new electronic filing system and coordinate who is responsible for submitting and following up to make sure your filing has been accepted.

### **How do you determine whether or not you need an audit?**

In order to determine whether you can file as a "small plan" (no audit requirement) or must file as a "large plan" (with the audit requirement), you have to determine how many plan participants you have at the beginning of your plan year. As mentioned above, plans with, generally, more than 100 participants (large plans) at the beginning of the plan year must engage an independent auditor. Following is the "80-120 Rule" for plans whose participant counts hover around 100. It provides relief from bouncing in and out of the audit requirement, but even better it can help plan sponsors stay out of the audit requirement if their participant count stays at or below 120 at the beginning of the year.

#### **80-120 Participant Rule (Large Plan vs. Small Plan):**

**Under full Form 5500 requirements:** If the number of participants reported on line 6 of the Form 5500 is between 80 and 120, and a Form 5500 was filed for the prior plan year, you may elect to complete the return/report in the same category ("large plan" or "small plan") as was filed for the prior return/report. Thus, if a return/report was filed for the 2008 plan year as a "small plan," including the Schedule I, and the number entered on line 6 of the 2008 Form 5500 is 100 to 120, you may elect to complete the 2009 Form 5500 and

schedules in accordance with the instructions for a "small plan" (no audit requirement). Once your participant count on Line 6 is 121 or greater, you must file as a "large plan," and your participant count on Line 6 must be below 100 before you can file as a "small plan."

**Applicable for 403(b) Plans:** As 403(b) plans had limited Form 5500 reporting requirements in prior years and the number of participants was not reported on the 2008 Form 5500, 403(b) plans with 120 participants or less as of the beginning of the plan year can use the "80-120 rule" as if they had completed a full Form 5500 for 2008 and complete the 2009 Form 5500 as a "small plan." Plans with over 120 participants at the beginning of the plan year must complete the 5500 as a "large plan."

### **Who is a Participant?**

**Active participants** - those individuals currently employed with the plan sponsor who are covered under the plan. **It is important to note that for 401(k) and 403(b) plans an active participant includes eligible participants who have not elected to defer into the plan.** When working with your TPA to determine the participant count, they may only have those actively deferring into the plan and not those eligible but not deferring; both are active participants.

**Retired or separated participants** - those individuals who are no longer employed by the employer but who are receiving benefits or are entitled to receive benefits under the Plan

**Deceased participants** - those individuals who are deceased and have one or more beneficiaries receiving or entitled to receive benefits

The details of these requirements can be found in the instructions to Form 5500 under "What to file and the detailed instructions for Lines 6 and 7. You should work with your TPA to determine your participant count and review the information with your auditor. If you are just under the 120 you should work with your TPA to manage terminated accounts to try to stay out of the audit requirement.

### **Transition Relief**

The Department of Labor issued Field Assistance Bulletin No. 2009-02 (FAB 2009-02) providing guidance and transition relief on annual reporting requirements for 403(b) contracts issued prior to January 1, 2009. FAB 2009-02 provides that the plan administrator may exclude from Form 5500 reporting annuity contracts and custodial accounts for participants that meet the following:

- The contract was issued prior to January 1, 2009
- The employer ceased to make or have an obligation to make contributions to the contract of a current or former employee before January 1, 2009
- All rights and benefits under the contract are legally enforceable against the custodian or insurer without involvement by the employer
- The individual owner of the contract is fully vested in the contract or account

Contracts that meet the above criteria may be excluded from reporting for participant count information as well as excluded from assets on the Form 5500.

### **5500 Expanded Reporting for 403(b) Plans**

As mentioned above, for plan years beginning January 1, 2009 and later, 403(b) plans will be required to complete a full Form 5500. In previous years, 403(b) plans were required to file Form 5500 but only had to report the name of the plan and plan number, plan sponsor name, address, employer identification number and the 403(b) plan code 2L or 2M. The full Form 5500 and required schedules is significantly more in depth and will require additional preparation time and cost. Below is a list of some of the information and schedules to be included in your Form 5500 for 2009:

- Form 5500 - Participant Count Information - Required for all plans

- Schedule A - Insurance Information
  - Required if any benefits under the plan are provided by an insurance company or similar organization. This includes investment contracts such as pooled separate accounts and guaranteed investment contracts.
- Schedule C - Service Provider Information for "large plans"
  - Service providers that received \$5,000 or greater are required to be included
  - Expanded reporting requirements for the 2009 Schedule
  - Information regarding the termination of an accountant or actuary
- Schedule D - Participating Plan Information
  - Required for plans with collective trusts, pooled separate accounts, master trust investment account or 103-12 IEs
- Schedule H - Financial Information for Large Plans
  - In addition to the financial information for the plan, the schedule includes the accountant's opinion information and questions regarding transactions made during the year
- Schedule I - Financial Information for Small Plans
- Schedule R - Retirement Plan Information
  - Includes information on plan distributions
- Form 5500-SF - Short Form Annual Return – New for 2009, is a simplified annual reporting form for use by certain Small Plans. Plans meeting the conditions below may file the Form 5500-SF instead of the Form 5500. To be eligible to use Form 5500-SF, **the plan must meet all of the following conditions:**
  - Be a small plan (i.e., generally have fewer than 100 participants at the beginning of the plan year)
  - Be exempt from the audit requirement
  - Have 100% of its assets invested in investments with a readily determinable fair value
  - Hold no employer securities
  - Not be a multiemployer plan.

### When is the Form 5500 Due?

Form 5500 is due by the end of the 7th month after the plan year-end with the option of an additional 2 1/2 month extension. For example, for December 31st plan year-ends, the Form 5500 must be filed by July 31st or October 15th with the Form 5558 (Form 5500 extension).

#### **Just a Few Reminders for Plan Years Beginning January 1, 2009:**

- An executed plan document **MUST** have been in place by December 31, 2009
- Talk to your Third Party Administrators, Custodians or Trustees about procedures, timing and fees for 2009 Form 5500 reporting and providing financial information for the audit, if required
- Contact us immediately if you have an audit requirement for your plan
- Plan administrative procedures should be established and internal controls over those procedures documented to provide for proper plan fiduciary oversight
- Employee contributions must be deposited as soon as administratively feasible but not later than the 15th business day of the month following the payroll check date
- Updated Summary Plan Descriptions (SPD's) should be distributed to all participants

Please contact Janet Nahorney at [jnahorney@blumshapiro.com](mailto:jnahorney@blumshapiro.com) or 860.561.6831 if you have questions or if we can be of assistance with your plan needs.