

WISS Not-for-Profit Update

IRS Grants Temporary Reprieve to Sponsors of 403(b) Plans



The IRS has issued Notice 2009-3, which grants temporary relief to sponsors of 403(b) plans. The Final Regulations were published in July of 2007. Under the regulations, a plan document was required to be in place by January 1, 2009. The deadline has been extended to December 31, 2009.

This relief is for the plan document requirement only. All the operational changes under the Final Regulations are still required on a “good faith” basis. Further, the relief is only for 2009. It does not excuse operational defects that occurred either before or after 2009.

The IRS will consider Plan Sponsors as meeting the 403(b) requirements if:

- The plan operates under a reasonable interpretation of the Final Regulations during 2009.
- Best efforts to retroactively correct any operational failures occur during 2009.
- All the other changes required by the Final Regulations are adopted, i.e. the establishment of a Pension Committee, meeting fiduciary responsibilities, expanded 5500 and audit requirements.

For plans established and maintained by tax exempt entities, the Employee Retirement Income Security Act (ERISA) may or may not apply depending upon the plan itself. Tax exempt sponsored 401 qualified plans, including 401(k) plans, are subject to ERISA. For 403(b) programs, ERISA coverage will depend upon the structure of the program. In general, programs with minimal employer involvement, no employer contributions, and a number of investment providers are generally not subject to ERISA. However, programs with employer matching or supplemental contributions, employer direction or limited investment choices, are subject to ERISA.

Compliance with ERISA begins with knowing the rules and the ERISA Quick Compliance Checklist on page 2 may help to assess your plan’s compliance. But remember, it is not a substitute for a comprehensive compliance review.

What role does the Department of Labor (DOL) play?

It is the responsibility of the DOL to enforce ERISA. In some ways, the DOL has similar responsibilities to that of a plan fiduciary—they keep a close eye on employees to ensure that plan participants’ best interests are adequately served.

What are the main responsibilities of a Fiduciary?

ERISA imposes specific duties upon plan fiduciaries. A plan fiduciary must act solely in the interest of plan participants and beneficiaries.

In ensuring that the plan provides the participants and beneficiaries with the benefits due them and in defraying reasonable plan expenses, a plan fiduciary must:

- *Demonstrate Prudence:* Act with care, prudence and diligence
- *Diversify Investments:* Diversify the investment options of the plan so as to minimize the risk of large losses.
- *Adhere to the Plan:* Act in accordance with the documents and instruments governing the plan

Can a person be held personally liable for not fulfilling their obligations?

ERISA section 409 provides that “any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach...”

What is an ERISA Fidelity Bond?

ERISA requires each fiduciary or other person who handles plan assets to be insured by a fidelity bond. The required Fidelity Bond provides coverage for loss of property of an insured plan resulting directly from dishonest or fraudulent acts committed by an employee. The amount of the bond must be at least 10% of the value of the funds handled (minimum of \$1,000) and generally need not be greater than \$500,000.

Additionally, under ERISA, fiduciaries may be held personally liable for breach of their responsibilities in the administration or handling of employee benefit plans. Fiduciary liability insurance, however, is not required.

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ERISA Quick Compliance Checklist

If you answer "No" to any of the questions below, you should review your plan's operations because you may not be in full compliance with ERISA's requirements.

1. Have you provided plan participants with a Summary Plan Description, summaries of any material modifications of the plan, and annual summary financial reports?
2. Do you maintain copies of plan documents at the principal office of the plan administrator for examination by participants and beneficiaries?
3. Do you respond to written participant inquiries for copies of plan documents and information within 30 days?
4. Does the Plan operate in accordance with the Plan/Trust Documents?
5. Does your plan have a written investment policy statement?
6. Do the plan fiduciaries periodically monitor plan investments and prudently evaluate whether to keep or replace them and maintain adequate documentation of their reviews?
7. Are the plan investments compared to its peer group over varying periods of time?
8. Are the plan's investments diversified so as to minimize the risk of large losses?
9. Has a plan fiduciary determined that the investments are prudent and solely in the interest of the plan's participants and beneficiaries, and evaluated the risks associated with plan investments before making the investments?
10. Is your plan covered by a fidelity bond against losses due to fraud or dishonesty?
11. If the plan permits participants to select the investments, has the plan provided them with enough information to make informed decisions?
12. Does the plan provide and track on-going employee investment education?
13. Are the service provider arrangements reasonable and is the cost and quality of those services in line with the industry?
14. Do the plan fiduciaries meet regularly and keep well documented minutes of those meetings?
15. Is there a prudent fiduciary decision making process and is there sufficient documentation to support their decisions?
16. Did the employer or other plan sponsor send participant contributions to the plan on a timely basis?
17. Did the plan pay participant benefits on time and in the correct amounts?

If you answer "Yes" to any of the questions below, you should review your plan's operations because you may not be in full compliance with ERISA's requirements.

1. Has the plan engaged in any financial transactions with persons related to the plan or any plan official? (For example, has the plan made a loan to or participated in an investment with the employer?)
2. Has the plan official used the assets of the plan for his/ her own interest?
3. Have plan assets been used to pay expenses that were not authorized in the plan document, were not necessary to the proper administration of the plan, or were more than reasonable in amount?

If you have any questions on this topic contact Theresa Dominianni at tdominianni@wiss.com or 973-994-9400.



Save The Date - March 3, 2009

7:30am-9:30am

Seminar: 403(b) Regulations

Expanded Plan Sponsor Responsibilities for 2009 and Beyond

- 403(b) Audit Requirements and Issues
- Challenges with Initial Year Testing and Improving the Process
- Meeting Fiduciary Responsibilities in a Bear Market
- Participant Education and Communication Best Practices

Location: Park Avenue Club-184 Park Avenue, Florham Park, NJ

For more details contact Francine Henry at fhenry@wiss.com or (973) 994-9400.



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