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## New Transition Relief for 403(b) Annual Reporting

By B. David Joffe

The Department of Labor (DOL) has recently issued a bulletin that provides guidance on the Form 5500 Annual Return/Report requirements for 403(b) plans. 403(b) plans are annuity-based retirement plans for employees of public schools, employees of certain tax-exempt organizations, and certain ministers. The Form 5500 is the annual report that is generally required to be filed with the DOL for an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (ERISA).

The new requirements will primarily be of concern for tax-exempt employers that have 403(b) plans with employer contributions. Certain plans that only provide for salary reduction agreements and have limited employer involvement may not be subject to the reporting requirements under a DOL safe harbor regulation. Also, governmental and non-electing church plans are not subject to the reporting and other requirements under ERISA.

In July 2007, the Department of the Treasury issued final regulations for 403(b) plans. The DOL separately published Form 5500 revisions and related final regulations. The DOL regulations are generally effective for plan years beginning on or after January 1, 2009. Previously, 403(b) plans were only subject to limited reporting obligations. However, under the new rules, beginning with their Form 5500 for the 2009 plan year, "large" ERISA-covered 403(b) plans (generally plans with 100 or more participants) are required to file audited financial statements with their Form 5500; small 403(b) plans (generally fewer than 100 participants) are eligible for a waiver of the audit requirement. Small 403(b) plans will for the most part be able to use the Form 5500-SF (Short Form 5500), a new simplified form for small plans invested in certain types of assets, although even small 403(b) plans must report aggregate financial information regarding the plan.

In the Bulletin, the DOL recognizes the concern of plan administrators regarding the difficulty of obtaining financial information, particularly with regard to certain pre-2009 contracts and custodial accounts to which the employer is no longer making employer contributions or forwarding employee salary reduction contributions. In the absence of transitional relief, some 403(b) plans would be faced with the possibility that the DOL may reject the return as incomplete due to the administrator's inability to identify all participant contracts and accounts to be included as plan assets and obtain other financial information required to be included in the plan's financial statements. As a related matter, the DOL generally rejects Form 5500 filings with adverse, qualified, or disclaimer opinions (other than disclaimers pursuant to the limited scope audit exception). The American Institute of Certified Public Accountants, the national professional organization for certified public accountants, informed the DOL that plan accountants generally will issue qualified or disclaimer opinions for large 403(b) plans subject to ERISA's audit requirements until sufficient time has elapsed to allow the auditors to be confident that the assets of the plan being reported are materially correct.

Accordingly, the DOL has issued the Bulletin to provide transitional relief. The relief is limited to the Form 5500 requirements, including the requirement for large plans to include as part of their annual report the report of an independent qualified public accountant.

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Specifically, the administrator of a 403(b) plan does not need to treat annuity contracts and custodial accounts as part of the employer's plan for purposes of the annual report if:

- the contract or account was issued to a current or former employee before January 1, 2009;
- the employer ceased to have 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 are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer; and
- the individual owner of the contract is fully vested in the contract or account.

Moreover, employees with only contracts or accounts that are excludable from the plan's Form 5500 or Form 5500-SF under the transition relief do not need to be counted as participants covered under the plan for Form 5500 annual reporting purposes. The DOL also will not reject a Form 5500 on the basis of a "qualified," "adverse" or disclaimed opinion if the accountant expressly states that the sole reason for such an opinion was because such pre-2009 contracts were not covered by the audit or included in the plan's financial statements.

The DOL also recognizes in the Bulletin that some plans may encounter compliance issues unrelated to pre-2009 contracts. Acknowledging that there may be instances when full annual reporting compliance by plans may not be possible for the 2009 plan year, the guiding principle "must be to ensure that appropriate efforts are made to act reasonably, prudently, and in the interest of the plan's participants and beneficiaries." The DOL takes the position that, although ERISA's annual reporting requirements may result in added costs to a plan, an administrator of a 403(b) plan should be able to prepare an acceptable 2009 Form 5500 or Form 5500-SF without undue expense or burden. The DOL expects that accountants engaged to conduct audits will notify plan administrators of questions, issues, and irregularities discovered as part of the audit engagement that could materially affect the plan's audit expenses and views the provision of such information as helpful to ensure that the use of plan assets to defray annual reporting costs are reasonable, prudent, and in the interest of the plan's participants and beneficiaries.

If you have any questions about the Bulletin or any other employee benefits matters, please contact David Joffe or one of the other attorneys in the Employee Benefits & Executive Compensation Group at Bradley Arant Boult Cummings LLP.

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