

FAQ on 403(b) plan Form 5500

Clarification on Form 5500 filing requirements

January 2010

Which 403(b) arrangements must file Form 5500?

All 403(b) plans that are subject to Title I of ERISA must file a Form 5500. Neither the regulations nor any subsequent guidance has changed the status of a 403(b) plan regarding whether or not it is subject to Title I of ERISA.

Whether a plan satisfies the safe harbor is a function of many factors, as described in the Appendix: Safe Harbor Description that follows this Q&A.

For additional reference, see Department of Labor Field Assistance Bulletin 2007-02 ("FAB 2007-02") at <http://www.dol.gov/ebsa/regs/fab2007-2.html> which addresses how the Department of the Treasury/Internal Revenue Service regulations governing Internal Revenue Code § 403(b) tax-sheltered annuity programs affect the status (ERISA/Non-ERISA) of such programs under the Department of Labor's safe harbor regulation at 29 C.F.R. § 2510.3-2(f).

If a plan is subject to ERISA, what are the requirements for filing annual reports?

All 403(b) arrangements subject to Title I of ERISA must file a Form 5500 return. The determination of which arrangements must file has not changed, although some plan sponsors not previously subject to Title I of ERISA may have elected, in light of the final 403(b) regulations, to make the plan subject to Title I of ERISA.

For plan years beginning 1/1/2009 or after, however, the detailed filing requirements have changed considerably for 403(b) plans.

Old Rule: 403(b) plans subject to ERISA must file Form 5500. For plan years beginning before January 1, 2009, 403(b) arrangements subject to Title I of ERISA (and not otherwise subject to an exception), were not required to provide detailed information. Instead, they were only required to complete a very limited number of items in the previous Form 5500, and they were not required to obtain an audit.

New Rule: 403(b) arrangements subject to ERISA generally must file an expanded Form 5500, including schedules, and may be subject to audit. For plan years beginning January 1, 2009, or later, 403(b) arrangements covered by ERISA will no longer be exempt from filing appropriate schedules and will no longer be exempt from obtaining an audit unless they qualify for an exception or an audit waiver.

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Helpful links:

The 2009 Form 5500, Schedules and Instructions can be found at:

Notice of Adoption of Revisions to Annual Return/Report Forms:

<http://www.dol.gov/ebsa/regs/fedreg/notices/20071116.pdf>

This link includes the changes for the 2009 Form 5500.

Form changes:

2009 Form 5500 Changes — Final Rule — can be found at:

<http://www.dol.gov/ebsa/regs/fedreg/final/20071116.pdf>

I am hearing about expanded reporting on plan fees and expenses. What is that about?

There is a new and expanded Schedule C as well as some revisions to Schedule A. These additions will greatly expand that data gathered for plan fees and expense.

FAQs about the 2009 Form 5500 Schedule C:

http://www.dol.gov/ebsa/faqs/faq_scheduleC.html

Advisory Opinion 2005-02A:

<http://www.dol.gov/ebsa/regs/aos/ao2005-02a.html>

(Information pertaining to Schedule A)

Who is responsible for filing the Form 5500 return?

The plan's designated plan administrator is responsible for filing the return. If there is no plan administrator, the employer is responsible for filing the return.

When is the Form 5500 series return due?

The Form 5500 return is due by the end of the seventh month following the close of the plan year. An extension of up to 2½ months may be obtained if requested prior to the end of the initial filing deadline by filing Form 5558.

Following is a link to the document on the IRS Web site: <http://www.irs.gov/pub/irs-pdf/f5558.pdf>

What if the Form 5500 series return has not been filed in the past or is filed late?

So long as the plan administrator or the employer has not received an inquiry from the Department of Labor concerning the late filing, there is a voluntary correction program available.

Here are some useful links concerning delinquent filings and correction programs:

Delinquent Filer Voluntary Compliance Program Fact Sheet:

http://www.dol.gov/ebsa/newsroom/0302fact_sheet.html

Delinquent Filer Voluntary Compliance Program FAQs:

http://www.dol.gov/ebsa/faqs/faq_dfvc.html

Delinquent Filer Voluntary Compliance Program Online Calculator and E-pay:

<http://www.dol.gov/ebsa/calculator/dfvcmain.html>

Delinquent Filer Voluntary Compliance Program Final Rule:

<http://www.dol.gov/ebsa/regs/fedreg/final/2002007514.htm>

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Should I file the Form 5500-SF or the Form 5500?

Generally, to be eligible to file the Form 5500-SF, a plan must meet all of the following criteria:

1. The plan covered fewer than 100 participants at the beginning of the plan year.
2. The plan does not hold any employer securities at any time during the plan year.
3. At all times during the plan year the plan is 100% invested in certain secure, easy-to-value assets.
4. The plan is eligible for the waiver of the annual examination and report of an independent qualified public accountant under 29 C.F.R. 2520.104-46.

What pension plans are eligible for an audit waiver under the Small Pension Plan Security Amendments?

Pension plans with fewer than 100* participants at the beginning of the plan year are eligible for an audit waiver if they meet the conditions under 29 C.F.R. 2520.104-46.

*There is some flexibility for plans that have between 80 and 120 participants. These rules are described in detail in the Form 5500 Instructions.

For more detailed information, please go to 29 C.F.R. 2520.104-46:

http://www.dol.gov/dol/allcfr/ebsa/Title_29/Part_2520/29CFR2520.104-46.htm

Frequently asked questions on the Small Pension Plan Audit Waiver regulation:

http://www.dol.gov/ebsa/faqs/faq_auditwaiver.html

How do I find an auditor?

Obtaining a referral from another plan sponsor is often a good way to identify an auditor. Additionally, the DOL Web site has some information on this subject.

Selecting an auditor for your employee benefit plan:

<http://www.dol.gov/ebsa/publications/selectinganauditor.html>

How and where are Form 5500 returns filed?

Electronic Filing:

The name for the DOL electronic filing system is EFAST. In recent years, electronic filing has been optional. For plan years beginning January 1, 2009, all Form 5500 series returns must be submitted electronically. For plan years beginning January 1, 2009, and later, the system is known as EFASTII.

EFAST Web site: <http://www.efast.dol.gov/>

ERISA Filing Acceptance System:

This is a link to the electronic filing information by the Department of Labor Electronic Filing of Annual Reports; final rule:

<http://www.dol.gov/ebsa/regs/fedreg/final/2006006331.htm>

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Where can I find VALIC's SAS70 report?

Once you are logged into your account on Plan Sponsor Online, you can find the SAS70 under:

Resources

Information and Literature

If you are not yet registered for PSO, you can register online at VALIC.com and click on the appropriate selection in the "Links to Login" box in the lower left-hand corner. The system will guide you to the registration page and prompt you through the process with your User ID and Password. Contact our Plan Sponsor Service Team at 1-888-478-7020 if you have any problems with getting a User ID and Password set up.

If you currently use our contribution remittance systems, e-Remit or Retirement Manager, you can call 1-800-853-6399 and select option 4 to request access to Plan Sponsor Online.

Additional useful EBSA Web site links

Reporting and Filing Compliance Assistance web page:

http://www.dol.gov/ebsa/compliance_assistance.html#section5

Reporting and Disclosure Guide: <http://www.dol.gov/ebsa/pdf/rdguide.pdf>

Form 5500 Filing Tips for Pension Plans, Welfare Plans & Direct Filing Entities:

<http://www.dol.gov/ebsa/form5500tips.html>

Frequently Asked Questions about reporting delinquent participant contributions on the Form 5500:

http://www.dol.gov/ebsa/faqs/faq_compliance_5500.html

Appendix to FAQ

Description of 403(b) Safe Harbor

The rules governing the 403(b) plan safe harbor are set forth in the Department of Labor regulations, at 29 C.F.R. 2510.3-2. Important provisions include, but are not limited to, the following subsections:

(f) Tax sheltered annuities. For the purpose of Title I of the Act and this chapter, a program for the purchase of an annuity contract or the establishment of a custodial account described in Section 403(b) of the Internal Revenue Code of 1954 (the Code), pursuant to salary reduction agreements or agreements to forego an increase in salary, which meets the requirements of 26 C.F.R. 1.403(b)-1(b)(3) shall not be “established or maintained by an employer” as that phrase is used in the definition of the terms “employee pension benefit plan” and “pensions plan” if

- (1) Participation is completely voluntary for employees;
- (2) All rights under the annuity contract or custodial account are enforceable solely by the employee, by a beneficiary of such employee, or by any authorized representative of such employee or beneficiary;
- (3) The sole involvement of the employer, other than pursuant to paragraph (f)(2) of this section, is limited to any of the following:
 - (i) Permitting annuity contractors (which term shall include any agent or broker who offers annuity contracts or who makes available custodial accounts within the meaning of Section 403(b)(7) of the Code) to publicize their products to employees,
 - (ii) Requesting information concerning proposed funding media, products or annuity contractors;
 - (iii) Summarizing or otherwise compiling the information provided with respect to the proposed funding media or products that are made available, or the annuity contractors whose services are provided, in order to facilitate review and analysis by the employees;
 - (iv) Collecting annuity or custodial account considerations as required by salary reduction agreements or by agreements to forego salary increases, remitting such considerations to annuity contractors and maintaining records of such considerations;
 - (v) Holding in the employer’s name one or more group annuity contracts covering its employees;
 - (vi) Before February 7, 1978, to have limited the funding media or products available to employees, or the annuity contractors who could approach employees, to those which, in the judgment of the employer, afforded employees appropriate investment opportunities; or
 - (vii) After February 6, 1978, limiting the funding media or products available to employees, or the annuity contractors who may approach employees, to a number and selection which is designed to afford employees a reasonable choice in light of all relevant circumstances. Relevant circumstances may include, but would not necessarily be limited to, the following types of factors:
 - (A) The number of employees affected,
 - (B) The number of contractors who have indicated interest in approaching employees,
 - (C) The variety of available products,
 - (D) The terms of the available arrangements,
 - (E) The administrative burdens and costs to the employer, and
 - (F) The possible interference with employee performance resulting from direct solicitation by contractors; and
- (4) The employer receives no direct or indirect consideration or compensation in cash or otherwise other than reasonable compensation to cover expenses properly and actually incurred by such employer in the performance of the employer’s duties pursuant to the salary reduction agreements or agreements to forego salary increases described in paragraph (f) of this section.

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