



Multnomah
GROUP

Institutional Retirement Plan Consulting


The New Regulatory Environment for Sponsors of 403(b) Plans

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Overview of 403(b) Issues

- Overview of the New Regulations
- Plan Operations: Universal Availability and ACP Testing
- Impact of New Regulations on the Fiduciary Responsibilities of the Board of Trustees, Institution, and Administration
- Assessing the Application of ERISA and its Regulatory Implications
- Prudent Governance Policies and Procedures
- Plan Document and Design Challenges
- Adjunct Instructors, Coaches, and Substitutes
- Multiple Vendor vs. Single Vendor
- Investment Performance
- Plan Cost Benchmarking and Fee Reasonableness
- Audit Preparedness and the new Form 5500 Rules
- Participant Educational Challenges


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Overview of the New §403(b) Regulations

- New §403(b) Regulations
 - Final regulations published July 26, 2007 (72 FR 41128)
 - Effective for plan years beginning on or after January 1, 2009
 - Reduces the extent to which 403(b)s differ from other salary reduction arrangements
 - Employers are plan sponsors
 - Employers are responsible for plan administration

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Summary of New §403(b) Regulations

- Who can sponsor §403(b) Plans?
 - Organizations exempt from tax under §501(c)(3)
 - Public schools under §170(b)(1)(A)(ii)
 - Included in this category:
 - Public Schools
 - State Colleges
 - Universities
 - Certain ministers



Regulation Highlights

- Written Plan Document
- Both form and operation must satisfy §403(b)
- Plan termination availability
- Optional Plan provisions allowed – hardships; loans; acceptance of rollovers; catch-up contributions etc.
- Universal availability
- Contract exchanges



Written Plan Document

- Plan Document Requirements
 - Must have been adopted on or before December 31, 2009
 - Eligibility, benefits, investment alternatives, time and form of payment
 - Employee or employer contributions
 - Annuity contracts and custodial accounts
- Plan Document Options
 - Loans, hardship distributions
 - Plan-to-plan or annuity contract transfers or exchange provisions
 - Acceptance of rollovers
 - Auto enrollment
 - Delegation of responsibility for administrative functions
 - Catch up contributions
 - Vesting



Written Plan Document

- No remedial amendment period
- IRS planning to launch their opinion letter program for prototype and volume submitter plans April 1, 2010

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Non Discrimination Requirements – Universal Availability

- Church Plans Exempt
- All employees of the employer must be permitted to make salary deferrals except:
 - Nonresident aliens
 - Employees eligible to make deferrals to another 403(b), 401(k), or 457(b) plan
 - Students under a work study program
 - Employees working less than 20 hours per week
- Cannot exclude collectively bargained employees
- Notice requirements annually for participants to make or change cash of deferred elections

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Impact of New Regulations on the Fiduciary Responsibilities of the Board of Trustees, Institution, and Administration

- Employee Retirement Income Security Act Accountability
 - 501(c)(3) not subject to ERISA
 - No employer contributions
 - 501(c)(3) subject to ERISA
 - Employer Contributions
 - Exercises Control - DOL FAB No. 2007-02
 - School District
 - Religious Organization
- Implications of ERISA Plan
 - Fiduciary Duties
 - Disclosure Requirements
 - Information Returns (Form 5500)

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Non-ERISA Fiduciary Standards

- Murky definition of roles
- No clear definition of responsibilities
- Significant variance in remedies
 - Civil court action
 - State common-law fiduciary statutes
 - Damages
 - Lack of legal precedent
- ERISA was originally the accumulation of various state fiduciary laws into an overriding Federal regulatory framework

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403(b) Plans – DOL Compliance

Fiduciary Duties

Functional Definition (what did they do?) ERISA Section 3(21)

TO THE EXTENT THAT ANY ENTITY OR INDIVIDUAL:

- Exercises any discretionary authority or discretionary control respecting the management of such plan or disposition of its assets
- Renders investment advice for a fee or other compensation, direct or indirect
- Has any discretionary authority or discretionary responsibility in the administration of such plan
- Special relationship of trust requiring undivided loyalty (in a unique position to harm)

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Fiduciary Standards

Core Standards of Conduct

ERISA §404(a)

- Duty of loyalty (exclusive benefit rule)
- Duty of prudence (not prudent man standard)
- Duty to diversify investments
- Duty to follow plan document to the extent that they comply with applicable laws

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Fiduciary Standards

Monitoring Plan Operations & Vendor Services

- Not required as such
- Fundamental obligation
- Must stay in touch with plan operations
- Delegation of responsibility does not equal allocation of liability – responsible fiduciary is ultimately liable

Documentation

- Do it religiously
- Be sure of what is being documented
- Critical to establishing actions taken

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Compliance with Plan Document

Following Plan Document

- Definition of Compensation
- Eligibility to Participate
- Loans
- Hardships
- Multiple Vendor Salary Deferral Limits
- MRDs
- In-Service Distributions

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Plan Investments

Monitor

- Investment Policy Statement
- Fund selection
- Ongoing fund performance & expenses
- Significant management & cash flow changes
- Style drift
- Organization Changes/Challenges
- Participant investment behavior
 - Participant levels
 - Diversification of investments

Adjust – appropriately

- Use policy statement guidelines
- Use benchmarks
- If the provider is changed, what about the black-out period in a volatile market (*Enron issue*)

Document

- Investment Policy Statement
 - Have one
 - Keep it up to date
- Minutes of meetings

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Fiduciary Issues in Not-For-Profit Education

- Institution as Plan Administrator or Named Fiduciary
 - Board Liability w/o Oversight
 - Delegated Committee
 - Level of Risk to Staff and Faculty
 - Coverage for Named Fiduciaries
 - Fiduciary Committee vs. Steering Committee
 - Process for Investment Oversight
 - TIAA Fixed
 - Stable Value Analysis
 - Credit Quality and Risk

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Fiduciary Delegation and Plan Management

Limited Delegation of Responsibilities Related to the Administration of the Retirement Benefit Program to the extent that it does not Financially Impact the Institution

Board of Trustees

BOT Retains Responsibility for Development of the Plan Document that Defines Levels of Benefit and Eligibility for Benefits

Institution

Retirement Plan Committee

Administrative Committee Appointed by the Board of Trustees, Principal, or President through the Delegation Above That Assumes Responsibility for the Proper Administration and Governance of the Plan

Retirement Plan Advisory Committee

Faculty, Staff, and Administrative Committee Appointed by the President or Principal that Advises the RPC on Issues Related to the Management of the Plan

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ERISA Disclosure Requirements

- ERISA provides for many “safe harbors” to mitigate the risk to employers and fiduciaries
 - Qualified Default Investment Alternative (QDIA)
 - 404(c)
 - Summary Annual Report
 - Summary Plan Description
 - Summary of Material Modification
 - Sarbanes-Oxley
- Who is accountable for disclosure preparation and release
 - Institution vs. Vendor
 - Group Contracts / Service Agreements

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Plan Document and Design Challenges

- Single Plan vs. Multiple Plans
 - Many institutions have two plans
 - Tax-Deferred Annuity (Deferral Plan)
 - ERISA governed or State governed
 - Defined Contribution Plan (Employer Contribution Plan)
 - Exclusively ERISA governed
 - Occasionally new plans have been established for each vendor
 - TIAA-CREF
 - Fidelity
 - Vanguard
 - Valic

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Overview of Not-For-Profit Education Plan Issues

- Compensation
 - W-2 for staff
 - Contract wages
 - Calendar year vs. Contract year
 - Sabbatical wages
 - Grants
 - Coaching
- Eligible Employees
 - Deferral vs. Employer Contributions
 - Coaches
 - Substitutes
- Crediting Past Service
 - "Eligible Employers"
 - Validating Eligibility
 - Immediately Preceding
 - Ad-Hoc to Full Faculty
 - Returning Faculty
- Hours of Service
 - Tracking hours for part-time faculty
- Method for Enrolling Participants who Fail to Make an Election
 - QDIA Protections
- Disability Compensation
 - Employer Contributions
 - Funding
- Plan Administrator
 - Institution vs. Delegation
 - Indemnification

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Multiple Vendor vs. Single Vendor Solutions

- Burden has shifted from participants and vendors to Sponsor
 - Plan operation matches plan documentation
 - Contract exchanges
 - In-service withdrawals
 - Loans
 - Distributions
 - Form of benefit
- Retirement services is priced by scale
- Service costs may be impacted

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Investment Performance

Monitor

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Plan Investments

Adjust – appropriately

- Use policy statement guidelines
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Document

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Plan Investments

Communicate with Participants

- ERISA self-direction and a volatile economy is a new frontier
 - Concern is real
 - Participants are not, and do not seek to be professional money managers
- Risks to fiduciaries are real
 - Failure to select appropriate funds
 - Failure to monitor fund performance
 - Failure to evaluate fees paid on funds

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Plan Cost Benchmarking and Fee Reasonableness

Basic Rules

- Paying expenses from plan assets is a fiduciary decision
- Expenses must be reasonable and necessary for the administration of the plan
- Administration Expenses would not have been incurred "but for" the administration of the plan
- Settlor functions
- Benchmark continually

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Audit Preparedness and the new Form 5500 Rules

- Currently, there are minimal Form 5500 filing requirements for ERISA §403(b) plans
- Non-ERISA plans – no Form 5500 reporting
- For the 2009 year (due 2010)
 - Form 5500 required
 - More schedules and information
 - Potential audit requirement (>100 employees)

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Form 5500 Filings


- Plan Level Balance Sheet
 - First day of the plan year 2009
 - Last day of the plan year 2009 / 2010
 - Statement of Changes 2009 / 2010
- Schedule C Insurance Information / Revenue Sharing Information
 - Revenue Sharing and Brokerage Compensation in Excess of \$5,000

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FORM 5500 FILING CALENDAR			
Plan Year End	Form 5500 due date	Form 5500 due date with extension	Financial statement periods to be presented*
December 31, 2009	July 31, 2010	October 15, 2010	December 31, 2009 plan year (with comparative December 31, 2008 statement of net assets available for benefits)
June 30, 2010	January 31, 2011	April 15, 2011	June 30, 2010 plan year (with comparative June 30, 2009 statement of net assets available for benefits)
September 30, 2010	April 30, 2011	July 15, 2011	September 30, 2010 plan year (with comparative September 30, 2009 statement of net assets available for benefits)

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Reporting Requirements – IRS/DOL

- Plan must file full Form 5500
- §403(b) plans treated like §401(k) plans
- All schedules must be completed (as appropriate) to report plan activity and investments:
 - Large plans – Financial info in Schedule H
 - Small plans – Financial info in Schedule I
- Audited Financial Statements (Large Plans)


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Reporting Requirements – IRS/DOL

- Financial statements and footnotes of large plans (Schedule H) must be audited by an independent auditor
- All returns must be filed electronically beginning with 2009 plan year (DOL EFAST system)
- Increased oversight by IRS and DOL

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Large Plan vs. Small Plan

- Large Plan – Over 100 participants on the first day of the plan year. Can use the 80-120 rule as if you had been filing.
- Participants – eligible employee (universal availability) plus former employees with plan balance
- Large plans file financial information on Schedule H, small plans on Schedule I

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Who is a Participant?

- Current employees who are eligible for the Plan (don't forget universal availability)
- Former employees with account balances in the Plan

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What is an Independent Audit?

- Independent examination of management's financial statements
- Results in a report
 - Unqualified
 - Disclaimer
 - Limited scope
 - FAB 2009-02
- Consideration of controls
- Communication to management and "those charged with governance"
 - Statement on Auditing Standards No. 112/115
 - Statement on Auditing Standards No. 114
- Who in the organization will be involved in the audit?

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DOL Limited Scope

- 29 CFR 2520.103-8
 - In certain circumstances, the DOL says the Plan Administrator (that's the sponsor) can request that the auditor limit the scope of their audit to exclude investments and related earnings
- Note: If full scope, audit procedures would be required to be performed over investments and related earnings.

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DOL Limited Scope

- DOL will only accept limited scope if:
 - The investments are held by a qualified institution (insurance, trust company, bank or similarly regulated institution)
 - The qualified institution can certify the information is "complete and accurate"
 - Certification is signed by an officer of the qualified institution (not a subsidiary, related entity, or agent (unless agreement exists))
- *If the above are not in place, get a new certification or perform a full scope audit*

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Limited Scope Audit - What Does the Auditor Do?

- Auditor compares the certified *investment* information to the financial statements
 - Custodian investment statement(s) including all investments at year-end and activity during the year by financial statement caption
- Auditor still considers contributions, distributions, loans, etc.

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Audit Opinions

Acceptable types of Audit Opinions

- Unqualified
- Disclaimer
 - Limited scope
 - FAB 2009-02

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DOL Field Assistance Bulletin # 2009-02

- The administrator of a 403(b) plan does not need to treat annuity contracts and custodial accounts as part of the employer Title I plan or as plan assets for purposes of ERISA's annual reporting requirements provided that:
 - 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.
- In addition, the Department of Labor will not reject a Form 5500 on the basis of "qualified", "adverse" or disclaimed opinion if the accountant expressly states that the sole reason for such an opinion was because such pre-2009 contract were not covered by the audit or included in the plan's financial statements.

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Other Items Requested During Audit – Not All-Inclusive

- Plan document (executed)
- Plan amendments (executed)
- Summary Plan description
- Investment policy
- Loan policy
- Copies of investment or insurance contracts (executed)
- Vendor service agreements, including information sharing agreements (executed)
- Documentation of internal controls – sponsor and vendor
- Materials provided to new employees
- All communication to employees regarding the Plan
- All communication with DOL or IRS
- Meeting minutes from oversight committee
- Form 5500

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403(b) Financial Statement Audits Issues

- FAS-157 Memo and Disclosure Preparation
 - May not be provided by the vendor
- Contribution of Benefits
 - Multiple Payroll Cycles
 - Multiple Vendors
 - "As soon as reasonably practical"
- Accuracy of Benefit Payments
 - Multiple Samples
- Vendor Controls
 - Limited Scope Audit
- Mismatch in Plan Document and Plan Operation
 - Tax Qualification
 - Corrective Action
- Financial Controls
 - Appropriate separation of roles

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Participant Educational Challenges

- Cost of Employee Communication is High
- Multiple Vendor Challenges
 - Sales vs. Education
 - Continuity of message

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Contract / Operational Constraints

- "Fixing" 403(b) Plans is Challenging
 - Individual vs. Group Contract Structures
 - Contingent Deferred Sales Charges
 - Interest Rate Adjustments for Fixed Products
 - Fixed-Term Annuities
 - Collateralized Contract Loans
 - Outsourced Employee Communication

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10 Steps a Plan Sponsor Should Take

1. Receive a Limited Delegation from Board of Trustees to Administration
2. Formalize a Retirement Plan Committee / Advisory Committee
3. Consider Independent Legal Experts for Document Review
4. Assess Current Gaps for Plan Testing, Document, Operation, Contracts, and Compliance
5. Demand Fee Disclosure and Transparency
6. Develop Retirement Plan Policy Statements
7. Be Willing to Put Your Services Out to Bid
8. Negotiate a Better Fee / Service Structure
9. Consolidate Providers
10. Talk to Plan Auditors

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Resources

- www.IRS.gov/ep
- www.DOL.gov/ebsa
- www.aicpa.org/ebpaqc

www.MultnomahGroup.com
(888) 559-0159

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