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**403(b) Plans - New Rules:  
Are you ready for significant changes?**

# Today's Presenters

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Ginny is a senior compliance consultant with the Dallas office of Milliman. As head of the Compliance Consulting group within the Southern employee benefits practice, she provides clients with technical and practical guidance on a wide range of retirement plan issues. Her experience encompasses plan design and installation, government reporting and disclosure, plan terminations, mergers and acquisitions, IRS and DOL audits, nondiscrimination testing and ERISA technical research. Ginny is a frequent speaker and writer on topics affecting 401(k), 403(b) and 457(b) plans. Ginny has a BBA from Texas Tech University and holds the ASPPA QPA, QKA and QPFC designations. (Telephone number: 214-863-5128; email address: [ginny.boggs@milliman.com](mailto:ginny.boggs@milliman.com))

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# Final 403(b) Regulations - Overview

The information contained herein and presented is not intended to constitute the rendering of legal, tax, investment, or accounting advice. Application to specific circumstances should rely on further professional guidance.

# Final 403(b) Regulations - Overview

- First updated guidance since the original 1964 403(b) regulations
- Issued July 23, 2007 (published in the Federal register July 26, 2007)
- These long-awaited regulations finalize the proposed regulations issued November 16, 2004

# Final 403(b) Regulations - Overview

- General effective date - tax years beginning on or after January 1, 2009
- *Note, however, that many of the provisions in the new regulations are existing rules. In many instances, the new regulations simply reflect prior changes in the law since the old 1964 regulations were issued.*
- Guidance may be relied on before 2009, but only if its application is consistent and reasonable
- Formalizes conformity of 403(b) plans with other employer-based retirement plans – e.g., 401(k) and governmental 457(b)

# Final 403(b) Regulations - Overview

Highlights of the final regulations include:

- Written plan document requirement
- Stricter contract exchange and transfer rules
- Nondiscrimination requirements – “universal availability rule”
- How to establish who is the “employer” for nondiscrimination testing
- Timing of deposits of employee deferrals
- Plan termination
- Investments



# Written Plan Document Requirement

- Previously applied only to ERISA plans
- DOL F.A.B. No. 2007-02 issued July 24, 2007
- More than one vendor

# Written Plan Document Requirement

Written plan must include all material provisions:

- eligibility
- benefits
- contribution limits
- available investment contracts and accounts
- loans
- hardship withdrawals
- distributions
- fund transfers
- rollovers



# Written Plan Document Requirement

- IRS will publish a model 403(b) plan document
- Increases the potential liability and responsibility of 403(b) employers/plan sponsors
- Failures could result in adverse tax consequences to all plan participants

# Exchange and Transfer Rules

After September 24, 2007, this Revenue Ruling became obsolete

- Former Rules – Revenue Ruling 90-24 Exchanges
  - Participant could exchange his 403(b) contract or account to another vendor (even one not offered through the employer!)
  - Created individual plans for each employee that the employer is not generally able to monitor for compliance

# Stricter Exchange and Transfer Rules Emerge

## New Stricter Transfer Rules

- Now involves Employer coordination and monitoring of vendors
- Requires an agreement between the employer and vendor establishing the means to share employment and plan benefit information
- Ensure compliance with the employer's plan provisions, IRS limitations and IRS rules governing loans, distributions and withdrawals

# Stricter Exchange and Transfer Rules Emerge

## Plan-to-Plan Transfers

- Participant must be a current or former employee to transfer monies in
- Must retain the same (or stricter) distribution restrictions
- Both plans must allow the transfer
- 403(b) funds also can be transferred to purchase permissive service credits in a governmental defined benefit plan

# Stricter Exchange and Transfer Rules Emerge

## Plan-to-Plan Transfers

- Cannot transfer to non-403(b) plan
- Cannot merge with a 401(k) or 457(b) plan
- The Rollover exception



# Nondiscrimination Requirements

## Universal Availability Rule Basics

- Granted to one: Granted to all
- Allowable exclusions
- \$200 annual minimum contribution requirement allowed
- Annual “effective opportunity”



# Nondiscrimination Requirements

## Universal Availability – Under New Rules

- eliminates prior allowable exclusions
- collectively bargained employees
- visiting professors
- government employees who make one-time elections
- employees working under a vow of poverty

# Nondiscrimination Requirements

## Universal Availability – Under New Rules

- Previously no “bright-line” test for the less than 20 hours per week exception
- Bright-line test of less than 1,000 expected hours of service in 12-month period (coupled with the less than 20 hours per week)
- Effectively Available – employees must be given “meaningful” notice of their opportunity to defer in 403(b)



# Nondiscrimination Requirements

## Universal Availability – Under New Rules

- Will have to be included if they ever complete 1,000 hours in the preceding one-year measurement period (as defined in the plan)
- *Note: there is no change in ERISA plans, which may not use the 20 hours per week exclusion and may only exclude “part-time” employees under the 1,000 hours rule described above*



# Nondiscrimination Requirements

## Universal Availability – Under New Rules

- For the plan to be effectively available, a “meaningful notice” must be provided to all eligible employees at least annually
- The “meaningful notice” must inform employees of their right to participate in the 403(b) plan and provide an effective method for making and changing their deferral elections

# Nondiscrimination Requirements

## Universal Availability – Under New Rules

- Elective deferrals to 403(b) plans remain free from ADP testing
  - Subject to universal availability
  
- Employer contributions and after-tax employee contributions continue to be subject to ACP testing and other nondiscrimination testing
  - No longer have safe harbors available
  - Can no longer rely on good faith compliance

# Nondiscrimination Requirements

## Controlled Group Issue – Under New Rules

- Common control exists between a tax-exempt organization and another organization if at least 80% of the directors or trustees of one organization are controlled by the other (direct or indirect control)
  - Good faith compliance no longer applies
- Combined organizations are treated as a single employer
  - Affecting applicable nondiscrimination testing and contribution limits
- Permissive aggregation allowed
  - Single plan covering employees from each organization

# Deposit Requirements

- Salary deferrals must be transferred to the 403(b) plan's investment vehicle as soon as reasonable
- 15 business day example, or as soon as reasonably feasible
- The new rule has applicability only for non-ERISA plans
- No change for plans that are subject to ERISA

# Plan Termination

- Prior rules did not allow for plan terminations
- The new regulations allow 403(b) plans to be terminated, provided
  - all plan benefits are distributed to participants as soon as practicable after termination, and
  - the employer does not contribute to another 403(b) plan for 12 months
- Participants have the right to roll over such distributions to another eligible retirement plan (i.e., a 403(b), 401(k), 457(b) governmental plan, or IRA)
- 100% vesting required at plan termination

# Plan Termination

- As stated above under the transfer rules, employers that freeze or terminate a 403(b) plan cannot make a decision to merge or transfer 403(b) plan assets into a 401(k) or 457(b) plan (participant must choose!)
- Therefore, an employer may not make plan-level transfers of 403(b) plan assets to its 401(k) plan, although it may encourage participant-level rollovers



# Plan Termination

- 403(b) plan terminations are allowed earlier than the effective date of the new regulations
- However, the plan must also apply and comply with all applicable requirements of the new regulations at that time
- ***One notable exception - the written plan document requirement***



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# Written Plan Document – Issues and Actions

- What is your existing plan?
  - Plan Documentation – what do you have, what do you need?
    - Model document from IRS
  - Know fiduciary responsibility
    - Not only Employer, but now Plan Sponsor
    - Consistency required for plan operation
    - Define clear, manageable plan guidelines
  - Multiple vendors
    - Too many can add to the complexity of document

# Exchanges/Transfers – Issues and Actions

- No more unrestricted transfers – after 9/24/07
    - Don't allow unrelated exchanges beyond this date
    - Participant protection
      - Only approved providers you have chosen
    - Fiduciary duty – comply with regulations
      - Know the contract provisions of providers
      - Know the participant's employment status in plan as well as other plans
- \*\*Sharing information between employer and vendor  
Think about data format to help comply

# Universal Availability – Issues and Actions

- What does this mean to you?
  - Employee demographics – who is participating, have they been notified of eligibility
    - New employees – make sure they get annual notice
    - Fiduciary responsibility – promote, educate and encourage participants
    - Coordinate communications
  - HR dept. and payroll
    - Know how to track hours to make sure you are meeting exclusion requirements
    - May need to consider allowing all employees to participate to avoid tracking hours

# Employee Deposits – Issues and Actions

- Is your payroll in-house or an outside provider?
  - Should adhere to “as soon as administratively feasible” school of thought
    - Best interest of employees
    - Participant salary deferrals should be in the market not out
  - ERISA plans still have to follow DOL timing – this is not a free pass to fall below the standard

# Define Employer – Issues and Actions

- Are you part of a controlled group?
  - Good faith compliance not good enough anymore
    - If have that 80% indirect or direct ownership, then must test all together
    - Impact on nondiscrimination requirements and other limits – if don't know who is in group, your plan is out of compliance
  - Permissive Aggregation
    - Makes sense if a single plan maintained

# Plan Termination – Issues and Actions

- Should you terminate existing or frozen plan(s)?
  - Plan Documentation – what do you have, what do you need?
    - Amend plan for termination
    - Administrative responsibilities may be driving force to terminate plan
  - Employee rollovers and distributions
    - Know the process
    - Employee communication crucial
  - Core retirement program
    - Communicate/educate employees on new/enhanced plans

# Plan Investments – Issues and Actions

- Where are participants investing their money?
  - Investment Policy – plan sponsors need one
    - Provide details about funds, selection, monitoring, etc.
  - Fees and Expenses
    - Do participants understand/know what they are
    - Effect on investment returns
    - Surrender charges
  - Investment Options
    - Fiduciary obligation to regularly evaluate
    - Regularly communicate/educate employees
    - Administrative responsibilities may be driving force to streamline number of options in plan





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