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From: The American Pension Company [theresa@americanpensioncompany.com]
Sent: Thursday, September 14, 2006 12:19 PM
To: EBSA, E-ORI - EBSA
Subject: Annual Reporting Requirements for 403(b) Plans
Attachments: 403B Reporting I.doc

Thank you for accepting comments with regard to the proposed changes for Form 5500 Annual Reporting. Here are ideas and comments with regard to 403(b) plans and ERISA, annual plan reporting, employer responsibility with depositing contributions timely, and the newly proposed independent audit requirement. We administer ERISA 403(b) plans for tax exempt organizations and I have personally worked with plan sponsors of 403(b) ERISA plans since 1989. We have found that tax exempt organizations do not have the funding to pay for the CPA audits and that most auditors are not very well educated and bill the employers too much for their services. With the tax exempt employers, the best way to reach them with requirements is to educate--and then they will comply. Theresa Lensander, ext. 523

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ANNUAL REPORTING REQUIREMENTS FOR 403(b) PLANS

403(b) plans remain significantly different from qualified plans and because of this we believe that 403(b) plans are not "on par" with 401(k) plans, and that abbreviated reporting rules should still apply.

Our suggestion is to add a simple targeted question on a short Form 5500 addressing the timing of deposits that would accomplish the goal of both alerting sponsors to this requirement while retaining the Department's ability to review employee contributions deposited based on the response on Form 5500. In addition, a Technical Advice Bulletin issued by the Department would serve to alert sponsors and educate them about the plan asset deposit requirements.

EDUCATION

We believe that 403(b) plan sponsors need to first and foremost be educated about the requirements for being subject to ERISA Title I so they know if they need to file Form 5500. Plan sponsors need to ascertain whether or not they are ERISA plans and apply under the DOL Advisory Opinion 76-1 if they are uncertain. This is important so that non-ERISA sponsors can evaluate whether or not they are subject to Title I and encourage sponsors to come in for a ruling as to whether or not they are Title I and need to comply. A DOL Technical Advice Bulletin would accomplish this.

Generally, handling of employee contributions is at the employer payroll level, and issuance of the IRS regulations as well as continued IRS audits, should assist with education in this area. We do not believe that the answer is to subject 403(b) plans to the independent audit requirement, but instead to educate the plan sponsors about their responsibilities to deposit the funds timely.

BACKGROUND

While we recognize that since the 1986 Tax Reform Act and Small Business Job Protection Act there have been significant strides to draw parallels between qualified plans and 403(b) plans, We also acknowledge that the two continue to be administered and to exist differently in their form and in operation.

The IRS has issued proposed 403(b) regulations (11/16/2004); however these regulations recognize the differences between 403(b) and 401(k) plans. For example, in the section entitled "Comparison with Section 401(k) Elective Deferrals," the differences are noted that exist with regard to elective deferrals between the two plans. See Differences below. These differences continue to exist and these differences are the key to why the reporting should continue to be made on a simplified basis.

In addition, the IRS also has issued Employee Plan Compliance Resolution Program (EPCRS). (Revenue Procedure 2006-27) The voluntary correction program, including SCP, while recognizing that some standard corrections are similar to 401(k), also recognizes the nuances with 403(b) plans in its correction process and continues to maintain separate rules relating to 403(b), separate definitions, additional correction methods and waiver of penalties depending on the circumstances.

DIFFERENCES

We acknowledge that differences between 403(b) plans and qualified plans, such as 401(k) continue to exist. Here are three cited in the IRS proposed regulations that apply to employee contributions.

403(b) Plans are limited to Certain Employers and Certain Employees

403(b) plans were set up to encourage tax exempt organizations, schools and certain other non-profit organizations and their employees to save for their retirement. It was thought that because their for-profit counterparts earned higher salaries and worked for companies with greater potential to provide retirement benefits, that this group of individuals was entitled to a unique plan called 403(b).

403(b) contributions may only be made to certain funding arrangements.

Since the funding vehicles are restricted for 403(b) plans, it appears that an independent audit would not serve a purpose. It is premature to expect 403(b) plan sponsors to be able to absorb the cost of an independent accountant audit for a number of reasons

In addition, multiple vendors made it difficult or impossible for the Employer to attain the financial information necessary for an audit. The time and expense to attain the information for the audit would not be worth it to the tax exempt employer. Due to the types of funding vehicles permitted, the use of an audit seems to be limited at best.

The employer often does not have the exact number of participants who are in the plan because the data is not kept track of in the same way as a qualified plan. Often, there are multiple vendors who do not have the same tracking system for participants. The asset information and compiling any type of summary is not set up for a 403(b) plan. The assets inside a 403(b) plan are already restricted in terms of their investment to annuities and custodial accounts, so the independent audit would not necessarily yield the additional information and would be costly to tax exempt sponsors.

Universal eligibility rules apply.

Generally with a 403(b) plan, all employees are eligible to participate. Because there is no eligibility that may be imposed on eligibility for employee contributions, the employee count may push certain plans into the 100+ audit category unfairly in comparison with the 401(k) counterparts, who may require 1 year of service and age 21 as a requirement to be eligible for the plan. This is unfair to the 403(b) plan sponsor, who would be required to include all employees (not just eligible employees) in the employee count.

CONCLUSION

We recommend that a targeted question on Form 5500 addressing the timing of deposits, such as having the Employer provide the date of the last employee contribution for the plan year, or a question such as were the contributions made within the prescribed period set forth in the regulations?, would be both a practical and realistic approach to establishing compliance and educating plan sponsors.

In addition, Technical Advice Bulletins issued by the Department on timing of employee contributions, introducing when to deposit them, with reference to the DOL regulations for ERISA 403(b) plans as well as assisting Employers with how to apply for a status check to see if the plan is subject to Title I.