



# Are You Ready for this Year's New 403(b) Regulations?

Many nonprofits lack the accounting records they need. But there's still time to prepare.

By Barry Wechsler

For years, 403(b) retirement plan sponsors led a charmed life, exempted from the detailed paperwork and rigid Department of Labor regulations of 401(k) plans. But those days are over. Since January 1, 2009, not-for-profit organizations that provide 403(b) plans covered by the Employee Retirement Income Security Act of 1974 (typically plans offered by educational, health care, and charitable nonprofit institutions) have to be as diligent and methodical in their recordkeeping as 401(k) plan sponsors have been.

This has proved a daunting task for many not-for-profit plan sponsors that have never kept 403(b) plan documents or financial re-

ords before. (A "plan sponsor" refers to an organization, or its leaders, that offer employee retirement plans.)

Why the sudden urge to regulate? Policy makers realize that most Americans will depend on 403(b) and 401(k) plans to fund their retirement nest eggs. According to the Employee Benefit Research Institute, these tax-free employee savings plans constitute the sole employer provided retirement benefit for 63% of American workers. Regulating the way the plans are administered is expected to safeguard an employee's retirement savings. The new requirements make you, as the plan sponsor, accountable. If a prohibited transaction occurs, the employer may be subject to monetary penalties.

What may be an administrative nightmare for you will be a boon for plan participants, who now will be assured of the plan's operational integrity. The new rules will aid policy makers, too, who will have 403(b) plan data available to them for the first time. For decades, the Department of Labor has mined data on 401(k) plans to track employee benefit trends and find opportunities for improvement. Officials can now perform similar analyses for 403(b) plans.

## What's being regulated

The new regulations require 403(b) plan sponsors to adopt a written plan document and file a Form 5500 Annual Report/Return. Additionally, large 403(b) plans, which cover 100 or more partici-

pants, will have to include an au-

ditated financial statement with their Form 5500 filings. Plan sponsors also are obligated to report indirect as well as direct compensation paid to service providers. This new requirement is designed to increase the transparency of indirect compensation, which previously has not been brought to light.

Department of Labor regulations are beyond the scope of most general auditors.

The Form 5500 Annual Report/Return and the audited statement don't have to be filed with the Department of Labor until July 31, 2010, but the work needs to begin in 2009. Here's how to start:

### 1. Adopt a written plan document.

Your organization has until December 31, 2009, to adopt a document showing that your retirement plan is operating in accordance with "a reasonable interpretation" of Internal Revenue Code section 403(b) and subsequent regulations. If you don't have a written plan document, you'll need to have one drafted. But even if a written plan exists, it should be reviewed and revised, since regulations may have changed since it was created.

## What's the difference between 403(b) and 401(k) plans?

A 403(b) plan is much like a 401(k) plan, but it's administered only by specific not-for-profit organizations. (In contrast, any employer is eligible to offer a 401(k) plan—even not-for-profit employers.) Both vehicles are deferred compensation savings vehicles commonly known as "defined contribution" plans. Typically, participants contribute pre-tax income to the plan and pay no income tax on the contributions and earnings until money is withdrawn, usually for retirement. (Under a Roth 403(b) or 401(k) plan, the participant makes after-tax contributions and tax-free withdrawals.)

These tasks are jobs for your professional advisors.

## 2. Get your financial records in order.

Beginning with plan year 2009, you'll have to file a Form 5500 Annual Report/Return with the Department of Labor. Form 5500 reveals the financial condition of your organization's retirement plan. It will require a wealth of financial information that you may not have at your fingertips, since previously there was no reason to track it. Necessary records include employee contribution and benefit payment records, individual participant account balances, and total plan assets. You must also account for "missing" participants who have left the organization but are still covered by the plan.

Gathering all that information is going to be a real challenge. It can be made easier by consulting with an experienced employee benefit plan auditor.

## 3. Determine if an audit is needed.

If your 403(b) plan has 100 or

more participants, you, as the plan fiduciary, are responsible for having your plan audited. The auditor will select a sample of individual participant accounts to see if the employer is deducting the proper amount from the participant's paycheck and depositing contributions on a timely basis.

For years, 403(b) retirement plan sponsors led a charmed life.

The auditor will also check that documentation is accurate and that total plan assets reflect the sum of all individual accounts. Additionally, the auditor will test internal controls of processes such as investment selection, which has become a serious concern in light of a February 2008 U.S. Supreme Court ruling that allowed an individual plan participant to sue the plan sponsor to recover losses because investment instructions

were not executed. Although this pertained to a 401(k) plan, it can easily be applied to 403(b) plans. In these tumultuous economic times, experts expect the number of such lawsuits to increase.

It's important to note that even though the filing deadline for the first audit isn't until July 31, 2010, the audit pertains to transactions during the current year. Furthermore, auditors are required to measure 2009 figures against comparable information from the prior year. For example, the audit staff will need to know the 2008 year-end plan value, what the employer owes to the plan, and accrued expenses, among other things. If this information isn't available, then the accounting team will need to extract it. This task should be done as soon as possible.

Filing a timely and complete audit is a serious fiduciary duty of the executives who administer the retirement plan. If the Department of Labor finds the audit to be deficient, executives may be person-

*continued on page 18*



## Choosing the Right Auditor

Auditing employee benefit plans requires specialized knowledge of Department of Labor (DOL) regulations, which are beyond the scope of most general auditors. If your accounting firm doesn't audit employee benefit plans regularly, it may not be able to perform all the required tests or meet the performance standards of the DOL. If the DOL finds your audit deficient, then you may be subject to penalties.

The primary reason employee benefit plan audits are found to be deficient, according to the DOL, is that the auditor lacked experience. The DOL recommends choosing an auditor that performs employee benefit plan audits on a regular basis, such as firms that belong to the American Institute of CPAs' Employee Benefit Plan Audit Quality Center. For more information, visit [www.buchbinder.com/html/403b.htm](http://www.buchbinder.com/html/403b.htm).

ally liable for penalties that will accrue until an acceptable audit is filed.

Since the methodology of an employee benefit plan audit is vastly different from the procedures used to audit a not-for-profit organization's financial statement, the Department of Labor recommends using experienced employee benefit plan auditors. This increases the likelihood that the audit will meet Department of Labor standards.

You must safeguard the plan's assets from fraud or error.

#### 4. Establish proper internal controls.

As a plan sponsor, you must implement practices, procedures, and policies to safeguard the plan's assets from fraud or error and ensure accurate recordkeeping. A

plan audit includes an evaluation of your internal controls. Your auditor should be able to spot operational weaknesses and recommend corrective actions.

Although the new regulations will increase your organization's reporting and compliance responsibilities, the rules will help protect your employees' retirement savings. Loose regulation of Wall Street has eroded the economic security of many Americans. Increased oversight of 403(b) plans may prevent similar disasters for nonprofit retirees. ■

*Barry Wechsler, CPA (bwechsler@buchbinder.com), a partner in the New York office of Buchbinder Tunick & Company, LLP (www.buchbinder.com), specializes in accounting and auditing services for not-for-profit clients. He is a member of the American Institute of Certified Public Accountants and the New York State Society of CPAs.*

### Learn More

These articles (available at [www.snpo.org/members](http://www.snpo.org/members)) will be helpful if your organization offers a retirement plan (or even if it doesn't):

**Retirement Plan Changes: Don't Be a Day Late and Thousands of Dollars Short** (Vol. 27, No. 6)

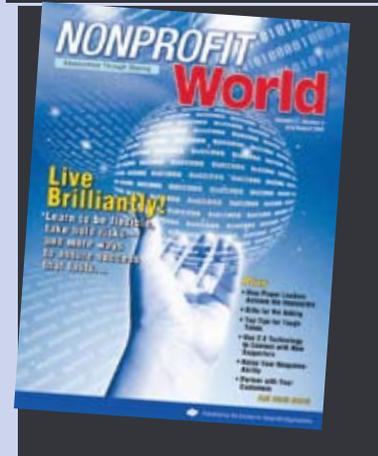
**How to Find the Perfect Auditor** (Vol. 22, No. 3)

**Are You Fulfilling Your Financial Trust?** (Vol. 17, No. 1)

**Setting Up a Control System for Your Organization** (Vol. 16, No. 3)

**Fraud: How to Prevent It in Your Organization** (Vol. 26, No. 3)

The work needs to begin this year.



## Enjoy Reading *NONPROFIT WORLD*?

Here are more benefits of membership in the Society for Nonprofit Organizations

12 issues of *Nonprofit World Funding Alert*, providing monthly updates on grant and funding opportunities

- **Membership in GrantStation**, with instant access to over 5,500 grantmakers via the Find-a-Funder searchable database
- **Complete access to over 700 printer-ready management articles**, searchable by author, key word, or subject
- **Discounts on products and services**, including books, audiotapes, videotapes and Webinars presented by experts in the field
- **Reduced enrollment fees** from the Learning Institute for the Society's **Certificate of Excellence in Nonprofit Leadership and Management**
- **Free job postings** on our NonprofitCareers.org job site

For more information, visit:

[www.snpo.org](http://www.snpo.org)