

## Questions and Answers from the March 13, 2008 ftwilliam.com 403(b) webinar

**Q-1.** Can you 'ignore' validation checks . . . so if the client has to complete the IRA custodian, for ex. can docs be prepared in Word to permit edits?

**A-1.** It is possible to ignore edit checks when you are certain that any defect will be corrected after generating the document.

For example, if you ignore (leave blank) question E.12a of the Full scope document which reads "If [the cash out amount] is greater than \$1,000, enter the name of the IRA provider for mandatory rollovers", an error message will appear and the status of Section E will appear as "NOT-OK" on the Edit/Print menu. In addition, you will get the following message on the first page of the Adoption Agreement and Summary Plan Description: "**CAUTION - The [Adoption Agreement / Summary Plan Description] has not passed all edit checks.**"

The answer to E.12 does not actually appear on the Adoption Agreement, so the Adoption Agreement is actually just fine - you would just get rid of that first error page. (Please note that most checklist answers are required for the Adoption Agreement and so the Adoption Agreement normally will not be accurate if a required field is left blank.)

The answer to E.12 does appear in the Summary Plan description and you will see the following error once the SPD is generated (and E.12 is blank): "The IRA will be issued by !@!CashOutIRAName - NOT VALID."

You can either fill the information in on the SPD once you are ready and delete the first page with the error message - or wait to generate the SPD until you can fill in E.12.

**Q-2.** Must a 403(b) plan provide for immediate entry, no age requirement, no waiting period (non-FICA church plan)?

**A-2.** It depends on the type of contributions.

For elective deferrals, yes - the plan should not provide for service requirements (entry dates are permissible - see Q&A 12), no age requirement and no waiting period (unless the plan is a FICA Church Plan) in order to meet the universal availability requirement under 403(b). There are only a few limited exceptions to the general rule that elective deferrals must be available to all employees (non-resident aliens, part time employees, etc. may be excluded).

For other types of deferrals (match and nonelective), there can be age requirements and waiting periods to be eligible to receive those types of contributions.

**Q-3.** In an ERISA Church Plan with a discretionary match does the FICA or Non FICA determine whether or not the plan is subject to nondiscrimination testing?

**A-3.** Yes. Whether there is a discretionary match, nonelective contribution or any other arrangement permitted under 403(b) only FICA Churches (defined in Code section 3121(w)(3)(A) and (B)) are exempt from Universal availability rules and nondiscrimination (as opposed to church plans in general as defined under ERISA 3(33), for example). Code section 403(b)(12)(B) clearly limits the exemption from nondiscrimination and universal availability to "FICA Church Plans".

Public School Plans are also exempt from the nondiscrimination rules (except that the annual compensation limits of Code section 401(a)(17) apply to a Public School Plan).

**Q-4.** (I'm combining two related questions - A and B):

**A.** The regulations state the definition of what less than 1,000 hours per year after the exclusions and so that's why I am asking... For normally works fewer than 20 hours per week are you putting a definition in the plan document? We were thinking of simply including a reference to the specific Code section in the exclusion (like students) versus putting a definition in our plan...

**B.** Did you say ERISA plans may have a problem with excluding ee's who work less than 20 hours?

**A-4.**

**A.** This a great comment - we are amending our Adoption Agreement to incorporate the definition of working less than 20 hours per week under the final regulations.

**vi.**  Employees who normally work fewer than 20 hours per week.

will now read:

**vi.**  Employees who normally work fewer than 20 hours per week as defined in Treas. Reg. section 1.403(b)-5(b)(4)(iii)(B).

This change should be on the system by the end of this week (3/21/08 at the latest).

**B.** The comment I made in the webinar and the information we currently have on the help button for the above item (excluding employees who normally work fewer than 20 hours per week) regarding ERISA plans that may have a problem with excluding ee's who work less than 20 hours... should now be ignored.

The regulation essentially incorporated the ERISA rule for working part time / less than 20 hours a week. Treas. Reg. section 1.403(b)-5(b)(4)(iii)(B) specifically defines working 20 hours per week as working less than 1,000 hours of service in a twelve month period

whether or not the plan is subject to ERISA. What's confusing is that the regulations (at Treas. Reg. section 1.403(b)-5(b)(4)(iii)(B)) essentially incorporate the ERISA rule 202(a)(1) and then say "[s]ee however, section 202(a)(1)..." of ERISA if the plan is subject to ERISA. We decided to simply incorporate the regulatory definition in the Adoption Agreement to avoid this confusion.

**Q-5.** Does your plan document accommodate the idea of a "wrapper" document? It doesn't appear that the adoption agreement contemplates variety. For example, if I am an employer and I want to make available the various funding vehicles 403(b)(1)s, (7)s and (9)s under my plan/program...how do I accomplish that?

**A-5.** The Plan most definitely will allow multiple funding vehicles. However, it should be noted that Retirement Income Accounts are handled in a rather tricky way.

First, the relevant Basic Plan Document Provisions:

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"Fund" means the funding vehicles used to fund benefits payable under the Plan which may include Annuity Contracts, Custodial Accounts and Retirement Income Accounts specifically approved by Employer for use under the Plan.

Section 9.01      INVESTMENT OF ASSETS

All existing assets of the Fund and all future contributions shall be invested in applicable Funds. Except to the extent that they are inconsistent with the terms of the Plan, the terms and conditions of each Fund are hereby incorporated herein by reference. If the Plan has been established for the benefit of employees of a church-related organization (as defined Treas. Reg. section 1.403(b)-2) the Plan is a Retirement Income Account.

The Plan Administrator shall maintain a list of all Funds under the Plan. Such list is hereby incorporated as part of the Plan. Each Fund and the Administrator shall exchange such information as may be necessary to satisfy section 403(b) of the Code or other requirements of applicable law. In the case of a fund which is not eligible to receive contributions under the Plan, the Employer shall keep the fund informed of the name and contact information of the Plan Administrator in order to coordinate information necessary to satisfy section 403(b) of the Code or other requirements of applicable law.

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In particular note that Section 9.01 states "[i]f the Plan has been established for the benefit of employees of a church-related organization (as defined Treas. Reg. section 1.403(b)-2) the Plan is a Retirement Income Account." This sentence has been recently added to the Basic Plan Document and the change should be on the system by the end of

this week (3/21/08 at the latest). (The limited scope document will have a similar sentence at section 9.01 also to be on the system by the end of the week.)

Retirement income accounts are treated as an annuity contract both under the 403(b) regulations and in our Basic Plan Documents. (The main difference between all these funding vehicles from the perspective of the Plan Document is the more restrictive distribution restrictions placed on custodial accounts.) This means even if the retirement income account decides to invest in custodial accounts the retirement income account will still be subject to distribution rules just like an annuity contract (i.e. the retirement income account would not be subject to the more stringent distribution requirements that would apply if a non-church-related organization had a 403(b) plan invested in custodial accounts).

**Q-6.** Does the system provide for SPDs for Non-ErISA plans, even though they are not required?

**A-6.** Yes. In the full scope plan, the summary plan descriptions appear whether or not the plan is subject to ERISA. The "Your Rights ERISA" section will not appear if the plan is not subject to ERISA. In the limited scope plan we call SPDs "Plan Descriptions" to clarify that they are something different from the ERISA-required Summary Plan Description (SPD) but in form and content they work the same.

**Q-7.** Class allocations in the full scope?

**A-7.** Yes. We offer new comparability with two options: 1. Defined groups or 2. Each Participant in his/her own group.

**Q-8.** Will a match (that's made to a separate 401(a) plan) cause a deferral only 403(b) to become subject to ERISA? If a non profit has a salary deferral only 403(b) and a separate 401(a) Plan providing for matching contributions attributable to the deferrals made under the 403(b) could the 403(b) be considered a non ERISA provided it meets all of the other requirements to be considered non ERISA?

**A-8.** Good question.

For nonprofits (that are not a public school plan and not a church plan), 403(b) plans are required to be funded solely "pursuant to salary reduction agreements or agreements to forego an increase in salary" under the 29 CFR 2510.3-2(f) safe harbor. As long as the plan meets the rest of the 29 CFR 2510.3-2(f) safe harbor and FAB 2007-02, the plan should not be subject to ERISA simply because there is a match to a separate 401(a) plan based on the 403(b) contributions.

If it is a public school or church this arrangement should not cause the plan to be subject to ERISA.

**Q-9.** Does the PPA of 2006 affect this as it does 401K?

**A-9.** Yes. The Basic Plan Documents have been updated for the PPA to the extent changes apply to the 403(b) plan document.

**Q-10.** Do you recommend putting existing 403b plans (currently on the prior Ft William doc) onto the full scope plan?

**A-10.** Yes. We recommend converting all old documents before the end of 2008.

**Q-11.** What would satisfy as "Evidence of Trust" when transferring a 403(b)? Is this a Document from your company we can use? What is "Evidence of Trust"? A 403(b) vendor is asking for this item in reference to a transfer.

**A-11.** Our document is not an "Evidence of Trust". I don't know what the vendor is referring to since 403(b)s are not required to be held in trust. A copy of the custodial account should satisfy the vendor.

**Q-12.** Would universal availability be met if a plan allows for an Entry Date? The Entry Date would help provide time for automatic notice requirements and to start payroll deductions.

**A-12.** Yes. Entry dates are perfectly acceptable - must be at least once per year to be considered an "effective opportunity" to make elective deferrals under Treas. Reg. section 1.403(b)-5(b)(2).

**Q-13.** Are all 403bs required to have a prototype, or just plans with NECs?

**A-13.** 403(b) plans are not required to have a prototype document - the concept doesn't really apply. Only 401(k) documents have "prototype" documents. A 403b plan MUST, however, have a plan document. The style does not matter. Our full scope plan document looks like a prototype but it is not legally a prototype document.

**Q-14.** Are annual 5500s required for 403b plans now? Even church plans? Even if no NECs?

**A-14.** 5500 are not required for ALL 403(b) plans. Only plans that are subject to ERISA

are required to file a 5500. In addition, a recent DOL Notice eliminates the limited 5500 reporting option for 403(b) plans effective for the 2009 plan year. (See <http://www.dol.gov/ebsa/regs/fedreg/notices/20071116.pdf> - the "Discussion of the Public Comments" section suggests transitional relief may be considered by DOL but is certainly not promised).