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403(b) PLANS

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Mr. Wiggins has practiced in employee benefits, executive compensation, and ERISA litigation for over fourteen years. In 2008, the United States Secretary of Labor appointed Mr. Wiggins to the ERISA Advisory Council, where he advises the Secretary on her functions under ERISA. Recently he was appointed as the Chair for the ERISA Advisory Council's 2010 study of Employee Benefit Plan Auditing and Financial Reporting Models. Mr. Wiggins is a graduate of Cornell Law School and the University of North Florida.

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403(b) PLANS

I. Introduction

A. What is a 403(b) Plan?

A 403(b) plan is, generally, a tax-deferred annuity program established under Section 403(b) of the Internal Revenue Code of 1986, as amended (“Code”). It is a retirement plan for employees of public schools, employees of certain tax-exempt organizations, and certain ministers. Under a 403(b) plan, employers may purchase annuity contracts, or establish custodial accounts invested only in mutual funds, for the purpose of providing retirement income for eligible employees (hereafter, the annuity contracts and custodial account agreements shall sometimes be referred to, individually, as a “403(b) Contract”). Annuity contracts must be purchased from a state licensed insurance company, and the custodial accounts must be held by a custodian bank or Internal Revenue Service (“IRS”) approved non-bank trustee/custodian. The annuity contracts and custodial accounts may be funded by employee salary deferrals, employer contributions, or both. Although not subject to the qualification requirements of Code Section 401, many requirements that apply to qualified plans also apply to 403(b) plans. Subject to certain exceptions for church plans that were in existence on September 3, 1982, a 403(b) plan must be a defined contribution plan.

Historically, most employers treated their 403(b) plans as a collection of individual contracts between the employees and the tax-deferred annuity providers. The employer’s involvement was minimal, and often limited to allowing annuity providers to promote their products at the worksite and coordinating salary deferrals.

B. Final 403(b) Regulations

On July 26, 2007, the first comprehensive regulations in 43 years governing 403(b) plans were issued - 72 Fed. Reg. 41,128 (July 26, 2007) (“Final Regulations”). Prior to the Final Regulations, 403(b) plans were governed by various guidance issued by the IRS as far back as 1964, when the original regulations were published. Subject to certain exceptions, the Final Regulations were generally effective January 1, 2009. For collectively bargained plans that were in effect on July 26, 2007, the effective date is later of (1) January 1, 2009 and (2) the earlier of (i) July 26, 2010 and (ii) the date the collective bargaining agreement expires, without regard to any extensions after July 26, 2007.

A significant requirement of the Final Regulations is the new requirement the 403(b) arrangement be embodied in a written document. Prior to the Final Regulations, the Code required that some terms be set forth in the underlying 403(b) Contract, and the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), required that the document be in writing for plans covered by ERISA. Now, the Final Regulations for the first time require that

the 403(b) plan document include all the material terms and conditions for eligibility, benefits, limitations, the contracts available under the plan, the time and form of distribution, and optional provisions such as loans and hardship distributions.

In Notice 2009-3, the IRS extended the deadline for adopting a written plan to December 31, 2009. During 2009 sponsors were required to operate the 403(b) plan in accordance with a reasonable interpretation of Code Section 403(b), taking the Final Regulations into account. After the written plan was adopted, sponsors had until the end of 2009 to correct any 2009 operational failures retroactively. As of now, all 403(b) plans should be in compliance with Code Section 403(b) and the Final Regulations, both in form and operation.

II. Is the 403(b) Plan Subject to ERISA?

ERISA generally covers plans sponsored by private employers. ERISA does not cover plans sponsored by governmental entities; nor does it cover plans sponsored by a church, unless the church makes an election (that is allowed in ERISA and the Internal Revenue Code) to be covered by ERISA. As a result, most 403(b) plans that are covered by ERISA are those sponsored by non-governmental tax exempt entities that are not electing churches, such as most 501(c)(3) organizations.

In 1979 the Department of Labor (“DOL”) adopted a safe-harbor regulation (29 C.F.R. § 2510.3-2(f)) under which a 403(b) plan is not covered by ERISA provided that:

- The plan is funded entirely through salary reduction agreements;
- Employee participation in the plan is completely voluntary;
- All rights under the annuity contract or custodial account are enforceable solely by the employee (or his or her beneficiary or representative);
- The employer’s involvement is limited to certain activities that generally do not involve employer discretion;
- The products available to employees under the 403(b) plan are limited to a number and selection that is designed to afford employees a reasonable choice in light of relevant circumstances; and
- The employer receives no consideration other than reasonable amounts to cover expenses.

Plans that meet these requirements are referred to as safe-harbor plans, and are not subject to ERISA even if they otherwise would be if they were sponsored by a non-governmental, non-church tax-exempt organization.

In a Field Assistance Bulletin (“FAB”) 2007-02 (July 24, 2007), the DOL provided guidance on how the Final Regulations would affect the status of safe-harbor plans. In FAB 2007-02, the DOL stated that compliance with the Final Regulations would not by itself affect the status of a 403(b) plan as a safe-harbor, non-ERISA plan. Rather, the requirements of the safe harbor regulation continue to be operative and whether a 403(b) plan is covered by ERISA will continue to be determined on a case-by-case basis. Most notably, the DOL said that (1)

adopting a written plan document would not violate the safe harbor, and (2) the employer may test for non-discrimination compliance and contribution limits without falling outside the scope of the safe harbor.

The DOL did note, however, that the Final Regulations give 403(b) plans significant flexibility over how to allocate discretionary administrative functions. The DOL stated that the plan document should correctly describe the employer's limited role and allocate discretionary determinations for functions such as QDRO determinations, loans, and hardship distributions to the annuity provider, the participant, or a third party vendor appointed by the annuity provider or participant.

III. Required Plan Terms and IRS Determination Letter Procedures

Under the Final Regulations, some required plan terms must be included in the 403(b) Contract and some terms must be included in the plan document. The Final Regulations make it clear that the written document need not be set forth in one document; the written plan document may incorporate language in the 403(b) Contract.

A. Required Terms for the 403(b) Contract

The 403(b) Contract must include the following provisions:

- Vesting (Code Section 411)
- Nontransferability (Code Section 401(g))
- Limits on elective deferrals (Code Section 402(g) limit)
- Minimum required distributions rules (Code Section 401(a)(2)), including the incidental death benefit rule
- Rollovers (Code Section 401(a)(31))
- Limits on incidental benefits (Code Section 401(a); Treas. Reg. § 1.403(b)-6(g))
- Custodial account agreements should include a requirement that assets be held for the exclusive benefit of participants and beneficiaries.
- Although not technically a requirement for the 403(b) Contract, the annual additions to the contract may not exceed the limits of Code Section 415(c).

B. Problematic 403(b) Contracts. The Final Regulations require the 403(b) Contract to be issued under a plan which, in both form and operation, satisfies the Final Regulations. The Final Regulations effect this rule primarily by requiring the written 403(b) plan document to

identify the 403(b) Contracts available under the plan. This can create problems if a 403(b) Contract cannot find the plan or the plan cannot find the contract. Such problematic 403(b) Contracts can arise in different ways.

1. Contract Exchanges and Information Sharing Arrangements. One way for a problematic 403(b) Contract to arise is through a “contract exchange.” Prior to the Final Regulations, a 403(b) participant could transfer his or her 403(b) Contract to a vendor who had no relationship to the employer without incurring a taxable distribution. Such a transfer was commonly called a “90-24 transfer,” because the exchange was non-taxable under Rev. Rul. 90-24. Rev. Rul. 90-24 has been superseded by the Final Regulations. However, any 90-24 exchanges made on or before September 24, 2007 are not subject to the Final Regulations. Thus, such contracts are not required to be made a part of the employer’s plan (discussed below), though they are still subject to the statutory requirements of Code Section 403(b). It is up to the participant and the vendor to ensure compliance.

The Final Regulations do permit contract exchanges under a 403(b) plan provided that the employer enters into an information sharing arrangement with the vendor, the new contract includes distribution restrictions that are no less stringent than the old contract, and the employee’s accumulated benefits are preserved. The general purpose of the information sharing agreement is to permit both the employer to monitor plan compliance on a plan-wide (or even employer-wide if the employer has other plans) basis for all vendors that hold plan assets. For example, if the plan permits loans, then the employer and the vendor need to communicate to ensure the employee doesn’t take out a loan that exceeds the limits of Code Section 72(p) resulting in a deemed distribution. The IRS has clarified that the term “contract exchange” refers only to a transfer of a 403(b) Contract to a vendor that is not an investment option under the plan, *i.e.*, who is not authorized to receive plan contributions. Thus, a transfer between funds offered under the plan is not a “contract exchange.”

2. Other Problematic Contracts. An exchange of a grandfathered 90-24 contract that occurs after September 24, 2007 causes the contract to be subject to the Final Regulations. Such contracts can be problematic because the vendor will usually be a stranger to the plan and outside of the employer’s control. A third type of problem arises when an employer changes 403(b) vendors. Unlike investments in 401(k) plans, which usually get mapped over to the new provider, 403(b) Contracts usually stay with the old vendor. Those old contracts were never subject to a 90-24 exchange and thus are not grandfathered. Instead, they are subject to the Final Regulations. A fourth type of contract that can be considered problematic is a contract held by a taxpayer whose employer has gone out of business. Finally, there may be some 403(b) Contracts that simply do not comply with the Final Regulations but are still receiving employer contributions.

C. IRS Relief for Problematic Contracts. Many employers and 403(b) providers explained to the IRS how difficult it could be to include problematic contracts in the plan. In response, the IRS offered various relief in Revenue Procedure 2007-71.

1. Pre-2005 Contracts. The Final Regulations do not apply to 403(b) Contracts issued prior to 2005 and to which no contributions have been made since 2004. Thus, such contracts are not required to be made a part of the employer's plan. The employer has no compliance responsibility for such contracts, and does not have to obtain or provide, any information about them. The 403(b) vendor and the participant will instead be responsible for 403(b) compliance.

2. Post 2004/Pre-2009 Contracts for Active Employees. A 403(b) Contract issued after 2004 but before 2009 by a vendor who has not received contributions in a year after the contract was issued (*e.g.*, because the employer switched vendors or the contract is in the plan due to a non-grandfathered 90-24 exchange) is not required to be part of the plan if the employer makes a good faith reasonable effort to include the contract in the plan. A good faith reasonable effort includes collecting available information concerning the vendor and notifying the vendor of the name and contact information for the person in charge of administering the plan for the employer. As an alternative, the vendor, prior to making a distribution or a loan to the participant, may make a good faith effort to contact the employer and exchange, with the person in charge of administering the employer's plan, any information that may be needed to comply with Code Section 403(b).

3. Post 2004/Pre-2009 Contracts for Former Employees or Beneficiaries. A 403(b) Contract issued after 2004 but before 2009 by a vendor who ceased to receive contributions before January 1, 2009 (*e.g.*, because the employer switched vendors, the employer ceased to exist, or the contract is in the plan due to a non-grandfathered 90-24 exchange) is not required to be part of a plan. Such contracts are still subject to Code Section 403(b) (other than the requirement that they be issued under a plan). However, if the participant requests a loan, the vendor must make reasonable efforts to determine whether the participant has in the prior twelve months taken out any other outstanding loans from a qualified plan. If so, the vendor must take reasonable efforts to determine the highest outstanding balance of such loans for that period. The vendor may not merely rely on information received from the participant or beneficiary. Note that this relief applies only if the participant is a former employee or a beneficiary of a former employee. For this purpose, the vendor may rely on the participant or beneficiary if such reliance is not unreasonable.

D. Required Terms for Plan Document

The 403(b) plan document must contain all the material terms and conditions governing:

- Eligibility (including universal availability)
- Benefits
- Applicable limitations
- Contracts available under the plan

- Time and form under which benefit distributions would be made
- Code Section 415 limits on annual additions

The plan document may contain the following:

- Optional features consistent with, but not required under, Code Section 403(b), including loans, hardship distributions, rollover contributions, and plan-to-plan transfers.
- The plan may allocate responsibility for administrative functions.

E. IRS Determination Letter Program

In Announcement 2009-34, the IRS announced that it intends to establish a program for pre-approved prototype 403(b) plans. In that announcement the IRS issued a draft Revenue Procedure and sample plan language to be used for 403(b) prototype plans. The IRS requests that those vendors who intend to file an application for an opinion letter for a §403(b) prototype plan send an email to ep.prototype.projections@irs.gov stating their intent (mass submitters should send an estimate of the number of opinion letter applications it seeks for sponsors). The 403(b) prototype plan program will allow eligible employers to adopt a pre-approved prototype plan and comply with § 403(b) and the Final Regulations, including the written plan requirement.

IV. 403(b) Funding Arrangements

The assets of a 403(b) plan may generally only be held in insurance company annuity contracts or mutual fund custodial accounts. Certain state and local government annuity plans that existed prior to May 18, 1982 may be self-funded. A retirement income account established under Code Section 403(b)(9) may invest in an annuity, a custodial account, or may be self-funded and thus self-annuitized if the distribution's actuarial present value at the annuity starting date equals the participant's accumulated benefit and the plan sponsor guarantees the annuity. A retirement income account may also be funded through a trust.

Salary reduction contributions should be transferred to the insurance company or entity holding the custodial or retirement income account within a period that is no longer than reasonable for the proper administration of the plan. The regulations state in an example that the plan could provide for 403(b) elective deferrals to be contributed within 15 business days following the month in which these amounts would otherwise have been paid to the participant. This is not a safe harbor under the ERISA plan asset rules that govern the timing of contribution of plan assets. Thus, if the plan is covered by ERISA, the plan should follow the ERISA rules as well. Furthermore, the Code Section 415 rules coordinating the timing of contributions within limitation years should be followed.

V. 403(b) Nondiscrimination Rules

A. Universal Availability. A 403(b) plan that includes a salary reduction arrangement is not subject to the same nondiscrimination rules (e.g., ADP/ACP) that apply to 401(k) plans. Instead, such plans must satisfy the requirement for universal availability. Under this rule, if one employee is allowed to make a salary reduction contribution, then all employees of the employer must be permitted to make such a contribution. According to the IRS, to satisfy this requirement it is not enough for the plan merely to provide that all employees are eligible. The employee must have an effective opportunity to participate. This means, generally, that the employer must communicate the availability to all employees without waiting for the employees to ask, and must allow employees to change their elections at least once a year.

The following employees are excludible from the universal availability requirement:

- (1) Employees who are eligible under another 403(b) plan, 457(b) (governmental) plan, or 401(k) plan of the employer that allows for salary reduction contributions;
- (2) Non-resident aliens who have no U.S. sourced income;
- (3) Certain student employees;
- (4) Employees who normally work fewer than 20 hours per week; and
- (5) Employees who do not defer more than \$200 per year.

B. Other Non-Discrimination Rules. Prior to the Final Regulations, the 403(b) nondiscrimination rules were governed by IRS Notice 89-23. Under that notice, for employer contributions, 403(b) plans that satisfied certain disparity safe harbor tests were deemed to comply with the 403(b) nondiscrimination rules. Moreover, under Notice 89-23, employers were allowed to use a reasonable good faith interpretation of the nondiscrimination testing requirements of Code Section 403(b). The Final Regulations repealed Notice 89-23.

The Final Regulations now require the 403(b) plan to comply with the nondiscrimination rules that apply to qualified plans. Thus, for employer contributions, the plan must comply with Code Section 401(a)(4), taking into account Code Section 401(a)(5). Matching contributions must comply with the ACP test of Code Section 401(m). The plan must also satisfy the minimum coverage rules of Code Section 410(b). Finally, the compensation that may be taken into account is subject to the limits of Code Section 401(a)(17).

C. Governmental Plans and Church Plans. Neither the universal availability rules nor the other nondiscrimination requirements described above apply to church plans. The only rules above that apply to governmental plans are the universal availability rules and Code Section 401(a)(17).

VI. ERISA Audit and Financial Reporting Requirements for 403(b) Plans

A. Overview. Because historically most 403(b) plans looked less like an employer-provided plan and looked more like a collection of individual contracts, and because 403(b) plan investments were generally limited to state-regulated insurance contracts and registered mutual funds, the DOL took a different approach to the annual audit and financial reporting requirements of 403(b) plans. More specifically, prior to 2009, the DOL regulations contained an exemption to the ERISA annual reporting requirements for 403(b) plans. Under the exemption, 403(b) plans only had limited reporting requirements. For example, 403(b) plans were only required to complete Part I, and lines 1 -5 and 8 of Part II, of the 2008 Form 5500. Such plans were also not required to engage an independent qualified public accountant (“IQPA”), include an audit with the Form 5500, or attach any schedules to the Form 5500. Pension plans that were funded exclusively with fully allocated insurance contracts and met certain other requirements could also take advantage of this exemption.

On July 21, 2006, the DOL issued proposed regulations that were designed to change the Form 5500 filing requirements significantly. Among the changes was a proposal to eliminate the annual reporting exemption for 403(b) plans. The DOL finalized those regulations on November 16, 2007. 72 Fed. Reg. 64,731 (Nov. 16, 2007) (the “Final 5500 Regulations”). The Final 5500 Regulations retained the exemption for fully allocated insurance contracts.

The Final 5500 Regulations required, for the first time and generally effective for plan years beginning on or after January 1, 2009, that large 403(b) plan administrators hire an IQPA to audit the plan and include the audit with the plan’s annual report. Administrators for small 403(b) plans are not required to obtain an audit, and may generally use the Form 5500-SSF (Short Form 5500). Even small plans must, however, report aggregate financial information regarding the plan.

Whether a 403(b) plan is a large plan subject to the audit requirements or an exempt small plan depends on the number of participants (the same as other ERISA plans). Generally, large plans are those that, at the beginning of the plan year, have 100 or more participants. Plans that have fewer than 100 participants at the beginning of the plan year are considered small plans. A plan that filed as a small plan in 2008 and has between 100 and 120 participants may also file as a small plan under the “80-120” rule.

B. Transitional Relief. The DOL has issued two Field Assistance Bulletins that provide 403(b) administrators with certain, transitional relief.

1. Field Assistance Bulletin No. 2009-02. In Field Assistance Bulletin (“FAB”) No. 2009-02, the DOL recognized that many employers may not be able to obtain the information needed for 403(b) Contracts issued prior to 2009 to which contributions are no longer made. The DOL noted further that auditors would be issuing qualified or disclaimer audit opinions each year, at least until sufficient time has elapsed to allow the auditors to be confident that the assets of the plan being reported are materially correct. In either case, the DOL could

reject the 5500 filings and impose penalties on the 403(b) plan's administrators for a failure to file a proper annual report (5500 and audit, if applicable).

FAB 2009-02 provides that a 403(b) plan administrator does not need to treat annuity contracts and custodial accounts (i.e., 403(b) Contracts) as part of assets of the 403(b) plan for purposes of the annual report provided that the administrator makes good faith efforts to transition for the 2009 plan year to ERISA's annual reporting requirements. In addition, the following conditions must be met:

- The 403(b) Contract was issued to a current or former employer before January 1, 2009;
- The employer ceased to have any obligation to make contributions (including salary reduction contributions) and, in fact, ceased making contributions to the 403(b) Contract before January 1, 2009;
- All of the rights and benefits under the 403(b) Contract are legally enforceable against the vendor by the participant or beneficiary without any involvement by the employer; and
- The participant is fully vested in the 403(b) Contract.

The DOL will not reject 5500 that includes an adverse opinion if the auditor expressly states that the sole reason for such an opinion was because such pre-2009 contracts were not covered by the audit or included in the plan's financial statements. In addition, current or former employees who only have contracts that are excludible as described above are not counted for purposes of determining whether the plan is a large plan subject to the audit requirements or a small plan.

2. Field Assistance Bulletin No. 2010-01. In response to many inquiries regarding the scope of FAB 2009-02, the DOL issued FAB No. 2010-01. FAB answers many questions, the most significant of which are:

- If an administrator cannot meet the requirements of FAB 2009-02, FAB 2010-01 appears to extend the 2009-02 relief to administrators who make a "good faith" effort to comply with ERISA's reporting requirements. The DOL does not specify what constitutes good faith efforts, but does explain that the administrator has the burden of demonstrating good faith.
- A 403(b) Contract to which an employer forwards loan repayments does not fall within the scope of FAB 2009-02 exclusion and must therefore be included in the 2009 Form 5500. The exclusion would apply if the employee directly makes loan repayments to the vendor, if all other conditions were otherwise satisfied.

- A 403(b) Contract need not be included in the annual report even if the administrator can identify the contract, provided the requirements of FAB 2009-02 are otherwise met.
- A 403(b) Contract may be included in the 2009 annual report even if the contract could be excluded under FAB 2009-02. Moreover, an administrator may elect to include one or more contract and elect to exclude others, provided that the excluded contracts otherwise satisfy FAB 2009-02.
- Although it is the role of the administrator to determine whether a contract may be excluded under FAB 2009-02, the DOL “expects that the accountant will alert the plan administrator” if the accountant determines that a contract was incorrectly excluded.
- The Schedule of Assets Held for Investment (Form 5500, Schedule H, Line 4i) and the Schedule of Reportable Transactions (Form 5500, Schedule H, Line 4j) will be deemed to be presented in compliance with the DOL requirements if all required information, other than the information that may be excluded under FAB 2009-02, is included.
- Those 403(b) Contracts that may be excluded under FAB 2009-02 for the 2009 annual report may also be excluded from the comparative financial statements for the 2009 annual report.
- The relief provided under FAB 2009-02 (for adverse opinions or incomplete financial information) will continue to apply in later years provided FAB 2009-02 continues to apply.
- A final contribution made in 2009 for benefits accrued in 2008 will not by itself cause the contract to fall outside the scope of FAB 2009-02.

In addition, FAB 2010-01 provides further guidance regarding safe harbor plans that are not subject to ERISA. In FAB 2010-01, the DOL made it clear that a plan is subject to ERISA if the employer, rather than the 403(b) vendor or participant, selects the plan’s third-party administrator. The DOL also clarified that, to a safe harbor plan, the plan must generally offer a choice of more than one 403(b) vendor. The DOL did say, however, that a small employer may limit the number of providers to one if employees are permitted under the plan to engage in a contract exchange as permitted by the Final Regulations.

C. Fully Allocated Contracts. The limited exemption from ERISA’s annual audit and reporting requirements that formerly applied to 403(b) plans continues to apply if the plan’s benefits are funded exclusively through fully allocated contracts and certain requirements are

met. This rule can be found in the Form 5500 instructions, which provide that “fully insured” contracts need not be reported on Part I of the Schedule H or I. According to the instructions, such contracts are considered fully allocated “only if the insurance company ... unconditionally guarantees ... a retirement benefit of a specified amount.” In Advisory Opinion 2010-01A, the DOL clarified that these 5500 instructions reflect the DOL’s view that fully allocated contracts include only those contracts under which an insurance company immediately assumes fixed dollar obligations. The exemption is based on the fact that under a fully allocated contract the plan has shifted the risk for the payment of benefits that have accrued under the plan to date.

VII. Miscellaneous ERISA Requirements

As noted in FAB 2007-02, the IRS Final Regulations did not affect the analysis of whether a 403(b) plan is subject to ERISA. Nonetheless, the increased focus on 403(b) plans together with the recent DOL guidance appears to have made many sponsors more aware of their ERISA obligations.

A. Fidelity Bonds. Every ERISA fiduciary who handles plan assets is generally required to obtain a fidelity bond. Federally-chartered banks, broker-dealers, large insurance companies, and large trust companies are often exempt from ERISA’s bonding requirements. Thus, few 403(b) Contract providers will be required to obtain a fidelity bond. Generally anyone else who “handles” plan assets is required to obtain a fidelity bond.

Most sponsors of a 403(b) plan that is subject to ERISA will have one or more employees who should be covered by a fidelity bond. Such employees, who are generally officers of the employer, have the requisite authority over plan assets such that there is a risk that plan assets could be lost in the event of the employee’s fraud or dishonesty. Such authority may include the power to direct plan distributions. Thus, even committee members who have the power to direct a corporate trustee to pay plan benefits is required to obtain a fidelity bond. In addition, anyone who has the authority to make plan investments is required to be bonded.

B. Spousal Rights. Although 403(b) plans are not subject to the qualified joint and survivor annuity (“QJSA”) or qualified pre-retirement survivor annuity (“QPSA”) rules of the Code, they are subject to the same rules under ERISA (if they are in fact ERISA plans). However, because a 403(b) plan cannot be a defined benefit plan (except for certain grandfathered arrangements), the plan will be subject to the QJSA/QPSA rules only if the plan offers a life annuity and only to the extent a participant elects a life annuity. Many plans do, of course, offer life annuities. Accordingly, many ERISA-covered 403(b) plans could be subject to the full panoply of the QJSA/QPSA rules.

In addition, all ERISA-covered 403(b) plans will be subject to ERISA’s other rules that protect spousal rights. Thus, for example, 403(b) plans are subject to ERISA’s QDRO rules. Moreover, a participant who is married must generally receive proper spousal consent before the participant names somebody other than the spouse as his or her beneficiary.

C. 403(b) Nondiscrimination and ERISA Rules. As noted above, a 403(b) plan must satisfy the rule of universal availability and must also comply with Code Section 410(b). ERISA-covered 403(b) plans must also satisfy ERISA's minimum participation and vesting rules. Those rules are substantially similar to the minimum participation and vesting rules that apply to tax-qualified plans under Code Sections 410(a) and 411. Code Section 410(a) prohibits "disguised age and service" provisions which are described in the Code Section 410(a) regulations. Such prohibitions apply to ERISA-covered 403(b) plans through ERISA § 202(a). Thus, an ERISA-covered 403(b) plan must satisfy both the 403(b) nondiscrimination rules and the "disguised age and service" prohibitions of the Internal Revenue Code.