



Workshop 5: 403(b) for 401(k) Administrators

Ed Salyers, CPA

Ronald J. Triche, Esq., APM

Facilitator: Susan D. Diehl, CPC, QPA, ERPA



Agenda – 403(b) vs. 401(k)

- In General
- Nondiscrimination Testing
- Limitations
- Vesting
- Distributions
- Failures – EPCRS
- Excise Taxes
- ERISA Treatment



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) vs. 401(k) In General



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Preamble to 403(b) Regs.

“...the effect of the various amendments made to section 403(b) within the past 40 years has been to diminish the extent to which the rules governing section 403(b) plans differ from the rules governing other tax-favored employer-based retirement plans, including arrangements that include salary reduction contributions, such as section 401(k) plans...”

“However, there remain significant differences between section 403(b) plans and section 401(a) plans”

Let’s explore those differences



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Eligible Employers / Employees

- 403(b) Plans – Restricted to the following employers
 - Public Education
 - 501(c)(3) organizations
 - Certain ministers as described in IRC 414(e)(5)(A)
- 401(k) Plans
 - Available to all private sector employers
 - Governmental employer may not establish on or after 05/06/1986
- Both 401(k) & 403(b) only available to common law employees



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Different Definitions for Church Plans

- 403(b)
 - Church & QCCO – IRC 3121(w)(3)(A) & (B)
 - NQCCO – everything else under IRC 414(e)
- 401(k) Plans
 - IRC 414(e)
- ERISA Section 4(b)(2)
 - A nonelecting church plan is defined in section 3(33) of ERISA



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Investments

- 403(b) Plans – Restricted
 - Annuity contracts – IRC 403(b)(1)
 - Custodial Accounts – IRC 403(b)(7)
 - Retirement Income Account – IRC 403(b)(9)
 - Some public schools may have 50 or more vendors approved for investment
- 401(k) Plans
 - Like all other 401(a) Plans



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Plan Document

- 403(b) Plans
 - Written plan may be more than 1 document
 - No statutory RAP
 - Exceptions apply to Steeple Churches and QCCOs
- 401(k) Plans
 - Like all other 401(a) Plans



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



What Funds Are Part of the Plan

- 403(b) Plans
 - Special rules under RP 2007-71
 - Vendors that received no funds after 01/01/2005 not part of the plan
 - Vendors that received funds 01/01/2005-12/31/2008 – reasonable good faith reliance provisions
 - Funds transferred under RR 90-24 prior 09/25/2007 not part of the plan
 - Special transfer & exchange regime
 - Vendors receiving contributions on or after 1/1/2009 are a part of the plan
- 401(k) Plans
 - All funds under the plan & trust



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Types of Contributions

- 403(b) Plans & 401(k)
 - Participant contributions
 - Elective deferrals – including Roth
 - After-tax
 - Automatic contributions
 - Employer contributions
 - Matching
 - Employer non-elective contributions



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) vs. 401(k) Nondiscrimination Testing



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Elective Deferrals – Discrimination Testing

- 403(b) Plans – IRC 403(b)(A)(ii) Universal Availability
 - No ADP test
 - All employees must be given the opportunity to defer (unless IRC exclusions)
 - Determined on a common law employer basis
 - May test geographically distinct units separately
 - Does not apply to church & QCCO
 - Annual required notice of “effective opportunity”
- 401(k) Plans – ADP Test
 - Rules under IRC 401(k)(3) and regulations for aggregation
 - Governmental employers excluded



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Excludable Employees – Elective Deferrals

401(k)

- No later than age 21 or 1 year of service
- Excluded classes
 - Collectively bargained
 - Non-resident aliens

403(b)

- Students - IRC 3121(b)(10)
- Eligible for another plan of the employer that is a 403(b), 401(k) or 457(b)
- Normally work less than 20 hours per week
- Non-resident aliens
- Will not defer more than \$200 annually



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



IRC 403(b)(12)(i) Requirements

- IRC §401(a)(4) – nondiscrimination
- IRC §401(a)(5) – permitted disparity
- IRC §401(a)(17) – compensation limits
- IRC §401(a)(26) – minimum participation
- IRC 401(m) – ACP
- IRC §410(b) – minimum coverage requirements
- Only 401(a)(17) applies for governmental
- Church & QCCO exempt from the discrimination requirements



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Matching Contributions – ACP Test

- 403(b) Plans – ACP Test applies
 - Except governmental employers, Churches and QCCOs
 - Exclusions
 - Same exclusions as the Universal Availability
 - Age 21 and 1 year of service
 - Elective contribution cannot be used to satisfy the ACP test (403(b) has no ADP testing requirements)
- 401(k) Plans – ACP Test
- Governmental employers deemed to satisfy



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



IRC 410(b) Testing

- 403(b) Plans – IRC 410(b) Test applies
 - Except governmental employers, Churches and QCCOs
 - Note NQCCO must satisfy
 - In determining excluded employees, the additional exclusions that apply to 403(b) plans may be used
- 401(k) Plans must satisfy
 - Except governmental & Church (IRC 414(e))
 - Nonelecting church plan must satisfy the pre-ERISA 401(a)(3) coverage requirements



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



IRC 401(a)(4)–Discrimination Testing

- 403(b) Plans & 401(k)
 - Must not discriminate in favor of highly compensated employees
 - Benefits, rights & features test



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) That Fails Coverage & Nondiscrimination Rules

- 403(b) may be aggregated with a 401(a) plan to satisfy the tests
 - Treas. Reg. 1.410(b)-7(f)
- One-way street
 - A 401(a) plan may not aggregate with a 403(b) to pass the tests



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) vs. 401(k) Limitations



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Elective Deferrals – IRC 402(g) Limits

- 403(b) Plans
 - Special 15 YOS catch-up rule – IRC 402(g)(7)
 - Only certain employers – Treas. Reg. 1.403(b)-4(c)(3)(ii)
 - Smallest amount of 3 prong test
 - Special ordering rule when participant qualifies for age 50 catch-up and 5 YOS catch-up
 - Years of service calculated different than 401(a)
- 401(k) Plans – standard rules



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



IRC 415(c) Limitation For 403(b)

- Plan aggregation
 - Not aggregated with other defined contributions plans (non-403(b) of the employer)
 - Participant aggregates with defined contribution plan of employer controlled by the participant
- Special 5 year non-elective contribution after separation from employment
- Compensation is includible compensation – modified definition
- Excess – separate account under 403(c)



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) vs. 401(k) Vesting, Distributions & Loans



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Vesting – 403(b) Plans

- 403(b) Plans not subject to IRC 411
 - Non-vested separate accounting subject to 403(c)/401(a)
 - Operationally this can be handled through “separate accounting”
- If subject to ERISA, subject to ERISA vesting standards



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Timing of Distributions – 403(b)

- Custodial arrangements & Annuity contracts
 - Elective Deferrals & all custodial account contributions may not be distributed until:
 - Age 59 ½, severance, death, or disability
- Annuity contracts – employer contributions
 - No earlier than severance from employment or the prior occurrence of some event:
 - Death, age, disability, or stated number of years



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



RMD & Transfers

- 403(b) Plans RMD
 - Underlying contract/agreement has responsibility for inclusion of RMD language
 - Plan does not have to include the IRC 401(a)(9) language (may reference the contracts)
 - Determined in same manner as IRA – Treas. Reg. 1.403(b)-6(e)(2)
- 403(b) - Transfers
 - Payroll slot vendors
 - Non-payroll slot vendors
 - Other 403(b) plans



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Hardships & Loans – 403(b)

- Hardships
 - Follow 401(k) rules
 - Multiple vendors requires coordination across vendors
- Loans
 - Rules under IRC 72(p) apply
 - Multiple vendors requires coordination across vendors



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) vs. 401(k)
Other



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) – Timing of Contributions

- Elective deferrals – IRC requirements
 - As soon as administratively practicable
- Elective deferrals 403(b) subject to ERISA
 - Normal ERISA time frames
- Note no prohibited transaction under IRC 4975 for late contributions



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) -Treatment of Failures - EPCRS

- Generally a contract failure
 - Exception excess contributions & nonforfeitability
- Failure to operate under plan terms
 - All contracts with respect to which the operational failure occurred
- Impacts all contracts
 - Non-discrimination
 - Ineligible employer
 - Failure to have contracts issued pursuant to a written plan (all impacted contracts)
- 401(k) Plans
 - Applies to entire plan



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Excise Taxes – 403(b)

- IRC 4979 excise tax on excess contributions (ADP) does not apply
 - However, tax applies to excess aggregate contributions (ACP) does apply
- IRC 4975 PT does not apply
 - If ERISA then subject to ERISA rules
- IRC 4973 – Excise tax applies on excess 415(c) in a custodial account applies



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Required Filing of 1099-R & 945

- IRC 3405
 - 403(b) Plans
 - Responsibility with the investment vehicles as the “payors”
 - 401(k) Plans (like all 401(a) Plans)
 - Responsibility starts with the plan administrator



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



403(b) vs. 401(k) ERISA



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



ERISA Coverage - Exemptions

- Governmental employers
 - Applies to both 403(b) & 401(k) (established before 05/06/1986)
- Non-electing Church plans under IRC 414(e)
 - Applies to both 403(b) & 401(k)
- Elective deferrals only with limited employer involvement (how much is too much?)
 - Applies only to 403(b) plans
 - Treas. Reg. 2510.3-2(f); FAB 2007-2; FAB 2010-1; Advisory Opinion 2012-02A



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



ERISA 403(b) Plan vs. Non-ERISA 403(b) Plan

ERISA Fiduciary Rules Apply	State Fiduciary Rules May Apply
Must File Form 5500	Form 5500 Not Required
Large Plan Audit Requirement	No Audit Required
ERISA Preempts State Law	State Law Applies (No Preemption)



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



ERISA 403(b) Plan vs. Non-ERISA 403(b) Plan

Must Disclose Fees	Fee Disclosure Not Required
Minimum Vesting Standards Apply	Minimum Vesting Rules Do Not Apply
QJSA Rules Apply	QJSA Rules Do Not Apply
ERISA PT Rules Apply	ERISA PT Rules Do Not Apply



AHEAD
OF THE
CURVE

2015 ASPPA ANNUAL
CONFERENCE



Questions



**AHEAD
OF THE
CURVE**

**2015 ASPPA ANNUAL
CONFERENCE**



Contact Us

Ed Salyers, CPA

615.757.3325

Ed.Salyers@cpa.com

Ronald J. Triche, Esq., APM
Groom Law Group, Chartered

220.861.6620

rtriche@groom.com



**AHEAD
OF THE
CURVE**

**2015 ASPPA ANNUAL
CONFERENCE**

