Transcript for 403(b) Phone Forum.

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Moderator: Welcome to the 403(b) phone forum. All participants are in a listen-only mode. I would now like to turn the call over to your host, Mr. John Schmidt. Please go ahead.

J. Schmidt: Thank you very much and hello, everyone. As was mentioned, I'm John Schmidt, the Acting Director of Customer Education and Outreach for IRS Employee Plans, and I'd like to welcome you to today's phone forum on 403(b) plans. Today, we'll be hearing from Sherri Edelman, Tax Law Specialist in Rulings and Agreements, Technical Guidance and Quality Assurance and Ed Salyers, Senior Employee Plan Specialist in EP Examinations. For today's program, they'll cover the written plan requirements and common issues identified under 403(b) plans.

Before we start, I'd like to point out just a couple of things. Everyone registered for this forum will receive a certificate of completion by e-mail approximately one week after today's forum. You must attend the entire live forum to receive the certificate.

Enrolled agents, enrolled retirement plan agents and enrolled actuaries are entitled to continuing professional education credit for this session. Other types of tax professionals should consult their licensing organization to see if this session qualifies for continuing professional education credit. As with all our presentations, the comments expressed by our speakers should not be construed as formal guidance from the Internal Revenue Service.

For more information regarding 403(b) plans, please visit our retirement plans website at www.IRS.gov/EP. You can get there by going to the main IRS webpage and clicking on the Retirement Plans Community tab along the top. Look to the left-hand navigation bar, select type of retirement plans and then click on 403(b) plans.

While visiting our website, you might also want to subscribe to our free electronic newsletters. The link for the newsletters is also on the left-hand navigation bar. We have two newsletters, *The Retirement News for Employers*, which is intended for small employers sponsoring retirement plans, and *The Employee Plans News* intended for retirement plan professionals. You've heard enough from me. So, without further adieu, I'd like to turn it over to our first speaker, Sherri Edelman.

S. Edelman: Good afternoon. Again, my name is Sherri Edelman. I'm a tax law specialist in Employee Plans Rulings and Agreements, the Office of Technical Guidance and Quality Assurance. What I'm going to do today is provide an overview of the guidance that we've issued pertaining to the written document requirement for 403(b) plans. I will also discuss the guidance that we've issued pertaining to pre-approved plans, the remedial amendment period, and EPCRS, which is Employee Plans Compliance Resolution Systems. I will finish up with a very brief discussion of some of the differences between 403(b) plans and 401(a) plans as it relates to the written plan requirement. At that point, I will turn the presentation over to Ed who will discuss the operational issues that he and his team in exam have seen during their audits of 403(b) plans.

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Prior to the issuance of the final 403(b) regulations, there was no requirement in the Internal Revenue Code for a written plan document for a 403(b) plan. There was one in a ERISA, and there still is one in ERISA, but that's only for 403(b) plans that are subject to title one of ERISA, and there are many 403(b)s out there that are not. So, until January 1, 2009, most plans did not have to be in writing and no 403(b) plan had to be in writing for purposes of compliance with 403(b) of the Internal Revenue Code.

The final regulations changed all that and required a written plan document to be in place by January 1, 2009. The regulations include an exception, and we have received many questions concerning this exception. That exception is for an annuity contract or a custodial agreement maintained by a church other than a retirement income account under a 403(b)(9). So, in other words, if a church maintains a retirement income account, that does have a written plan document requirement. The other scenarios that I described do not. So, for this purpose, this is very important, a church is defined in Section 1.403(b)-2(b)(5) of the regulations.

Soon thereafter the end of 2008, we issued Notice 2009-3. We recognized that there were employers out there that needed a little bit of additional time to comply with the written plan document requirement. So, we issued Notice 2009-3 that provided transitional relief for 2009.

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What 2009-3 said is that we are giving plan sponsors additional time, that being up until the end of 2009, to adopt a written plan document. The written plan document in other words had to be adopted on or before December 31, 2009. It must be intended to satisfy Code Section 403(b) including the regulations. It had to be operated in accordance with a reasonable interpretation of 403(b) and the underlying regulations. Lastly in order to comply with Notice 2009-3, on or before December 31, 2009, best efforts were made to retroactively correct any operational errors during 2009 to conform the operation of the plan to the terms of the written plan.

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Moving ahead during 2009, we issued, I believe it was during April of that year, we issued Announcement 2009-34, which described our Pre-approved Plan Program. Announcement 2009-34 included a description of the Pre-approved Plan Program and included a list of required modifications for 403(b) plans. The LRMs consist of sample plan language that plan sponsors can use to draft their pre-approved plan.

After the announcement was issued, we received a lot of comments. We reviewed the comments and analyzed them and we have revised the revenue procedure and the associated list of required modifications, in other words, sample language. That revenue procedure is in the clearance process.

We're constantly getting lots of questions concerning when it will be released. The clearance process is a lengthy process. It's detailed. It's there because we want to be sure that what we issue is correct. We hope to have it out as soon as possible.

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This is a good segue to a common question that we receive all the time about the Pre-approved Plan Program. Everyone wants to know when it will be released. We're glad that so many of you are interested in the Pre-approved Plan Program because it is our hope many employers will take advantage of the Pre-approved Plan Program once it is out, but we want to emphasize that that the Pre-approved Plan Program should not be your primary focus. Our concern is that you have a written plan, be concerned with Notice 2009-3 and ensure that your plan is operating in accordance with the regulations and the terms of the written plan. You basically should be concerned with that you have a written plan document in place and that you're operating in accordance with your written plan document. The focus should not be on when the revenue procedure is coming out. We're trying to get that message across, and we hope you will take our advice in that regard.

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Following 2009-3, we issued Announcement 2009-89. In Announcement 2009-89 we created a remedial amendment period for 403(b) plans. We realized that as time goes on, there is the issue of the drafting of the document, the operation of the document, what if there are changes in the law, etc., etc. We realized that it will be necessary to have a remedial amendment period for the written plan document for the 403(b) program. So we created a remedial amendment period.

Lots of people are under the belief that Section 401(b) of the Code which includes a remedial amendment period for qualified plans similarly applies to 403(b) plans, but that is not correct. So, in Announcement 2009-89, we created a remedial amendment period. What Announcement

2009-89 says that if an employer has a 403(b) written plan document in place and adopts and operates the plan in accordance with the law and any changes in the law, and at some point down the road either adopts a preapproved plan or an individually designed plan pursuant to the receptive programs and guidance, the adopting employer will be able to retroactively go back to January 1, 2010 and correct form defects in their plan documents retroactive to January 1, 2010. That's going to be a very, very important feature that I'm sure a lot of employers are going to take advantage of once our programs are up and running.

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The last piece of guidance that I want to talk about is EPCRS, Employee Plan Compliance Resolutions System currently, in Revenue Procedure 2008-50. The current version of EPCRS applies to both 403(b) and 401(a) plans. With respect to 403(b) plans, what it does is it currently allows plan sponsors to fix operational, demographic and employer eligibility failures as defined in Section 5.02 of Revenue Procedure 2008-50. What it doesn't do is permit an employer to correct a plan document error including the failure to have a written plan document and the failure to operate a plan pursuant to the term of the plan document.

As a result, we continuously receive EPCRS applications that are submitted pursuant to Rev. Proc. 2008-50 that say we didn't adopt a plan in time. Here's our plan document. We're submitting it for approval, so on and so forth.

What happens is we have to send those back. Again, the reason that we're sending them back is that there's currently no mechanism in place under Rev. Proc. 2008-50 to fix those plan document errors. Along the same lines, there's also no mechanism, I say this, but I want to use an example here under 2008-50, to correct an operational errors that is the failure to follow the terms of the written plan document.

So, in other words, if a plan sponsor submitted an application that said I failed to—Section 2.3 of my 403(b) plan requires me to comply with Section 415 of the Code and I didn't, and I'm hereby proposing to fix it, etc. etc., we would have to send that application back. The reason is because the error that you're proposing to fix is the failure to operate your plan pursuant to the terms of the plan document.

Now, in that latter case I just described, to the extent you have that error and you submitted it and you said well, we're submitting an application under EPCRS because we failed to comply with the terms of the law and that would be an operational error as set forth in Rev. Proc. 2008-50. You would be permitted to fix under the current version of EPCRS because the error is a failure to comply with Code section 415, not simply a failure to comply with the terms of a plan document. So, that's kind of a fine line there, and I hope you understand the distinction because again, we've been returning quite a number of EPCRS applications that come in because they say we didn't comply with the terms of the plan document.

We are currently working on the new EPCRS that will include a mechanism to correct plan document errors – both the failure to have a plan document and the failure to operate pursuant to the terms of the plan document. Again, that revenue procedure is in the clearance process and once that's out, you will officially be able to come in under that, but in the interim, you can't come in but our bottom line is you've got to have a plan and to the extent you don't have one, you should put it in place now. Also, if you think you can take advantage of the correction program for operational errors under EPCRS, that program is currently open.

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The last point I want to make before I turn the presentation over to Ed is I want to draw a distinction between 403(b) plans and 401(a) plans with respect to the written plan document requirement. 403(b) plans are not 401(a) plans, and in that regard, they are not subject to Revenue Procedure 2007-44. For those of you that are not necessarily familiar with qualified plans, 2007-44 is the Revenue Procedure which currently sets forth the five-year cycle for qualified plans to come in and amend the documents for changes in the law.

The cycles are commonly referred to as Cycle A, B, C, D and E. We have received several questions in preparation for this presentation inquiring about whether 403(b) plans can come in under Cycle B, whether they should submit red line copies, etc. We've also received 403(b) plans that have been submitted under the various cycles. 403(b)s again, are not 401(a)s. There are similarities between the two of course, and there are many, many differences, but with respect to the "qualified status," 403(b) plans should not be amended or restated and submitted pursuant to the cycles set forth in Revenue Procedure 2007-44.

Similarly along those lines, 403(b)s are not required to adopt interim amendments pursuant to the schedule and the requirements that are otherwise applicable to qualified plans. Again, we constantly receive many questions concerning the application of the interim amendment requirement to 403(b) plans. The current requirement for interim amendments is for qualified plans. It's not for 403(b).

403(b)s must of course operate—this dovetails back to my discussion a few minutes ago pertaining to the remedial amendment period to the extent there are changes in the law that apply to 403(b). The 403(b) plans must of course operate in accordance with the changes in the law, but to the extent that change would otherwise require a change to the written plan document pursuant to which the 403(b) is operated, assuming you meet all the other requirements for the remedial amendment period, the plan sponsor will be able to come in at some point down the road and fix that form defect in the written plan document to comply with those changes in the law.

So, that is all I'm going to talk about. Now I will turn the presentation over to Ed Salyers.

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E. Salyers: Thank you, Sherri. Again, my name is Ed Salyers, and I'm an auditor with the Employee Plans Examination Branch. Now, I'm picking up on slide 13, and we're going to be talking about what the auditors may be finding and are finding on the audits that we're doing on the 403(b) plans, and

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If you're following along with the power point slides, I have a couple of slides dealing with locate and review.

On those slides, we list your plan documents because this is what the auditors are going to be looking at. We're going to be looking at your written plan. If you're using the paper clip approach, you should have this together for your review because you're supposed to be operating under this written plan. So, you need to know what it is.

If there's a board resolution that adopted the plan, you need to have that board resolution attached to the plan. That's what we're going to be looking for to see that the plan was timely adopted. You'll be hearing us talk about Notice 2009-3 a lot in this presentation because in our audit, we are going to be making sure that you satisfy the requirements of 2009-3.

Part of the written plan will be referenced to the contracts under the plan, and most employers are using either an attachment or they're referencing where that list will be kept with their written plan. So, the auditors are going to be looking for what contracts are you making available for investments under your plan.

Now, an item that you may not have focused on is in Revenue Procedure 2007-71, and it's in Section 8, is dealing with the reasonable good faith notice. For those vendors that had contributions coming in to 2005, but their contributions stopped in 2008, they didn't go forward in to 2009, the reasonable good faith steps that an employer should take to bring those contracts under the umbrella of the written plan are in section 8. What we say in that Revenue Procedure is that the employer should notify those vendors, the 2005 to 2008 vendors that received contributions, send those vendors a notice telling them the person that they should contact so that they can coordinate any information that's necessary to satisfy Section 403(b) of the Internal Revenue Code.

Now, the vendor can also make an effort to satisfy that good faith standard by contacting the employer before they do distributions or loans. So, the auditors are going to be looking for documentation to show did the employer make a reasonable good faith effort to satisfy this standard.

Other things that we'll look at under our audits would include employee handbooks, enrollment material. Particularly on handbooks, one thing that we look for there are inconsistencies between the handbook and the written plan. Employers are more likely to keep their employee handbook up to date. If we see inconsistencies, that's going to be an indication to us that we probably have an operational problem for something that you're not following in the written plan. These are things that you can check yourself to make sure that you're in compliance.

The information sharing agreement, when our auditors are out there on the audit, we're going to be looking at samples at least of the account records, and we may see money being transferred into or out of accounts and if going to a vendor that's not a payroll slot vendor, we're going to be looking first off, does the plan allow for this and then, is there an information sharing agreement in place. These are the items that are new that you're going to see an auditor looking for during their audits. Prior to the written plan requirement these were not part of the normal audit steps.

Now, the collective bargaining agreements I've got listed, the reason that auditors will review the collective bargaining agreement is because quite often, there are items in those collective bargaining agreements that impact the 403(b) plan particularly on sick and vacation leave and how that might be handled under the 403(b) plan, and we'll discuss that in more detail later, but we're going to be looking at those items. So, you should be focused on those also.

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Now, if we're out there and we're doing an audit, one of the first things we're going to look at is did you comply with Notice 2009-3. Do you have a written plan timely adopted and if not, you know that the Revenue Procedure, the new Revenue Procedure for corrections is not out yet, but we will have to deal with this on the audit. In our most recent *Employee Plans Newsletter*, the director of employee plans exam, Monika Templeman, has a discussion about how we're handling this during and audit.. That's what we're going to talk about here is that if we're out on an audit, we find that the employer did not adopt the plan timely, well, then there's going to be a closing agreement and a sanction, but if the employer, even though they have not adopted the plan by December 31, 2009, had been proactive and adopted a written plan prior to being notified of an exam, it's going to be a lesser sanction. Similar to the VC, the voluntary compliance fee because you can't come in now so we'll give you voluntary compliance. So, if you're sitting there and you have not adopted a written plan, if there's one thing that you take away from my presentation is go out now and adopt a written plan so that before you could be contacted by anyone for an audit, you'll have it in place and then you'll be under the VC sanction provisions.

Now, you've gotten your written plan. It was timely in place. You heard Sherri talk earlier about the remedial amendment period. You've gone into 2010. You're going to adopt a prototype. Now you're under the remedial amendment period. So, you don't have to make amendments for form defects. You can wait; adopt the prototype plan retroactive to January 1, 2010.

If we're there on an audit, and we determine that there is a form defect in your plan, we're going to point the written plan defect out to you and we're going to ask you to make a placeholder amendment to correct the bad language. Now, the reason for that is that bad language causes operational failures, which are not under the remedial amendment period. So, what we would ask you to do is to make that amendment so that you don't have an operational problem.

However, because you're under the remedial amendment period, you don't have to make that plan amendment. You can say, okay, fine, I'm going to wait and make that amendment when I adopt my prototype. What we will do is we'll follow up with you probably through our Employee Plans Compliance Unit to make sure that you did adopt a prototype because we left knowing that you had a written plan defect and that you were supposedly going to cure that defect with the adopting of the prototype.

We're in the years now where you have to have a written plan. That means you also have to follow that written plan. There are always operational problems identified in the current Revenue Procedure 2008-50, the correction Revenue Procedure, but it doesn't cover failure to follow the written plan. So, we're there on an audit and we see that you're not following your written plan, we are going to enforce your written plan requirement, and that's going to be an operational failure that we will deal with on the audit. If there's something in the terms of your plan that you don't want in there, then you need to be considering making a prospective amendment to change your plan. These are the things that we're going to be looking at and if it's the operational problems that could have been corrected under the current Revenue Procedure, everything's already in place, but we will be looking to the written plan first and then having your operations follow that written plan.

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So now, what kind of issues do we find with just the operation? Well, universal availability is always right up there at the top of the list. Now, we're dealing with do you know what your document provisions are. Until the written plan requirement was instituted in the Internal Revenue Regulation, there was no requirement under the Internal Revenue Code for written plans. So, everyone's adopting these written plans probably midnight December 29th, a lot of people.

Do you know what boxes you checked when you were doing your adoption agreement. Did you actually select the items that you actually use in operation? Go back and take a look at that because, if you're still saying that you're going to exclude those who worked less than 20 hours or less than a 1,000 hours, are you monitoring those requirements because that's where everyone had problems in the past, particularly the K-12?

If you're not tracking hours, but yet you have an exclusion for hours, then you're going to have a problem. So, go back and look at your written plan exclusions and make sure those follow your plan operations because when our auditors come in on an audit, they're going to have an interview with those individuals who are actually monitoring how people get into the plan and they're going to discuss the internal control procedures and then we're going to be looking at payroll and seeing if we see individuals that aren't properly excluded. An example would be where you have individuals that are coded in their payroll file as having worked less than a thousand hours, but when you look at the salary for say a clerical position, their hourly wage based on what they've made would have been way out of the kilter, so we'll start looking at those items and saying well, this doesn't look consistent with your exclusions. That's generally where we find the problem. So, make sure that you are aware of what your written plan has for exclusions.

If you do have a universal availability failure, 2008-50 has the correction and that's the correction where we require an ADP-type calculation for the missed opportunity and it's one half of that amount plus earnings and if there's an employer's match, then it's a full match. So, that correction can be expensive. So, you need to be aware of whether or not you know that you're following the written plan requirements in your operation of who's eligible to make elective deferrals.

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So, now we're going to talk about excess elective deferrals which is right up there with universal availability now as a most common error because a lot of people have started letting everyone in for elective deferral purposes but excess elective deferrals is a very common problem.

The second bullet for optional provision should have catch-up before "optional provision" so that your catch-ups are the optional provision. You do not have to allow catch-ups, which is your 15-year service and your age 50, and we're going to talk about those individually. You don't have to allow those in your written plan, but if you're going to allow them, then they need to be part of your written plan. The 15-year service catch-up is a three-prong test which basically is the lesser of $3,000 a year, a $15,000 lifetime or $5,000 times years of service minus prior elective deferrals. So, it's a three-prong test that individuals are supposed to have generated.

What is happing is individuals using 15 years of service catch-up is becoming most common problem that we run in to? The 15 year of service is not calculated on an elapsed time concept. So, if you have an individual that it has been 15 years from the date they've been hired but the first five years, they worked part time and then the last ten years they've worked fulltime, they do not have 15 years of service.

Year of service for purposes of 403(b) is a fulltime equivalency for the position. So, that's a very common problem that we find. The other most common problem dealing with counting of service deals with giving service for a non-related employer.

I'll use the school systems as an example of another common error. Individual works for School System A for ten years, then they transfer to another School System B and they work five, you can't aggregate those years of service. It's with one employer. The only exception is for church-related organizations, and there are examples in the regulation on that.

When we are out there on an audit, and we look at the contributions that have been made (looking at the W-2s or your payroll file) and we see that there are amounts over, the year's basic limit (example $17,000 for 2012), we're going to want a calculation. So, if you're going to allow someone to make contributions over the basic limit and they're using the 15 year of service catch-up, then there should be a calculation involved, and we're going to want to see real records, the W-2 records, something that supports this calculation.

Now, a lot of employers are defaulting to age 50, if an individual is eligible for the 15 years of service and the age 50 in the same year. They're not contributing more than the age 50. They're just being defaulting to the age 50 by the employer. The problem with that is somewhere down the road, that individual is most likely going to want to use the 15 year of service catch-up and the age 50, but the ordering rule that sets out that the first contribution over the basic limit when the individual is eligible for both the 15 year of service catch-up and the age 50 is that all contributions over the basic limit, (2012 =$17,000) go first as contribution under the 15 year of service catch-up. So, you either are going to have to go back and calculate the correct limit or what we usually find is that the individual has already utilized all of the 15 year-of-service limit in prior years and there is an excess. What's happened, those monies that were defaulted to the age 50 in prior years used up all of the 15 year of service catch-up because they were eligible in the same period.

Just make sure that when someone wants to use the 15 year of service catch-up that you're content that your calculation is correct.

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So, now talking about the age 50 catch-up, again, an optional provision so do not have to allow, but if you do, put it in your document. Just remember that there is an ordering rule and one thing that you might want to keep in mind when we were talking about the three-prong test for the 15 year of service and we talked about the third prong being $5,000 times years of service minus prior elective deferrals. The valid age 50 catch-up, let's just say that catch-ups made for the individuals before they are even eligible for the 15-year calculation, those valid age 50 catch-ups are not elective deferrals for purposes of that third prong of the test. So, you don't have to consider the valid age 50 catch-ups and sometimes we find employers doing that.

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Now, there are certain post-severance contributions that can be made that should be part of your plan if you're going to make them and generally it's dealing with sick and vacation pay. Now, what we're going to talk about first is the elective deferral part of this. You can have a provision in your written plan to allow for exclusions from your sick and vacation pay that you pay the individuals after they sever employment. There's a time period in which to make a proper elective deferral. Basically as long as the sick and vacation payment is made before the later of two and a half months after severance or the end of the year severance, it will be timely and you can defer—the employee can defer elective deferrals out of that sick and vacation leave payment.

That could be beneficial if we're talking about someone who's retiring in December of 2012, they're going to receive their lump sum sick and vacation payment in 2013 in January and they could have another elective deferral election of $17,000 in 2013 or whatever the amount will be in 2013 if they have that much from their sick and vacation pay.

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Now, the other way that sick and vacation comes into play is dealing with post-severance contributions that are non-elective. Now, a 403(b) plan is the only plan that allows for contributions for a former employee after they've severed employment and in this case up to five years after they've severed. They have to be non-elective. Again, this is an optional provision, your plan must provide that you're going to have these non-elective contributions.

This is a pretty common thing that we see in plans, often dealing with executives and superintendants that they'll have these post-severance contributions as part of their employment contract.

This occurs with the bulk of the employees when dealing with wanting to shelter sick and vacation payouts from taxes. So, you're going to convert these sick and vacation amounts to employer non-elective contributions. What I would say on that is make sure that you have someone who really knows what they're doing if you're trying to do non-elective contributions instead of those sick and vacation payments being paid in cash make sure no option for cash.

The employee is only going to get a contribution made into the 403(b) as non-elective employer contributions. What is the auditor going to do when they're out there on the audit and we see these non-elective contributions. We're going to be looking to see particularly in the sick and vacation conversion, that no one is getting the right to take cash, often the union contract will still provide that the employee will be paid in cash. State law may not provide that the employer can't remove the right to receive cash from annual leave.

These are items that we will be looking at, and so, you should look at those also, make sure that you have (if you're going to convert your sick and vacation leave to a non-elective employer contribution) thought this through and have everything in place particularly dealing with what happens if an employee dies before all the amounts are paid up. We have a problem if we see that you're going to promise to pay this sum of money no matter what (is this really a 403(b) contribution)? So, there's a lot of thought that goes into this if you want to convert sick and vacation pay or try to convert it to a non-elective employer contribution of 403(b).

One example I would give is that for 403(b), the limitation year is generally the calendar year. So if we have employers who they're on a fiscal year and they're thinking that the fiscal year plan year is the limitation year for purposes of annual additions under section 415(c) of the Internal Revenue Code. So, they'll take these sick and vacation leave payments, and let's just say their school year ends in July, they'll make one payment in what they believe is one limitation year of $50,000 the annual addition limit and then another payment in what they believe is the next limitation year starting in August 1st, but really it's the same calendar year and so they're over the 415 limit. You need to be aware of how you're making these payments and be aware that the limitation year for the annual additions to a 403(b) is generally the calendar year.

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Now what happens if you have contributions in excess of the elective deferral limit? That's a real problem because if you don't return the excess out of the plan plus earnings by April 15th of the year following the year of the excess. If someone made an excess in 2012, then by April 15th of 2013 you should disperse that excess plus earnings. If you do not timely remove the excess elective deferral, then what happens is the employee is taxable on the excess in the year in which it was made and the employee is taxable on the earnings and that excess again when it's distributed. So, you do have a double taxation.

That's a real hard item to explain to the employee, and the first thing they want to know (we do find this regularly on our audits), and the employee wants to know why the employer wasn't monitoring this. So, I would say make sure that you have your catch-ups correct. Otherwise, you're going to end up with excess contributions and the employee is going to end up with being taxed twice on some money.

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Now, 415 limits is an item that in some examples is really beneficial under the 403(b) plans in that you can have a situation where the employer, let's say a college or university, has a 403(b) and they also have a money purchase defined contribution plan. The overall 415 limit for annual additions for 2012 is $50,000. So, an employee would have two separate 415 limits. They could have $50,000 in the 403(b) and $50,000 in the money purchase defined contribution plan. It would not get aggregated.

So, now that sounds like a good deal, but the flipside of that is that if that employee controls another employer that has a defined contribution plan, then that plan's going to be aggregated with that employee's 403(b) and here would be the example.

You have an accounting professor, and they have an accounting practice outside the college or university. The accounting professor sets up a defined contribution plan for his accounting practice, puts $50,000 in that defined contribution plan in 2012. The 403(b) at the university level will have an excess contribution for any amount that's put into the 403(b) because the excess resides in the 403(b) in this situation.

The question is what is the employer to do? Generally, I would say that they need to make sure that the employee is made aware of this problem, particularly if the employer requires the employee to get approval before they have outside employment, then that would be one way to have an opportunity to explain to the employee.

Employer may also put something in the salary reduction agreement so that it asks that question about contributions to defined contributions plans of an employer that the employee controls. Be proactive.

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Now, the other IRS violations under 403(b) plans, the loans and hardship were a big problem before the written plan requirement because there was no coordination. Under the written plan, there is a focal point, and so, we're seeing that the number of these problems is coming down.

The ineligible employers, those that have a 403(b) but are not eligible, these are generally your governmental employers that are non-educational and it's primarily water districts and housing authorities. You can look to the current revenue Procedure 2008-50. There's a correction in there. You have to come in to voluntary compliance; it's not self correct, and there's even a schedule at the back, Schedule 6, under Appendix F of revenue procedure 2008-50, that you can fill out for this error.

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Other items, we're seeing are late deposit employee contribution. Remember that ERISA has a different standard, and so, if you're an ERISA employer, you should be following that standard. Basically for the final 403(b) regulations the requirement is as soon as reasonable for the proper administration of the plan and we give an example of 15 business days after the end of the month in which the funds would normally be paid or made available.

The one thing I'd like to point out is that if you're transferring the funds; if the employer is transferring the funds to a third-party administrator, and then the third-party administrator is transferring to the vendor, employers you need to be reconciling when that money goes to the vendor because the contributions are not in a 403(b) (they're not a 403(b) contribution) until they're in the appropriate funding vehicles. So, if the third-party administrator is holding those funds two and three months, then there's a problem. Look at that.

Plan transfers - we're going to be looking at the plan to see that there really is a provision in the plan to allow for transfers. So, keep that in mind.

Slide 26

When you look at a 403(b), there is a difference between 401(a). If you have a failure under 401(a), you think that all the funds are impacted in the trust.

For a 403(b) plan, generally it's a contract failure. There are some exceptions for excess contributions (timely corrected) and nonforfeitability.

If there's a failure to operate under the terms of the plan, then it's all of the contracts that are impacted by that failure. So, it's not all of the employees. It's only those employees that are impacted by that particular failure.

Now, what impacts all contracts are nondiscriminations such as universal availability, 401(m) tests for non-elective contributions, ineligible employer that I talked about previously. These impact all our contributions. If you don't have a written plan, then that impacts all of your contracts. So, keep that in mind.

Slide 27

The one thing that you do have to realize is that when you talk about contract under the plan, we aggregate all of employee's vendors as one contract. So, if one contract of an employee with one vendor fails, all of the employee's contracts with other vendors are aggregated and are at risk. So, that is a different focus than you might be used to.

Slide 28

Now, fiduciary rules, we put in fiduciary rules because that's a common question that we get. There are no fiduciary rules under the Internal Revenue Code. If you're an ERISA plan, you should be following the ERISA fiduciary rules. If it's a non-ERISA plan, state law is what you should be looking to.

Slide 29

So, now we're at the home page of the IRS, and you can find it by going to IRS.gov and then clicking on Retirement Plan Community, and if you'll look on the left, there's types of plans. You can click there to go to and select, say, 403(b). That's a quick way to zero in on the particular type of plan that you're interested in.

If you want to find our phone forms, it's on there. I'm assuming that's where you may have gotten today's forum by looking at our home page.

You can find the current projects that our Employee Plans Compliance Unit is doing and the results when they're posted. If you want to see something on corrections, we have our correction page, so you can go there.

Basically, anything that you might want to find dealing with the IRS is on our home page and dealing with the different types of plans is on the Retirement Plan Community tab. We try to put our technical guidance up there. So, it's a pretty good source, and we have FAQs (frequently asked questions) for all our topics.

Slide 30

We have Fix-It Guides. Now, you may be familiar with a our 401(k) Fix-It Guide. When the new Revenue Procedure for correction comes out, then we're going to have a new 403(b) Fix-It Guide place on the web. You will be able to click on your problem and it will take you to how you should correct it and walk you through the steps. So, I would recommend that you check that out.

Slide 31

Also, on our home page, you can sign up for our newsletters, such as *The Employee Plans News* . That's the one that I mentioned that the director of employee plans exams has discussed our interim procedure for audit handling of plan defects.

Moderator: Three minutes remain.

E. Salyers: Thank you. So, you can go to the newsletters and take a look at what kind of issues we are finding. You can sign up and we'll send you a link. We just send you a link. You can go to the web from the link and see if there's something of interest to you in that newsletter.

Slide 32

Now, on the last slide, what we did, we tried to work the pre-questions into our presentation as we went along, and we were able to do that with a lot of the questions, but there were a lot of very fact-specific questions. So, some of you we've already contacted and answered your questions. The rest we'll be contacting, but if you have additional questions, then here is an e-mail address where you can send your question to and then it will be given to someone and we'll get back to you.

Twenty-five percent of the questions dealt with church plans. So, I think we worked all of those into the presentation. That pretty much sums up my end, and I appreciate the fact that you would sit and listen to us for an hour. I hope that this has been helpful to aid you to not have problems with your plan operations. So, thanks for listening and I now have that it's time for us to be cut off.

Moderator: That does conclude our conference for today. Thank you for your participation and for using AT&T TeleConference Service.