On February 17, 2010, the Department of Labor/Employee Benefits Security Administration issued Field Assistance Bulletin 2010-01, which may be some of the most important guidance the DOL has issued with respect to 403(b) plans. In the form of a user-friendly Q&A format, it not only provides valuable information regarding the applicability of the new 5500 annual reporting and audit rules to 403(b) plans (FAB 2009-02), but also clarifies the 30 plus-year-old guidance that some private tax-exempts utilize to avoid ERISA coverage for their 403(b) plans (29 CFR 2510.3-2(f)).

The Q&A addresses the following key issues:

**ASSETS INCLUDED/EXCLUDED IN THE 5500 ANNUAL REPORT/PLAN AUDIT**

Last year, the DOL/EBSA issued Field Assistance Bulletin 2009-02, which exempted certain fully vested 403(b) contracts from the 5500 financial reporting and audit requirements for 2009. The contracts involved were those to which contributions ceased prior to January 1st, 2009, and were primarily owned by individuals as opposed to employers. The information was important in that it was often difficult or impossible for the plan sponsor to obtain for these types of contracts. The guidance, however, was unclear in many aspects. It was silent as to how common transactions, such as loans and exchanges, would affect the exemption; and it defined an exempt contract as an agreement under which all rights of the contract were legally enforceable against the investment provider only by the individual owner of the contract. This provision implied that any employer action taken to enforce the provisions of the contract, no matter how minor, might eliminate the contract exemption from 5500 reporting/audit, an undesirable outcome.

Fortunately, the Q&A clarified that not every employer enforcement action will eliminate the exemption. For example, suppose the employer simply provides employment status to an investment provider so that an employment termination distribution can be processed. A contract that otherwise satisfies the FAB 2009-02 exemption will still meet the exemption, despite this employer action. Or consider employers who provide additional information sharing to a vendor at the vendor’s request, in order to enforce the provisions of a contract (such as loans/account balances with other investment providers). Although not specifically stated in the Q&A, they would presumably not be disqualifying affected contracts from the FAB 2009-02 exemption from 5500 and audit reporting.

The DOL also clarified that the 2009-02 exemption is not an “all or nothing” contract exemption; employers can pick and choose among contracts that qualify for the exemption which contracts they wish to report as...
plan assets in the 5500/audit. This guidance is especially welcome where exempt and non-exempt contracts exist at the same investment provider. In addition, the DOL clarified that the ability to locate and identify a contract is not a barrier to the 2009-02 exemption. (Some practitioners assumed that the FAB only applied to contracts that could not be identified/located.) It also stated that the exemption applies to both large and small plans, and addressed the determination of the number of participants in ascertaining whether a plan is large or small. Finally, the DOL formally extended the exemption beyond the 2009 plan year, and clarified that the exemption applies to otherwise exempt contracts where 2008 contributions were actually deposited in 2009.

### ADDRESSING AUDIT FIRM CONCERNS WITH THE FAB 2009-02 EXEMPTION

Many audit firms expressed rapid concern about FAB 2009-02 when it was issued, since exclusion of plan assets in the manner that the DOL/EBSA described was inconsistent with generally accepted accounting principles. In many situations, the employer is unable even to obtain a copy of contracts that might qualify for the plan asset exemption, never mind determine whether a contract qualifies for the exemption. Thus, many auditors are so uncomfortable with the exemption, that it appears very likely that adverse or disclaimed opinions will be issued where such contracts are involved.

To address these concerns, the DOL/EBSA provided the following points of clarification regarding audit opinions:

1. **The DOL stated unequivocally that contracts exempt under FAB 2009-02 may be completely disregarded for 5500 and plan audit purposes.** If the auditor disagrees, and issues a qualified, adverse or disclaimed opinion solely due to the fact that exempt contracts were not included in the plan audit/financial statements, that opinion will not cause the DOL to reject a filing (as it normally would).

2. **To address specific accounting concerns, the DOL clarified that exempt contract assets should not be reported on the Schedule of Assets Held for Investment, nor on the Schedule of Reportable Transactions on Schedule H for large plans.**

3. **The DOL appears to anticipate that there will be disagreements between auditors and plan sponsors as to whether contracts qualify for the exemption under FAB 2009-02.** Though short of requiring accounting firms to audit contracts to determine whether such contracts are exempt, the DOL states that audit firms should alert the plan administrator if they believe that contracts have been improperly excluded from plan assets, based on the exemption, and should note in the audit report any disagreements between plan sponsor and auditor in this area. As an aside, best practice dictates that all contracts/custodial agreements that can be obtained should be reviewed by counsel with specific 403(b) plan expertise, in order to determine treatment under FAB 2009-02.

This guidance should provide audit firms with a comfort level when they approach contracts that are potentially excludable from plan assets for 5500 reporting and audit purposes.

### AN ADDED BONUS: GUIDANCE ON THE SAFE HARBOR EXEMPTION FROM ERISA FOR CERTAIN TAX-EXEMPT 403(B) PLANS

The DOL/EBSA also provided welcome clarity to 29 CFR 2510.3-2(f), the regulation addressing an exemption from ERISA for private 501(c)(3) tax-exempt employers for elective-deferral only plans, where employer involvement is minimal. It should be noted that governmental and the vast majority of church plans are exempt from ERISA, regardless of employer involvement. Most practitioners have regarded the original regulation, issued in 1979, as clear as mud, and the DOL has issued surprisingly little formal guidance in the intervening 30 years to clarify the regulation. Even FAB 2007-02, which was designed to assist plan sponsors in determining whether their plans could remain exempt from ERISA in light of the final 403(b) regulations issued by the IRS, created more questions than it answered. The result was frustration for plan sponsors who desired to continue to utilize the exemption.

The DOL has remedied at least some of this frustration in the current FAB, by providing concrete examples of exactly what actions are prohibited under the safe harbor. Limiting the number of investment providers to a single vendor, for example, would generally subject a plan to ERISA,
with the significant exception of small plan sponsors in situations where offering payroll slots to multiple providers would not be feasible. Hiring a TPA to make discretionary decisions regarding plan transactions would also disqualify a plan from the safe harbor, and subject such a plan to ERISA. Employer-directed movement of account balances from one investment provider to another would also fall under ERISA regulations.

The DOL does appear sensitive in FAB 2010-01 to plan sponsors’ concerns about complying with the IRS’ final 403(b) regulations, yet remaining in compliance with the safe harbor. To that end, the DOL will permit employers to ban from vendor contracts problematic transactions, such as loans and hardship distributions, without subjecting the plan to ERISA. In addition, if transactions such as loans and hardships are permitted, the employer may limit vendor selection to those who are bound by contract to make discretionary determinations with respect to such transactions. Finally, an employer is permitted to remove vendors who do not comply with any aspect of the final 403(b) regulations, without running afoul of the safe harbor.

CONCLUSION

For the first time in history, 403(b) plan sponsors and auditors are facing very complex issues when addressing comprehensive 5500 filing and audit matters. The DOL/EBSA should be commended for the guidance it has provided in an easily understandable format with FAB 2010-01. The guidance falls short of addressing all issues associated with the new requirements, but is an important step in the right direction.

The clarity of guidance regarding the safe-harbor exemption from ERISA for private tax-exempt plan sponsors is not only unprecedented, but even breathes a little life into a regulation that many practitioners had written off as “dead” in light of the final 403(b) regulations issued by the IRS.