

## Internal Revenue Service

### Advisory Committee on Tax Exempt and Government Entities (ACT) Report on 403(b) Plans

On June 17, 2015, ACT released a report *Analysis and Recommendations Regarding 403(b) Plans*, which sought to examine the consequences of the release of final 403(b) regulations on the 403(b) community, along with key compliance issues. [http://www.irs.gov/pub/irs-tege/tege\\_act\\_rpt\\_14.pdf#page=15](http://www.irs.gov/pub/irs-tege/tege_act_rpt_14.pdf#page=15) The Employee Plans group conducting the review took into consideration where the IRS could focus its limited resources “to do the greatest amount of good.”

This comprehensive report, which encompasses the experiences of 403(b) service providers, practitioners, plan sponsors and document providers, reflects on the evolution of 403(b) plans, which are distinct from the development of qualified plans. Appendix A of the report includes detailed survey results reflecting experiences of these constituents, which provides specific insight into many important topics.

Recommendations include the following:

- Universal Availability – A troublesome compliance area remains universal availability. More educational outreach is needed, with a special emphasis on the public school community. Among the topics noted for the provision of additional information are the following:
  - How the 20 hours per week and 1,000 hours per year rules works.
  - What happens when an employer fails to provide the annual “effective opportunity” communication about a participant’s ability to begin or change regular 403(b) and Roth 403(b) elective deferrals.
  - The importance of the plan sponsor explaining plan eligibility to participants.
  - What happens when the job classification of a member of an excludable class changes in the middle of a year.
- Orphan Contracts - With a focus on practicality, the IRS should provide guidance on the impact of operational violations under an individual’s orphan contract on other contracts that the individual may have with the same employer. In addition, clarification should be provided explaining how pre-2009 frozen contracts issued to current employees before 2005 should be handled for compliance purposes.
- Contract Leakage - To minimize 403(b) contract leakage, the IRS should issue “soft guidance” to clarify that the vendor can “act as the decision-maker where the employer no longer exists for rollover and other withdrawal/distribution purposes under contracts.” In addition, the IRS should release guidance instructing issuers to provide advice notice to contract holders on the required minimum distribution rules and to make reasonable efforts to locate missing contract holders.
- Termination - Deficiencies in termination guidance should be addressed by legislation, or by giving the IRS the authority to address the problems. In addition, the IRS should provide more information on their webpage and expand the 403(b) Fix-It Guide to address appropriate corrections for situations where the termination fails because all assets cannot be distributed.

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- Employee Plans Compliance Resolution System (EPCRS) - EPCRS should be enhanced to reflect the unique features of 403(b) plans, including the implementation of the following suggestions:
  - Expand the Self Correction Program (SCP) portion to include correction for common loan failures.
  - Allow plan sponsors to use the DOL online earnings calculator to compute lost earnings.
  - Develop additional schedules for the Voluntary Correction Program (VCP) filing to allow for correction of the most common 403(b) operational failures.
  - Reduce the filing fees for the 403(b) community, at least briefly to allow for the discovery of compliance errors.
  - Implement a document amnesty program for any 403(b) plan sponsor that adopts a pre-approved plan so that no correction of prior documents is required.

## Nonqualified Deferred Compensation Audit Techniques Guide Published by IRS

Dated June 2015, the IRS recently published the *Nonqualified Deferred Compensation Audit Techniques Guide* LB&I-04-0615-005.

<http://www.irs.gov/Businesses/Corporations/Nonqualified-Deferred-Compensation-Audit-Techniques-Guide>

As explained in the guide, “a nonqualified deferred compensation (NQDC) plan is an elective or non-elective plan, agreement, method, or arrangement between an employer and an employee (or service recipient and service provider) to pay the employee or independent contractor compensation in the future.” A significant distinction between a NQDC plan and a qualified plan is the timing of the tax deduction. Under a nonqualified plan, employers cannot take a deduction until the income is made available to the employee. Qualified plan sponsors can deduct contributions in the year made, even though such amounts are tax deferred until they are distributed.

The guide provides a succinct summary that explains the four categories of NQDC plans including:

1. **Salary Reduction Arrangements** simply defer the receipt of otherwise currently includible compensation by allowing the participant to defer receipt of a portion of his or her salary.
2. **Bonus Deferral Plans** resemble salary reduction arrangements, except they enable participants to defer receipt of bonuses.
3. **Top-Hat Plans** (aka Supplemental Executive Retirement Plans or SERPs) are NQDC plans maintained primarily for a select group of management or highly compensated employees.
4. **Excess Benefit Plans** are NQDC plans that provide benefits solely to employees whose benefits under the employer's qualified plan are limited by IRC § 415.

Compliance with relevant NQDC plan rules is focused on:

- When are deferred amounts includible in an employee's gross income?
- When are deferred amounts deductible by the employer?
- When are deferred amounts taken into account for employment tax purposes?

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In addition to explaining how all of the rules work as well as the audit techniques to be used by examiners, the guide highlights that examiners need to carefully consider how 401(k) plans coordinate with NQDC plans of an employer. Specifically, the guide states:

*A NQDC plan that references the employer's IRC § 401(k) plan may contain a provision that could cause disqualification of the IRC § 401(k) plan. IRC § 401(k)(4)(A) and Treas. Reg. § 1.401(k)-1(e)(6) provide that an IRC § 401(k) plan may not condition any other benefit (including participation in a NQDC) upon the employee's participation or nonparticipation in the § 401(k) plan. Review NQDC plans looking for a provision that limits the total amount that can be deferred between the NQDC plan and the IRC § 401(k) plan. Also look for any NQDC provision which states that participation is limited to employees who elect not to participate in the § 401(k) plan.*

## Two Editions of *Employee Plan News* Released

On June 10, 2015, the IRS released No. 2015-6 and on June 23, 2015, the IRS published No. 2015-7 editions of *Employee Plan News*. <http://www.irs.gov/Retirement-Plans/Employee-Plans-News> In a shift from the release of previous editions, there are no comprehensive links to “printed” versions; rather, there are links to articles under the respective issues. Following are summaries of articles of interest, with applicable links.

- IRS Nationwide Tax Forums Scheduled – Five three day seminars and workshops will be held this summer, as noted below. <http://www.irs.gov/Retirement-Plans/EP-and-EO-participating-in-IRS-Nationwide-Tax-Forums>  
Topics covered will include:
  - SEP and SIMPLE saving options and limits
  - The right compensation to use when calculating contributions
  - Determine when employees participate in the plan
  - Employees of related employers
  - Common errors found on SEP and SIMPLE audits
  - Annual compliance tips.

The dates and locations of this year's forums are:

National Harbor, Maryland (DC)	July 7-9
Denver, Colorado	July 28-30
San Diego, California	August 11-13
Atlanta, Georgia	August 25-27
Orlando, Florida	September 1-3

- Voluntary Correction Program (VCP) Fee Chart Updated – The chart detailing the general fees applicable to single submissions of 401(a) or 403(b) plans has been updated. <http://www.irs.gov/Retirement-Plans/Voluntary-Correction-Program-Fees>
- Permanent Penalty Relief Program for Late Annual Report Filing for Certain Retirement Plans – Revenue Procedure 2015-32, which was published June 15, 2015, provides administrative relief for one-participant plans that are not subject to ERISA, if annual reports are filed late. <http://www.irs.gov/pub/irs-drop/rp-15-32.pdf>, <http://www.irs.gov/Retirement-Plans/Penalty-Relief-Program-for-Form-5500-EZ-Late-Filers> Introduction of this program is a result of a successful temporary pilot program announced in 2014.

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- Fix-It Guides updated – The following Fix- It Guides have been updated:
  - 403(b) Plan Fix-It Guide <http://www.irs.gov/Retirement-Plans/403b-Plan-Fix-It-Guide>
  - SEP Fix-It Guide <http://www.irs.gov/Retirement-Plans/SEP-Fix-It-Guide-Common-Problems-Real-Solutions>
  - SIMPLE IRA Plan Fix-It Guide <http://www.irs.gov/Retirement-Plans/SIMPLE-IRA-Plan-Fix-It-Guide>
- VCP Submission Kit - Failure to Make Timely Required Contributions to a Money Purchase or Target Benefit Plan – To assist plan sponsors in fixing errors under the Voluntary Correction Program (VCP), the IRS has produced a “kit,” which includes an overview of the process, links to forms that need to be filed, along with specific instructions by form, and Frequently Asked Questions (FAQs). <http://www.irs.gov/Retirement-Plans/VCP-Submission-Kit-Failure-to-Make-Timely-Required-Contributions-to-a-Money-Purchase-or-Target-Benefit-Plan>

## Alert Guidelines Published

On June 22, 2015, the IRS released *Alert Guidelines, Explanations & Plan Deficiency Paragraphs*, which IRS reviewers use as resources when assessing whether a plan satisfies the requirements for obtaining a determination letter. <http://www.irs.gov/Retirement-Plans/Alert-Guidelines-Explanations-and-Plan-Deficiency-Paragraphs> Plan sponsors are encouraged to use this information as a resource for reviewing plan rules prior to submitting an application for a determination letter.

The subject matter packages, which are bundled as a publication and two forms, are listed below. As explained in the IRS release, each package contains the following:

- An *Explanation* that provides guidance in the law and legal citations.
- *Alert Guidelines (Worksheets)* you can use to review retirement plans. Generally, a “Yes” answer to a question indicates a plan is in compliance with applicable law.
- *Plan Deficiency Paragraphs (Check sheets)* that are pre-approved wording that, if used by plan sponsors, will satisfy the applicable Internal Revenue Code requirements. While you aren’t required to use this exact wording, the pre-approved language provides an easy and reliable method for assuring plan qualification.

### Topics Covered

[Minimum Participation Standards](#) (Publication 6388, Form 5622, Form 6040)

[Minimum Vesting Standards - Defined Contribution Plans](#) (Publication 6389, Form 5623, Form 6041)

[Minimum Vesting Standards - Defined Benefit Plans](#) (Publication 4692, Form 5624, Form 8401)

[Joint and Survivor Annuities](#) (Publication 6391, Form 5625, Form 6042)

[Miscellaneous Provisions](#) (Publication 6392, Form 5626, Form 6043)

[Coverage and Nondiscrimination Requirements - Defined Contribution Plans](#) (Publication 6393, Form 5627, Form 6045)

[Coverage and Nondiscrimination Requirements - Defined Benefit Plans](#) (Publication 4965, Form 9638, Form 9640)

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[Permitted Disparity](#) (Publication 4964, Form 9639, Form 9637)

[Limitations on Contributions and Benefits](#) (Publication 7001, Form 8384, Form 6044)

[Top-Heavy Requirements](#) (Publication 7002, Form 8385, Form 8397)

[Employee Leasing](#) (Publication 7003, Form 8386, Form 8398)

[Required Plan Distributions](#) (Publication 7004, Form 8387, Form 8399)

[Affiliated Service Groups](#) (Publication 7005, Form 8388, Form 8400)

[Employee and Matching Contributions](#) (Publication 7334, Form 8799, Form 9416)

[Section 401\(k\) Requirements](#) (Publication 7335, Form 9002, Form 9417)

[Section 401\(h\)](#) (Publication 11433, Form 13069, Form 13070)

## Department of Labor

### Notice of Hearing and Extension of Comment Period Announced on Conflicts of Interest in Investment Advice

On June 18, 2015, the Department of Labor announced that the Employee Benefits Security Administration (EBSA) will hold a public hearing on August 10, 11, and 12, and continuing through August 13, 2015 (if necessary) to consider the implications of adopting the recently proposed conflict of interest rule and related proposed prohibited transaction exemptions. <https://www.federalregister.gov/articles/2015/06/18/2015-14921/hearing-on-definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>

The comment period was also extended to July 21, 2015 for the submission of comments on the proposed rule and proposed new and amended exemptions. Note that links to comments that have already been received can be found at <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>.

### Secretary of Labor Perez Testified Before Congress

On June 17, 2015, Thomas E. Perez, Secretary of Labor, testified before the Health, Employment, Labor and Pensions Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives on the recently proposed rules on conflicts of interest in investment advice. Secretary Perez's statement was published on the Department of Labor website. <http://www.dol.gov/ebsa/newsroom/ty061715.html>

In his testimony, Secretary Perez emphasized the need for better, cost effective investment advice to ensure that adequate funds are available when workers retire. He cited the example of a retiree whose advisor failed to work in her client's best interests, causing the loss of the retiree's safety net. While acknowledging that many advisors do a good job for their clients, Secretary Perez stated that "far too often, people don't have the information and tools they need to make the best decisions."

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Secretary Perez offered the following timeline:

*As of today, we are about one-half of the way through the comment period, which the Department has extended to 90 days to ensure sufficient time for all stakeholders to comment. There will be a public hearing during the week of August 10th, after which the comment period will reopen until approximately two weeks after the hearing transcript is published – a process that we anticipate will provide an additional 30 to 45 days of public comment. We have received incredibly helpful input so far, and are eager to hear more. I look forward to working with Congress to ensure all voices are heard.*

## Next ERISA Advisory Council Meeting Scheduled

The next ERISA Advisory Council meeting will be held from August 18 – 20, 2015.

[www.dol.gov/ebsa/aboutebsa/erisa\\_advisory\\_council.html](http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html). This website also contains links to invited witness statements from the May 2015 meetings on the following issues that are being explored in 2015.

1. Model Notices and Plan Sponsor Education on Lifetime Plan Participation  
<http://www.dol.gov/ebsa/pdf/ACmodelnotice2.pdf>, and
2. Model Notices and Disclosures for Pension Risk Transfers, which relates most frequently to defined benefit plans.  
<http://www.dol.gov/ebsa/pdf/ACmodelnotice1.pdf>

## SPARK Institute Announces Results of Study of Efficacy of Distribution of Retirement Plan Information Electronically

On June 5, 2015, the SPARK Institute announced the release of a study conducted on its behalf by Quantria Strategies, LLC entitled “Improving Outcomes with Electronic Delivery of Retirement Plan Documents.”

[http://www.sparkinstitute.org/content-files/press\\_release\\_e-delivery\\_studies.pdf](http://www.sparkinstitute.org/content-files/press_release_e-delivery_studies.pdf) While both the Department of Labor and Internal Revenue Service have provided guidance on the use of electronic delivery of retirement plan documents, the study concluded that the proliferation of technology as well as individuals’ comfort level with accessing information electronically, has resulted in unnecessary constraints on the efficacy of electronic distribution of retirement plan information. Providing electronic delivery as a default would be acceptable to most participants and result in extensive savings to plan sponsors, according to the report.


## Supreme Court

### Supreme Court Rules in Favor of Same-Sex Marriage

In a 5-4 decision the Supreme Court held that the Fourteenth Amendment requires a State to (1) license a marriage between two people of the same sex; and (2) recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. As a result of the Court’s decision in *Obergefell v. Hodges* (and three companion cases), same-sex marriage will now become legal in all 50 states.

[http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf)

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Although the Court's decision promises to eventually provide consistency for plan sponsors in processing participant requests in all 50 states, there are some short term issues that will still need to be addressed. Similar to the aftermath of the *Windsor* decision (which struck down Section 3 of DOMA) there are certain details that will need to be addressed; including:

- The retroactive nature of the decision (e.g., will participants be able to seek benefits at a state level denied prior to the *Obergefell* decision date?)
- Required updates to state legislation and related regulations for states that do not recognize same sex-marriage
- State level procedural changes and changes to forms (e.g., Death Certificates)
- Question of how states will address their current laws pertaining to civil unions and domestic partnerships

Any gaps in recognizing same-sex marriages should be immediately identified. Plan sponsors are encouraged to review current plan definitions regarding "spouse" and "marriage" in their plan documents and identify procedures pertaining to spousal consent for plan distributions as well as QDRO processing.

Voya will continue to monitor developments and keep you updated.

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