

October 31, 2019

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Submitted via email

RE: Requested Modifications to the Form 5500 for ERISA 403(b) Plans

The American Retirement Association (“ARA”) is writing concerning appropriate reporting of transfers of funds between 403(b) plans on Schedules H and I to the Form 5500. This letter follows several discussions between the ARA and U.S. Department of Labor (“DOL”) on these matters.

The ARA is a national organization of more than 26,000 members who provide consulting and administrative services to employer-provided retirement plans and sponsors of those plans as well as to IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its five underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-Deferred Savings Association (“NTSA”), Plan Sponsor Council of America (“PSCA”), and the ASPPA College of Pension Actuaries (“ACOPA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

Background

By a plain reading of the Form 5500 and its schedules, certain types of participant account-related transactions that are unique to 403(b) plans should be reported. But the proper place for reporting of these transactions on the current form is not readily apparent. As a result, correct completion of the Form 5500 and the accompanying schedules is the subject of significant confusion by plan sponsors and, frequently, of inquiries in an examination by DOL.

Additionally, in many DOL audit situations, treatment of these transactions at times is inconsistent among auditors. Employers and auditors alike have struggled with correct reporting since 2009, when new regulations for 403(b) plans went into effect, eliminating the exemption from Form 5500 reporting of most financial information for 403(b) plans. The following section describes types of transactions for which proper reporting is unclear.

The Transactions

- 1. Plan-to-plan transfers.** Plan-to-plan transfers which do not involve a distributable event -- from one employer’s plan to the plan of a different employer -- may only be made *to a plan* where the participant is a current or former employee. For this to be permissible under IRS rules, both plans must permit this type of transfer. Vendors *do*

not report these transactions to the IRS on Form 1099-R, and participants are not required to report them on the Form 1040. But the transferor-vendor must indicate what the assets consist of, otherwise they must be invested in a “restricted” source and the most restrictive distributable events will apply to these monies. This is, in most cases, the “Employer Contribution” account. For purposes of the Form 5500, the transfer may be identified as coming from either: (a) a separate non-ERISA Plan, which was not subject to Form 5500 reporting; (b) a grandfathered or orphan 403(b) plan that was held outside of the ERISA plan to which the participant now wishes to move their current employer’s plan account; or (c) a transfer from a previous in-plan transfer made without the employer’s involvement or approval. Clarification is needed as to the correct way to identify such a transfer.

- 2. Transfer of Assets of a Grandfathered Orphan 403(b) Account to a Contract with an Approved Vendor.** An orphan account is one that is not associated with an employer-sponsored plan. Under IRS rules, orphan accounts that have not accepted contributions after 2004 are “grandfathered.” Therefore, they are not treated as a part of a 403(b) plan under IRS rules and when there is a distributable event, their assets cannot be transferred to a 403(b) plan. They may only be transferred to an individual retirement account. But if the 403(b) plan is subject to ERISA, these accounts are treated as part of the 403(b) plan but are not subject to Form 5500 reporting. The transfer would be subject to reporting on the Form 5500 but it is not clear where this should be reported on the form.

- 3. Transfer from a Non-Grandfathered Orphan 403(b) Account to an Approved Vendor.** A vendor distributing assets of a non-grandfathered orphan account must indicate how the account assets are to be invested, otherwise they must be invested in a “restricted” source and distributions will be subject to the most restrictive conditions. Transfers of such accounts made after September 24, 2007, must be transferred to a vendor approved under the plan unless, under special rules, the participant re-transferred their assets to a contract issued by a vendor approved under the 403(b) plan by July 1, 2009. If the participant now requests a transfer of the assets to a 403(b) plan, an appropriate place for reporting it on the Form 5500 is lacking.

Recommendation

ARA recommends the addition of a line item to both Schedules H and I to the Form 5500, under Part II, as a new line 2(m) “Plan-to-Plan Transfers between 403(b) Plans” along with instructions on the transactions affected. In the alternative, ARA recommends that the instructions for an appropriate existing line item be clarified to deal with the transactions described above.

These comments were prepared by NTSA's Government Affairs Committee, Susan Diehl, Chair, on behalf of the ARA. If you have any questions regarding the matters discussed herein, please contact Martin Pippins, Director of Regulatory Affairs at (703) 516-9300. Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Martin L. Pippins, Executive Director, ACOPA
Director, Regulatory Affairs
American Retirement Association