



# **New 403(b) Plan Requirements and Prototype Program Guidance**

*Dallas Bar Association*

*Employee Benefits/Executive Compensation Section*

*August 5, 2009*

***Eric Winwood***

***Misty A. Leon***

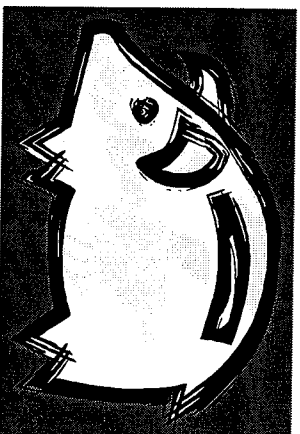
**BAKERBOTTSLP** ■

# Overview: *New Guidance on 403(b) Plan Issues*

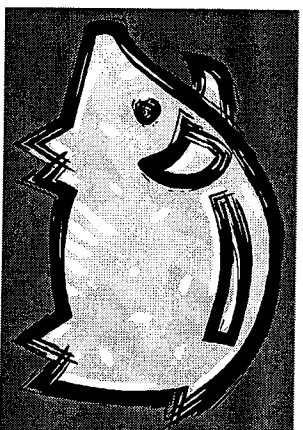
- *Extension of Written Plan Document Requirement: Notice 2009-03*
  - General effective date of January 1, 2009, remains the same
- *403(b) Prototype Plans: Announcement 2009-34*
  - Release of proposed procedures for issuing opinion letters on prototype plans and sample plan language for prototype plans
  - Individually designed plan guidance to follow
- *Mid-Year Modification of Safe Harbor Nonelective Contributions: Proposed Regulations*
  - Also applies to 401(k) plans
- *Form 5500 Reporting Requirements: FAB 2009-02*
  - Transitional relief for certain pre-2009 annuity contracts and accounts

## Background

- Final 403(b) plan regulations adopted in July 2007
- The new regulations replaced existing rules and caused some former IRS guidance to become obsolete
  - Rev. Rul. 2009-18
- The regulations are intended to diminish the extent to which the treatment of 403(b) plans differs from the treatment of other salary reduction arrangements (i.e., 401(k) and 457(b) plans)



401(k)



457



403(b)

## ***Impact of New Guidance***

- *All 403(b) plans must be maintained pursuant to a written plan document*
  - Written plan document must satisfy the requirements of the 403(b) regulations in both form and operation
- *New qualification rules must be followed in practice*
  - Rules regarding eligibility, benefits, contribution limits, available contracts, time and form of benefit distributions, and optional features (e.g., hardship withdrawals, loans, and acceptance of rollovers) must comply with the new rules in practice, effective January 1, 2009
- *ERISA compliance issues*
  - The new regulations force employers and service providers to more closely define relationships and duties and to make determinations that will potentially be governed by ERISA
  - ERISA rules harder to apply to 403(b) plan arrangements in some situations
  - Cutback issues

# **Implications for employee benefits policy:**

## ***Themes from the IRS and DOL***

- Increasing plan participation
- Stabilizing plans so that benefits will actually be paid
- Improving communications with participants
- Correcting abusive situations

## ***How significant are the new rules to U.S. workers?***

- 1,186,915
  - The number of Section 501(c)(3) organizations identified by the IRS as of 2008
- 13,862
  - The number of public school systems identified by the National Center for Education Statistics as of 2006

***These organizations are the actual or potential sponsors of 403(b) plans***

<b>From:</b>
<b>Table 25. Tax-Exempt Organizations and Nonexempt Charitable Trusts,</b> <b>Fiscal Years 2005-2008</b>
<b>Table 87. Number of Public School Districts, 1869-70 through 2006-07,</b> <b>U.S. Department of Education, Digest of Education Statistics 2008</b>

## ***Extension of Written Plan Document Requirement***

- ***Notice 2009-3***
  - A plan will not violate the requirements of 403(b) and the final regulations during the 2009 calendar year only if:
    - The plan sponsor adopts a compliant plan document on or before December 31, 2009, that is intended to satisfy the requirements effective as of January 1, 2009
    - During 2009, the plan sponsor operates the plan in accordance with a reasonable interpretation of the 403(b) requirements
    - Before the end of 2009, the plan sponsor makes its best efforts to retroactively correct any operational failure that occurs during the 2009 calendar year (using the general correction principles set forth in EPCRS guidance)
  - Notice 2009-3 cannot be relied upon with respect to the operation of a 403(b) plan or the correction of operational defects in any prior or subsequent year

## ***Enforcement of Documentation Requirement***

- *The IRS has informally indicated that it will be lenient with enforcement of "form defects" under written plan documents*
- *Strict compliance is required with respect to rules plan sponsors should have been aware of prior to January 1, 2009, such as the universal availability and nondiscrimination requirements applicable to 403(b) plans*
- *Although the IRS expects plan sponsors to self-correct 403(b) plan errors occurring during 2009, VCP procedures for additional 403(b) plan corrections are expected to be included in a future EPCRS Revenue Procedure*
- *Plans that terminate during 2009 likely not required to adopt a plan document (from an IRS standpoint)*



