GUIDESTONE QUICK GUIDE to Final 403(b) Regulations

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BACKGROUND INFORMATION

The IRS has published new regulations that will become effective for tax years that begin after Dec. 31, 2008. These new regulations apply to all 403(b) retirement plans. All employers that provide a 403(b) plan are required by the IRS to comply with these new regulations. A failure to comply can cause adverse tax consequences for all participants in the 403(b) retirement plan.

GuideStone Financial Resources has been dedicated to enhancing the financial security of our participants for more than 90 years. Our employees are highly experienced with 403(b) retirement plans. For several decades we have worked with churches, ministries, schools and colleges to properly document and administer their 403(b) retirement plans. We are committed to helping your church understand and take the necessary actions to successfully address these new regulations. The following questions and answers have been developed to provide you with a general introduction to this important topic, which will impact every church, ministry or educational institution offering a 403(b) retirement plan.

HOW COMPREHENSIVE ARE THE CHANGES?

The final 403(b) regulations are quite comprehensive and address a wide range of issues relating to 403(b) plans. These issues are addressed in the content of these FAQs.

WHAT IS THE EFFECTIVE DATE OF THE FINAL 403(b) REGULATIONS?

The regulations are generally effective Jan. 1, 2009. Plans are permitted to adopt the new regulations before Jan. 1, 2009, provided that they adopt them in their entirety. Most churches and church-related plans are subject to the Jan. 1, 2009, effective date. Select provisions in the regulations have earlier "applicability dates," one of which is the provision related to contract exchanges and plan-to-plan transfers. You will find information on contract exchanges and plan-to-plan transfers, including the special applicability date, addressed in detail in subsequent questions in these FAQs.

WHAT IS THE INTENT OF THE FINAL 403(B) REGULATIONS?

The final regulations accomplish multiple purposes. They remove provisions that no longer have effect.

They incorporate a number of items that provide interpretive guidance. But, generally, the final regulations reflect the numerous IRS rulings, bulletins, procedures, etc., that have been issued for 403(b) plans in previous years. [CONTINUED »

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An overarching message in these regulations is compliance. There is strong focus on compliance with the rules related to distributions and loans, particularly in plans with multiple fund providers. The IRS has made it clear that the employer has an obligation to ensure that distributions and loans in the aggregate, among all fund providers of the employer, do not violate permitted limits. The employer may use discretion in determining how plan responsibilities are divided. However, it is clear that the plan cannot rely solely on information provided by the participant. So, the need for accurate information sharing is highlighted in the final regulations.

WHAT IS A "WRITTEN PLAN" AS REQUIRED UNDER THE FINAL 403(B) REGULATIONS?

For the very first time, 403(b) programs that are not subject to the Employee Retirement Income Security Act of 1974 (ERISA) are required to be maintained under a written plan, which, both in form and operation, satisfies the 403(b) requirements. All provisions of the way the plan works must be spelled out in a plan document, and the plan has to be administered in accordance with these terms. To help organizations meet this written plan requirement, a revenue procedure will soon be released that will contain model plan language necessary to document a very basic 403(b) program.

WHAT ARE SOME OF THE ESSENTIAL WRITTEN PLAN REQUIREMENTS?

The written plan must include basic provisions, such as the following:

- **Eligibility.**
- **Benefits.**
- **Contracts available under the plan** (i.e., fund providers, service agreements, etc.).
- **Timing and form of distributions.**
- **Roles and responsibilities under the plan.**

WILL MULTIPLE DOCUMENTS SATISFY THE WRITTEN PLAN REQUIREMENT?

While the regulations anticipate a single document per plan, they allow for the possibility that an employer sponsoring a plan may use multiple 403(b) fund providers and that the "plan" may consist of various documents such as service agreements, separate contracts and administrative policies. Collectively, these multiple documents constitute "the plan" as long as each document coordinates and is referenced in the plan.

WILL THE WRITTEN PLAN MAKE A NON-ERISA 403(b) ARRANGEMENT SUBJECT TO ERISA?

No, this is not true in the case of church plans that have a special exemption from ERISA.

CAN A 403(B) PLAN BE TERMINATED UNDER THE FINAL 403(B) REGULATIONS?

Yes. In accordance with the regulations, a 403(b) plan can be terminated, very much in the same manner that a 401(k) plan can be terminated, and the individuals who receive their funds as a consequence of this plan termination have a right to roll these over to other eligible retirement programs. However, if a 403(b) plan is terminated, there are certain restrictions regarding when another 403(b) plan can be established.

HAS THE UNIVERSAL AVAILABILITY REQUIREMENT BEEN CLARIFIED?

For 403(b) plans subject to retirement plan nondiscrimination testing, such as 403(b) plans of colleges, universities and hospitals, the final regulations continue to require that if any employee is allowed to make elective deferrals, all employees of the employer must be allowed to make elective deferrals — with certain exceptions. This requirement is known as "universal availability." The final regulations clarify one of the groups of employees that can be excluded from the universal availability requirement, that is, "employees who normally work fewer than 20 hours per week."

HAS THE UNIVERSAL AVAILABILITY REQUIREMENT BEEN EXPANDED?

Yes. Under the final regulations, as a part of satisfying the universal availability requirement discussed previously, an employer must now demonstrate that employees are provided with "an effective opportunity" to make elective deferrals. The regulations state that the determination of whether an employer provides employees with an effective opportunity to make elective deferrals is based on all the relevant facts and circumstances. Some of the facts and circumstances looked at in determining whether employees have an effective opportunity to make elective deferrals are:

- **Notice of the availability of making elective deferrals,**
- **The period of time during which an elective deferral election may be made, and**
- **Whether any other rights or benefits are conditioned on the employee's making elective deferrals.**

Prior to the issuance of the final regulations, IRS officials repeatedly stated that the one thing they do not want to hear when auditing an employer is that employees are only told about the ability to make elective deferrals if they happen to stop by the Human Resources department and ask. These officials indicated they will ask to see payroll stuffers, posters and emails in order to determine whether an employer has let employees know they have the ability to make elective deferrals. GuideStone can help provide employers with communication pieces to help an employer provide an effective opportunity to its employees to make elective deferrals. Contact your Relationship Manager for more information.

DO THE REGULATIONS ADDRESS CATCH-UP CONTRIBUTIONS TO A 403(B)?

Yes. The final regulations reiterate that if a participant makes annual contributions above the basic limit on elective deferrals ($15,500 for 2008), the excess counts first toward the increased contribution limit for those with 15 or more years of service (if available), and then toward the catch-up provision for participants age 50 or older (if available). This is the approach that GuideStone currently uses and will continue to use in calculating plan contribution limits.

DO THE REGULATIONS ADDRESS THE TIME FRAME IN WHICH A PARTICIPANT'S PERSONAL CONTRIBUTIONS MUST BE DEPOSITED INTO THE PLAN?

The general rule under the final regulations is that all contributions must be made to the fund provider within "a period that is not longer than is reasonable for the proper administration of the plan." The regulations indicate that employee elective deferral contributions should be deposited within an administratively feasible period, typically within 15 business days following the month in which these amounts would have been paid to the employee, if not deferred. The key thought is that the IRS is seeking to ensure that contributions are properly and efficiently handled by the plan sponsor from the point of withholding to the point of contribution to the plan.

HAVE THE RULES ABOUT TRANSFERS (FORMERLY REFERRED TO AS 90-24 TRANSFERS) CHANGED?

Yes. This is a major change that will require some administrative retooling on the part of employers and fund providers. The old way of transferring money was documented under Revenue Ruling 90-24. Under the old rules, transfers were permitted to any 403(b) fund provider, even while still in service, by way of a "90-24 transfer." The problem was that employers often had no connection with the fund provider to which the funds were transferred. Often no one knew that a transaction had taken place. The employer, who would have some level of administrative responsibilities in regard to the 403(b) plan, would not know where the money was held. How could the employer deal with such questions as:

- **Are loan limits or contribution limits being exceeded?**
- **Is the financial hardship appropriate?**
- **Are individuals abiding by the plan distribution restrictions?**

The system wasn't working. The final regulations impose a new regimen to shore up these concerns.

WHAT IS THIS "NEW REGIMEN" AND HOW DOES IT WORK?

Under the final regulations, there are now two methods of transferring: (a) a transfer of money between fund providers within the same plan, and (b) a transfer of money from one employer's 403(b) plan to another employer's 403(b) plan.

Same plan — "contract exchange"

Let's assume that an employee who is in-service wants to move his or her retirement account from Fund Provider A to Fund Provider B under the employer's plan; however, Fund Provider B is not approved for ongoing contributions, i.e., does not have a "payroll slot" with the employer. Under the final regulations the transfer can only take place if:

- **The plan permits transfers;**
- **The account balance is not reduced as a result of the transfer;**
- **The funds moved must be subject to the same distribution restrictions with Fund Provider B as they were with Fund Provider A; and,**
- **In order to ensure compliance with such issues as loan rules, hardship distributions and other requirements of the 403(b) regulations, the employer and Fund Provider B (the fund provider receiving the account but not approved for ongoing contributions) must enter into an Information Sharing Agreement so that the employer and Fund Provider B agree to share information about the participant's account to ensure compliance.**

Note that the IRS assumes that approved Fund Providers, that is, Fund Providers approved for ongoing contributions, are already sharing information to ensure compliance with the 403(b) regulations.

Plan-to-plan — "plan-to-plan transfer"

Each plan, again, would have to permit the transfer in and/or out. The participant would have to be an employee or former employee of the employer for the receiving plan. And as before, the distribution restrictions must be retained and the account balance cannot be reduced as a result of the transfer.

WHEN DOES THIS NEW "CONTRACT EXCHANGE" AND "PLAN-TO-PLAN TRANSFER" APPROACH BEGIN?

The regulations provide that Revenue Ruling 90-24 will not be revoked until the general effective date of the regulations, which is Jan. 1, 2009. However, any transfer to another fund provider **after Sept. 24, 2007** could cause all the participant's contracts with the employer to become taxable on Jan. 1, 2009, ***unless*** one of the following two conditions is satisfied:

- **The fund providers are approved by the employer and a part of the employer's plan on Jan. 1, 2009, so that information sharing is already occurring; or**
- **The fund providers enter into an Information Sharing Agreement with the employer effective no later than Jan. 1, 2009. This agreement would be between the employer and fund providers who were not currently approved by the employer for the plan but who may have been approved in the past.**

In light of this, effective on Sept. 25, 2007, all transfers at GuideStone are being handled by use of forms that reference "contract exchange" and "plan-to-plan transfer." You may discard any forms referencing "90-24 transfer."

CAN YOU EXPLAIN THE INFORMATION SHARING AGREEMENT FURTHER?

The type of information that fund providers and employers will likely need to agree to share will be any information necessary for 403(b) plan compliance, including:

- **Information concerning the participant's employment, such as whether a termination of employment has actually occurred;**
- **Information necessary to determine compliance with applicable hardship distribution requirements;**
- **Information related to a participant's loans, such as outstanding balances and loan defaults; and**
- **Information necessary to satisfy other tax requirements, such as contribution limits.**

Although the Information Sharing Agreements are not required to be in place until Jan. 1, 2009, it is important that both sponsors and fund providers now contemplate their ability to enter into agreements to share the information required for purposes of compliance with 403(b) and other tax requirements before accepting any transfer after Sept. 24, 2007. Failure to enter into the agreement could pose the risk of adverse tax consequences for the participant in the future.

WHAT HAPPENS IF MY PLAN DOES NOT COMPLY WITH THE FINAL 403(B) REGULATIONS AS OF JANUARY 1, 2009?

The final regulations address the effects of a failure to satisfy the requirements of 403(b) and the regulations:

Contract failure. Most operational failures solely related to a single participant (such as failures in contribution limits, distributions, loan limits, etc.) would not adversely affect other participants but may disqualify the tax-favored status of the affected participant's account in the 403(b) plan. Under the final regulations, this would include disqualifying all 403(b) contracts of the participant under the employer's plan — for instance, a failure in a participant's contract with Fund Provider A may impact the participant's contract with Fund Provider B under the employer's plan.

Plan failure. The employer's plan may be disqualified (lose its tax-favored status) if the employer is not an eligible employer, if there is no written plan or if the retirement plan nondiscrimination rules (if applicable to the employer) are not satisfied.

WHAT ARE THE CONSEQUENCES OF DEFECTS OR UNINTENDED ADMINISTRATIVE ERRORS?

The final regulations clarify and confirm that the consequences of a "defect" in a participant's account, such as an uncorrected excess contribution or an impermissible distribution, do not extend to innocent participants. Of course, this does not change the rule that plan-level defects, such as documentation defects and discrimination defects, can affect every participant.

CAN THE EMPLOYER — AS THE PLAN SPONSOR — ASSIGN COMPLIANCE RESPONSIBILITIES AMONG VARIOUS PARTIES?

Plans with multiple plan providers can continue to negotiate with these providers to administer many of the compliance restrictions. However, the plan will need to include a mechanism for applying rules such as loan eligibility and limitations, and hardship eligibility, across fund providers. Moreover, the plan will not allow the employer to "pass off" responsibility for these administrative duties (such as information sharing on loans) to the participant.

WILL CHURCHES THAT PROVIDE A 403(B) RETIREMENT PLAN FOR THEIR EMPLOYEES BE SUBJECT TO THESE REGULATION CHANGES?

Yes. But if your church uses GuideStone as your sole 403(b) retirement plan vendor, the application of these changes will be simplified.

- **If your church allows plan participants to invest with multiple retirement plan providers or to transfer funds to other providers, compliance with these new regulations will be more complex.**
- **Compliance may also be more complex if your church has subsidiary organizations such as bookstores or affiliated ministries.**
- **Churches are excluded from some portions of the new 403(b) regulation changes because plans of churches are not subject to certain retirement plan nondiscrimination provisions that apply to church-related organizations such as colleges, universities and hospitals.**

QUICK GUIDE TO REGULATION CHANGES.

The following list includes a brief summary of the most significant 403(b) regulation changes. Those marked with an asterisk (*) are the regulations that apply to churches participating in a 403(b) retirement plan through GuideStone Financial Resources.

WHAT ARE THE NEW IRS REGULATIONS FOR 403(B) RETIREMENT PLANS?

*WRITTEN PLAN REQUIREMENT.

Non-profits, including churches and ministries that sponsor a 403(b) church retirement plan must maintain written documents that describe all material plan provisions.

*CONTRACT EXCHANGES AND PLAN-TO-PLAN TRANSFERS.

Participants, employers and plan providers now face new requirements if a plan allows participants to transfer 403(b) funds in their retirement account from one plan provider to another. Employers with multiple providers will need to enter into Information Sharing Agreements with all approved providers, and participant transfers along with certain other participant transactions will now require employer consent. (These new rules do not apply to rollovers between retirement plans.)

*TIMING OF IN-SERVICE DISTRIBUTIONS FROM EMPLOYEE CONTRIBUTION ACCOUNTS.

This provision impacts plans that allow employees to withdraw employer-contributed dollars while still in service to that employer without the occurrence of some event, such as reaching a specified age. Since most plans provided through GuideStone do not permit an in-service distribution of employer dollars until a participant has reached a specified age, this regulation change

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may not be applicable to your plan. However, please review your adoption agreement to confirm your plan does not allow employer contributions for in-service withdrawals without the occurrence of some event, such as reaching a specified age, or contact your Relationship Manager at GuideStone for assistance.

*NEW DEFINITION OF SEVERANCE FROM EMPLOYMENT.

The new regulations provide additional clarity to legal terms and phrases, one of which is "severance from employment." For most churches and ministries this change will have no impact. But for churches and ministries that have complex legal structures, hierarchical organizational structures or separate subsidiaries, there may be some impact.

UNIVERSAL AVAILABILITY.

Some 403(b) plans are subject to annual retirement plan nondiscrimination testing that demonstrates the plan does not discriminate in favor of highly compensated employees in design or practice. This regulation is not applicable to churches.

EFFECTIVE OPPORTUNITY REQUIRED.

This is related to the universal availability provision above and is also not applicable to churches.

*REQUIREMENT TO FOLLOW PLAN TERMS.

As mentioned earlier, all 403(b) plans must be documented in writing. A failure to follow these written plan provisions can result in adverse tax consequences for individual plan participants and/or all plan participants, depending upon the nature of the failure.

☑ NEXT STEPS

- ☐ **Review your plan document.**
  Does it address compensation, eligibility and contributions? If not, develop written rules and procedures to address these.
- ☐ **Does your plan involve more than one provider?**
  — If you allow contributions to multiple retirement plan providers or allow contract exchanges, additional action is required which may include an Information Sharing Agreement (ISA).
  — If all of your participants' funds are with GuideStone and you do not allow contract exchanges, an ISA will not be needed.
- ☐ **Let GuideStone help.**
  — Visit ***www.GuideStone.org/planregs*** for more information and resources designed to make compliance easy.
  — Call Glenn Able at **1-888-98-GUIDE** (1-888-984-8433) for additional information.

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