Tax Management
Compensation Planning Journal

Terminating a 403(b) Plan: Final Regulations Give a Green Light, but Employers Should Proceed with Caution

by David M. Glaser, Esq.
and Meridith Bogart Krell, Esq.
Patterson Belknap Webb & Tyler LLP
New York, New York[*]

INTRODUCTION

In July 2007, the Internal Revenue Service (IRS) issued final regulations (the ''Final Regulations'') under §403(b) of the Internal Revenue Code of 1986, as amended (the Code), which generally took effect for taxable years beginning after December 31, 2008.[1] The Final Regulations required significant changes to the rules that apply to tax-exempt organizations, public schools and churches that maintain tax-deferred retirement plans under Code §403(b) (referred to herein as ''403(b) plans''), and in most instances, required employers to amend and update their 403(b) plans and consider modifications to their related administrative practices. Among a long list of new rules and requirements that the Final Regulations brought to the 403(b) arena was a definitive provision permitting 403(b) plans to be formally terminated and terminal distributions made from such plans.

Prior to the Final Regulations, there had been no legal guidance regarding how, or even if, a 403(b) plan could be terminated. Although 403(b) plan terminations were likely occurring during the pre-Final Regulations era (there was no express legal rule prohibiting such plan terminations), many employers and employee benefit practitioners viewed the lack of legal guidance on 403(b) plan terminations as a barrier to terminating such plans. So, 403(b) plans that were no longer wanted or needed often remained ''frozen'' with no new contributions or enrollment, but sometimes became a thorn in an employer's side as the plan that just would not go away. Administratively, and sometimes even financially, this result was burdensome to employers.

The Final Regulations provided express rules permitting a 403(b) plan to contain written provisions that provided for a plan termination and that allowed accumulated benefits to be distributed upon a plan termination.[2] Then, in early 2011, the IRS issued specific guidance addressing the termination of 403(b) plans.[3] Although the Final Regulations and the IRS's subsequent guidance certainly open the door for 403(b) plan terminations, there remains uncertainty in how to effectuate a 403(b) plan termination, and in some cases under certain fact patterns, whether a 403(b) plan can in actuality be terminated.

[*] © David M. Glaser and Meridith Bogart Krell (2011).

[1] However, later effective dates applied for certain employers and/or certain types of 403(b) arrangements (e.g., plans maintained pursuant to collective bargaining agreements, plans maintained by certain church-related organizations).

[2] *See* Treas. Regs. §1.403(b)-10(a)(1).

[3] Rev. Rul. 2011-7, 2011-10 I.R.B. 534.

This article will briefly discuss the legal framework governing 403(b) plan terminations. We will then focus on the open legal and practical issues that remain under the current state of the law with respect to terminating 403(b) plans — issues that we believe to be ripe for governmental guidance and answers to which are arguably necessary to be able to comfortably proceed with 403(b) plan terminations. We will also discuss other considerations that have proven to be important to employers and plan participants in the 403(b) plan termination process. Finally, we propose possible legal analysis and practical methods to address some of the open issues, which may be especially useful to employers who are anxious to move forward with 403(b) terminations under the uncertain 403(b) plan termination regime that exists today. As an appendix to this article, we include an outline of procedural and administrative steps as a practical guide for plan sponsors and their advisors in considering a 403(b) termination.

PLAN TERMINATION RULES UNDER THE FINAL REGULATIONS

The Final Regulations permit a 403(b) plan termination only if the sponsoring employer does not make contributions to any other 403(b) contract for the period beginning on the date of the plan termination and ending 12 months after distribution of all assets from the terminated plan.[4] However, if at all times during the period beginning 12 months before the date of the 403(b) plan termination and ending 12 months after distribution of all assets from the terminated 403(b) plan, fewer than two percent of the employees who were eligible to participate in the terminated 403(b) plan as of the date of plan termination are eligible to participate in another 403(b) contract, the other 403(b) contract is disregarded in this analysis.[5] Furthermore, in order for a 403(b) plan to be considered terminated, all accumulated benefits under the plan must be distributed to all participants and beneficiaries ''as soon as administratively practicable'' after the plan's termination date.[6] Although the determination of what duration is ''administratively practicable'' for this purpose is generally a facts-and-circumstances test, most practitioners follow a presumptive rule that all distributions must be made within 12 months following the designated plan termination date.[7] For annuity contracts issued under a 403(b) plan, the Final Regulations provide that delivery of a fully-paid individual insurance annuity contract is treated as a distribution.[8]

Although the Final Regulations made definite strides to permit 403(b) plan terminations, they also left many open questions that need clarification.

GUIDANCE UNDER REVENUE RULING 2011-7

In February 2011, the IRS issued Rev. Rul. 2011-7 (the ''Revenue Ruling'') to clarify the 403(b) plan termination provisions of the Final Regulations, and to address the tax consequences of distributions made to participants and beneficiaries in connection with a 403(b) plan termination. The Revenue Ruling provided an ''approved'' termination procedure — a checklist of sorts — for terminating 403(b) plans. The termination procedure includes the following steps: (1) a plan sponsor adopts a binding resolution that: (a) establishes a plan termination date, (b) provides for the cessation of plan contributions, (c) provides for full vesting of all benefits on the termination date, and (d) authorizes the distribution of all benefits as soon as practicable thereafter (which is again generally interpreted to mean within 12 months following the date of the plan termination);[9] (2) the plan sponsor (and any related entity participating in the plan) stops contributions to the plan and to any other 403(b) plan during the period that begins on the termination date and ends 12 months after all benefits have been distributed from the plan; (3) participants and beneficiaries are notified of the plan termination and receive a Code §402(f) rollover notice; and (4) all plan benefits are distributed within 12 months following the plan's termination date.[10]

In answer to the open question of how to ''distribute'' 403(b) plan assets, especially annuity contracts, the Revenue Ruling confirmed the following:

- For fully-paid *individual* annuity contracts issued by an insurance company, a distribution occurs by delivering the contracts to the individuals, or by single-sum liquidating distributions, if permitted under the contract;
- For *group* annuity contracts, terminal distributions are accomplished by issuing individual certificates to the participants evidencing fully-paid contract benefits, or by single-sum payments if permitted under the contract; and

---

[4] Treas. Regs. §1.403(b)-10(a)(1).

[5] *Id.*

[6] *Id.*

[7] In Rev. Rul. 89-87, 1989-2 C.B. 81, the IRS provided that, with respect to qualified plans under Code §401(a), whether a distribution is made ''as soon as administratively feasible'' generally means no later than one year following the termination date. Rev. Rul. 2011-7 suggests that the same interpretation applies for 403(b) plans.

[8] Treas. Regs. §1.403(b)-10(a)(1).

[9] *See* Rev. Rul. 89-87.

[10] *See* Rev. Rul. 2011-7.

ISSN 0747-8607

- For custodial accounts, distributions are accomplished by distributing the individual's account balance in cash or in-kind to the individual or by a direct transfer, if elected by a participant or beneficiary, to another eligible retirement plan.

The Revenue Ruling also confirmed the tax consequences of such terminal distributions. Distribution of a fully-paid individual annuity contract or an individual certificate evidencing fully-paid contract benefits would not be a taxable event. Individuals are taxed when amounts are actually paid from the annuity contracts. Distributions from a custodial account are taxable when paid unless such amounts are directly rolled over or transferred within 60 days to an IRA or other eligible retirement plan.

Although Rev. Rul. 2011-7 was a step in the right direction, the IRS again left a trail of many open questions. Although the Revenue Ruling in some ways gave a ''how to'' on 403(b) plan terminations, it has also caused many plan sponsors, plan administrators and investment providers to halt any further 403(b) plan terminations because of the uncertainty brought about by the IRS's language.

LEGAL AND PRACTICAL ISSUES AND CONSIDERATIONS

Outdated Contractual Provisions

One practical problem that has resulted from the new scheme to terminate a 403(b) plan is that many existing annuity contracts and custodial agreements used to fund 403(b) plans pre-date the Final Regulations and do not contemplate plan terminations. For example, antiquated contracts and insurance documents often do not provide for distributions upon plan terminations. Some insurance companies are hesitant, generally due to state law concerns, to amend existing annuity contracts. These contractual impediments to effectuating a 403(b) plan termination are frustrating in a regime in which the law has finally caught up to the realities of the market.

Surrender Charges and Exit Fees

Along similar lines, distributions made as the result of a 403(b) plan termination may have the unintended consequence of exposing participants and beneficiaries to significant charges and fees. Annuity contracts (and possibly custodial agreements) often provide for surrender charges and/or exit fees when money is withdrawn from certain investment products, which are typically calculated as a percentage of a participant's account. Sometimes, the investment provider (either through the contractual documents governing the investment vehicles or otherwise) provides for a waiver of such charges and fees for distributions that occur as the result of specific enumerated events such as a termination from employment, disability, hardship or death benefit. However, because current 403(b) plan annuity contracts and custodial agreements were often established under the old 403(b) plan regime, they typically do not contemplate 403(b) plan terminations which were not legally sanctioned prior to the Final Regulations. As such, there is often no waiver of exit charges for withdrawals that occur as a result of a plan termination.

Vendor Hesitation to Issue Fully-Paid Annuity Contracts or Individual Certificates

Some 403(b) plan vendors, especially insurance companies, seem less than comforted by the Revenue Ruling's depiction of issuing fully-paid annuity contracts and individual certificates as a mechanism to effectuate a terminal distribution from a 403(b) plan. We understand that many do not find the Revenue Ruling to contain enough detail or definition of what the IRS envisions by a ''fully-paid annuity contract'' and ''individual certificates.'' As such, vendors are often not moving forward with 403(b) plan terminations until further guidance is published. Without having its vendors on board, it is virtually impossible for a plan sponsor to effectuate a 403(b) plan termination.

Participant Consent to Distributions

Certain provisions of applicable law,[11] and often annuity contracts and custodial agreements,[12] require participant consent for most distributions from a 403(b) plan. Accordingly, when a plan sponsor does not have distribution elections from all plan participants and beneficiaries of deceased participants (i.e., there are missing or unresponsive participants),[13] it could be virtually impossible to terminate a 403(b)

[11] *See* text accompanying footnotes 15–20 herein.

[12] The contractual impediments to distributing without participant consent would seem easily fixable with a contract amendment. However, as noted above regarding general issues with antiquated contracts, some vendors will not agree to an amendment that removes participant consent provisions.

[13] ''Missing participants'' are participants who the plan or employer cannot contact because they have moved and left no forwarding address. ''Unresponsive participants'' as used in this article means participants who do not respond to the plan's or the employer's notices or other disclosures. We assume for purposes of this article that before a plan sponsor deems a participant as ''missing,'' they have used routine methods of delivering notice to participants, such as first-class mail or electronic notification, and,

ISSN 0747-8607

plan. Although the Revenue Ruling arguably provides a mechanism to distribute annuity contracts without participant consent (i.e., there is no indication that the action of distributing fully-paid annuity contracts or individual certificates requires participant consent), there is no guidance on how to accomplish a complete 403(b) plan termination when there is plan money held under a custodial account without obtaining participant consent with respect to distributions. If an employer cannot ''force'' funds to be distributed from custodial accounts when a participant has not made a distribution election, then it is unclear how a 403(b) plan with such accounts can be terminated, given that cooperation of *all* participants seems unlikely, especially for larger plans.

It is our understanding that the IRS understands the gaping hole that the current guidance fails to address. We further understand that it was likely not the IRS's intention to prevent 403(b) plan terminations when a plan sponsor cannot achieve 100% cooperation from plan participants.[14] However, absent specific guidance on the issue, and given the risk, as discussed below, that a 403(b) plan termination could be deemed invalid, thereby causing all distributions taken to be subject to immediate taxation for participants and perhaps additional penalties for both the participants and the plan sponsor, many plan sponsors are hesitant to move forward with 403(b) plan terminations knowing it is unlikely that they will be able to obtain consent for distribution from each and every plan participant (especially participants who are not active employees).

Nevertheless, certain plan sponsors have a business need or desire to terminate their 403(b) plan now or in the near future and will not have the luxury to wait for additional governmental guidance on the issue of participant consent. As such, we think there is a plausible argument that current IRS and U.S. Department of Labor (DOL) regulations and other guidance provide a mechanism to be able to effectuate a 403(b) plan termination when there are missing or unresponsive plan participants and beneficiaries. At the very least, without specific guidance on how to deal with the participant issue and the notion that the IRS did not intend for one or two missing or unresponsive participants to prevent a 403(b) plan from terminating, this approach would seem to be in the spirit of existing law and in good faith, so that we would reasonably hope that neither the IRS or DOL would retroactively penalize a plan sponsor that took the proposed actions should the IRS and/or DOL later publish rules that were inconsistent with the proposed analysis.

Our proposition begins with the recognition that Code §411(a)(11) and its accompanying regulations[15] generally restrict the ability of a plan to distribute any portion of a participant's accrued benefit without the participant's consent. However, as an exception to the general Code §411(a)(11) rules, the accompanying regulations provide that, upon the termination of a defined contribution plan, if the plan does not offer an annuity option, then the plan may distribute a participant's accrued benefit without the participant's consent.[16] Notably, §411 does not apply directly to §403(b) plans.[17] However, the rules of Code §411 are virtually the same as those of §203 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) (and, more specifically, ERISA §203(e) parallels Code §411(a)(11)), and this parallel ERISA section is a bit broader in its applicability than its Code counterpart and does not exclude most Code §403(b) plans.[18] As such, 403(b) plans that are ERISA plans would be indirectly subject to the provisions of Code §411 by application of ERISA §203.[19] In addition, arguably, the Code §411 regulations can be applied to

if those methods fail to obtain the information necessary for the distribution, then the plan fiduciaries have taken other steps to locate the participant or beneficiary in accordance with the methods enumerated in DOL Field Assistance Bulletin 2004-02 (9/30/04) (herein referred to as ''DOL FAB 2004-02''), including certified mail, checking related plan records, checking with the designated plan beneficiary and using a letter forwarding service.

[14] At least one IRS representative has informally indicated that the IRS may develop a procedure whereby missing or unresponsive participants that make up less than two percent of participants would not prevent a plan sponsor from accomplishing a ''clean'' 403(b) plan termination. The concept would seem to be one of bifurcating the plan termination (i.e., treating the portion of the plan covering the missing or unresponsive participants as a separate plan or contract for these purposes, and so if such portion covered fewer than two percent of the original plan's participant, a plan termination could proceed), although it remains unclear how the missing or unresponsive participants would be handled and how a plan sponsor would be able to know at the time of the plan termination date whether it will fall below the two percent threshold.

[15] Treas. Regs. §1.411(a)-11.

[16] Treas. Regs. §1.411(a)-11(e)(1). As discussed later in this article, the exception does not apply if the plan sponsor (or any entity within the plan sponsor's controlled group) maintains another defined contribution plan. *Id.*

[17] Code §411(a) provides that the provision applies to Code §401(a) plans.

[18] ERISA §203 applies to ''pension plans,'' and ERISA §3(2)(A) provides a broad definition of ''pension plan'' that does not exclude Code §403(b) plans subject to ERISA.

[19] Presumably, non-ERISA 403(b) plans (e.g., non-electing church plans and governmental plans and other 403(b) plans that are solely voluntary salary reduction programs under which employees are offered a reasonable choice of both 403(b) plan providers and investment products and all rights under the annuity contract or custodial account are enforceable solely by the employee or beneficiary) would not face the same participant consent impediments as ERISA plans because the Code §411 consent rules do not apply (i.e., the parallel provisions found in ERISA §203 are not applicable); however, the contractual impediments might still remain, especially since many vendors might fail to distinguish

ISSN 0747-8607

interpret the ERISA §203 provisions,[20] which then further subjects 403(b) plans to the Code §411(a)(11) analytical scheme. (Although our analysis that follows is based on these premises, we understand from at least one U.S. DOL representative that the application of ERISA §203 to plan terminations is currently unclear.)

Accordingly, in the context of Code §411, it would seem permissible for a plan sponsor to automatically distribute a participant's 403(b) plan account held under a custodial agreement that does not offer an annuity (or that was amended to eliminate annuity distribution forms) as a distribution option upon a 403(b) plan termination. It would seem to be a bit more palatable to only apply this automatic distribution if the participant is missing or unresponsive to the plan sponsor's requests for a distribution election.

Subsequently, there is a question of what form of distribution a plan sponsor could elect, which brings up the issue of a plan sponsor's fiduciary liability in forcing out participant accounts. The DOL has provided a regulatory safe harbor [21] under which a fiduciary of a terminated ''individual account plan'' [22] — defined to include both Code §401(a) and §403(b) plans [23] — will be deemed to have satisfied its ERISA fiduciary duties if the fiduciary selects to transfer a participant's account to one of several enumerated transferees when a participant or beneficiary fails to elect a form of distribution within 30 days of receiving appropriate notice.[24] The fiduciary will qualify for the safe harbor if, among other requirements, the participant's account is distributed (1) to an individual retirement plan (i.e., an individual retirement account or an individual retirement annuity);[25] (2) to an inherited individual retirement plan established to receive the distribution on behalf of the nonspouse beneficiary in the case of a distribution on behalf of a beneficiary who is not the surviving spouse of the deceased participant; or (3) to an interest-bearing, federally-insured bank or savings association account in the name of the participant or beneficiary or to the unclaimed property fund of the applicable state in the case of a distribution of $1,000 or less.[26]

Therefore, it would seem permissible, and even covered by safe harbor protection, for a plan sponsor of a terminating 403(b) plan, after giving proper notice, to effectuate the transfer of missing and/or unresponsive participants' and beneficiaries' custodial account holdings as provided for in the DOL's safe harbor regulation (which, most often, is likely to be to an IRA).

Adding further complexity, we have seen the additional twist of how to handle the lack of participant consent when the employer continues to maintain another qualified defined contribution retirement plan — such as a 401(k) plan — after it terminates the 403(b) plan. The exception to the Code §411 rules that permits the distribution of a participant's accrued benefit without participant consent does not apply if the plan sponsor (or any entity within the plan sponsor's controlled group) maintains another defined contribution plan.[27] In that case, the participant's accrued benefit may instead be transferred to the other defined contribution plan without the participant's consent.[28] Because the Code §411 regulations do not define a ''defined contribution plan,'' it is unclear whether maintaining a 403(b) plan and a 401(a) plan simultaneously (or, maintaining the 401(a) plan after the 403(b) plan is terminated) is covered by the regulation. Under one interpretation, one could argue that because Code §411 does not contemplate 403(b) plans, maintaining a 401(k) plan after terminating the 403(b) plan will not take a plan sponsor out of the Code §411 exception, and therefore, distributions without participants' consents can occur. However, if we assume the more conservative interpretation — that the exception to the Code §411 rules cannot apply if a 403(b) plan sponsor maintains a 401(a) plan — then there is a further issue because it is impermissible to directly transfer accounts (other than as a rollover distribution) between a 403(b) plan and a 401(a) plan,[29] and so it is unclear how to effectuate the regulation's direction that the participant's accrued benefit be *transferred* to the other defined contribution plan

between ERISA and non-ERISA plans in this context.

[20] Pursuant to §101 of Reorganization Plan. No. 4 of 1978, 43 Fed. Reg. 47713 (10/17/78), 1979-1 C.B. 480, the Secretary of Treasury generally has authority to issue regulations under §203(e) of ERISA. *See, e.g.,* Notice of Proposed Rulemaking, 73 Fed. Reg. 59579 (10/9/08).

[21] DOL Regs. §2550.404a-3. The preambles to these regulations confirm that the regulations codified those parts of DOL FAB 2004-02 relating to the distribution of assets to an individual retirement plan from a terminating individual account plan in those instances in which a participant or beneficiary fails to make a distribution election. DOL FAB 2004-02 is the more commonly cited authority for handling missing and unresponsive participants when terminating defined contribution plans. *See* 71 Fed. Reg. 20820, 20828, n. 13 (4/21/06).

[22] DOL Regs. §2550.404a-3(a)(1).

[23] DOL Regs. §2550.404a-3(a)(2).

[24] DOL Regs. §2550.404a-3(b). The notice requirements are proscribed in DOL Regs. §2550.404a-3(e), and a model notice is provided in an appendix to the regulation.

[25] *See* DOL Regs. §2550.404a-3(d)(1)(i) (citing the definition of ''individual retirement plan'' in Code §7701(a)(37)).

[26] DOL Regs. §2550.404a-3(d)(1).

[27] Treas. Regs. §1.411(a)-11(e)(1).

[28] *Id.*

[29] *See* Treas. Regs. §1.403(b)-10(b)(3)(i) (providing that a plan-to-plan transfer is only permitted from a 403(b) plan to another 403(b) plan, and even then, only if certain conditions are met).

ISSN 0747-8607

without the participant's consent. One possible solution would be to be able to effectuate a mandatory rollover to the employer's remaining 401(a) plan for missing or unresponsive participants. Although this approach is without clear governmental support, we think that this result is most similar to the transfer concept.

It is important to note that effectuating a 403(b) plan termination under the proposed method is not without identifiable risks both for plan participants, beneficiaries and plan sponsors. On the one hand, if a plan sponsor forces distributions (via either a rollover or cash) for missing or unresponsive participants and such distributions were later deemed invalid by the IRS, then there is risk that the distributions would be deemed taxable to the participant or beneficiary on whose behalf they were made. Similarly, and even more concerning, if the entire 403(b) plan termination were to be deemed invalid because the "forced" distributions to missing and unresponsive participants were not recognized as valid distributions due to failure of all employees to take a distribution within 12 months following the termination date, then *any* distribution resulting from the plan termination (including rollover to an IRA or other eligible retirement plan) that would otherwise be an impermissible distribution would be an invalid distribution ineligible for rollover and, potentially, immediately taxable.

On the DOL side, the risk is that forcing distributions from a 403(b) plan without participant consent could be seen as a fiduciary violation, subjecting a plan sponsor to penalties and potential lawsuits.

CONCLUSION

With the current state of the law, in the case of 403(b) plans that might have missing or unresponsive participants (smaller plans with all active employees are less likely to have this issue), the most conservative approach at this point in time is to refrain from any 403(b) plan terminations until more guidance is published. Neither the IRS nor the DOL have come out with guidance about how to effectuate a 403(b) plan termination if there are participants who do not consent to a distribution, and representatives of both agencies have informally indicated that there remain a lot of open issues in this area. However, it must be recognized that there is a subset of 403(b) plan sponsors — especially plan sponsors who are dissolving and going out of existence in the near future — that cannot wait for more clarity on these open issues and must proceed in terminating their 403(b) plans. We offer the proposed analysis as a transitional approach that may enable such plan sponsors to move forward with their 403(b) plan terminations, notwithstanding the identifiable risks, while we wait for more governmental guidance. Notwithstanding, we recognize that some of the other open issues that we discussed above, such as vendor unwillingness or inability to cooperate with a 403(b) plan termination and/or contract impediments, may actually render a 403(b) plan termination currently impossible.

APPENDIX

A Sample 403(b) Plan Termination Procedure

We provide the following outline of legal and administrative steps as a practical guide and checklist for plan sponsors and their advisors in considering a 403(b) termination:[30]

1. *Confirm termination process with funding providers.* A plan sponsor who is contemplating a 403(b) plan termination should contact each funding provider to their 403(b) plan and confirm their willingness to facilitate a plan termination at this time. If a funding provider is willing to facilitate such a plan termination, the plan sponsor will also want to discuss the funding provider's proposed procedure to effectuate the plan termination.

2. *Distribution options.* Plan amendments and/or amendments to the underlying funding documents may be needed with respect to distribution options. For amounts held under custodial agreements, it may be advisable to eliminate non-lump sum distribution options (such as installments). One issue that we have come across is how installments already in pay status should be handled upon plan termination, as the law is currently unclear whether a plan sponsor can force payment of remaining installments in a lump sum.[31] For amounts held under annuity contracts, we have found that funding providers sometimes also recommend eliminating annuity forms and other non-lump sum distribution form. However, we are concerned that eliminating annuity distribution forms from annuity contracts violates the 403(b) regulations,[32] and so we instead suggest consideration of amending

---

[30] Please see the full article for legal issues and considerations.

[31] Perhaps Treas. Regs. §1.411(d)-4, Q&A-2(b)(2)(vi), can be relied on to support forcing payment in a lump sum of installments in pay status.

[32] *See* Treas. Regs. §1.403(b)-2(b)(2) ("Annuity contract means

ISSN 0747-8607

the plan and/or annuity contracts to make the normal form of benefit a lump sum while keeping annuity forms as optional benefit forms.

3. *Consider status of outstanding plan loans.* A plan sponsor will want to confirm with funding providers the loan repayment and default options that will apply to the terminating 403(b) plan. A participant can usually repay an outstanding loan prior to a total distribution. Alternatively, account balances often can be offset by outstanding loans at the time of a total distribution, subject to plan terms (or if the plan is amended to provide for such offset). If accounts are being rolled over to another employer-sponsored retirement plan (as discussed in our article, for instance, when the employer maintains a 401(a) plan in addition to the terminating 403(b) plan) or other eligible retirement plan, then another option might be to provide for the ability to rollover outstanding loans to the same plan. Plan amendments to both the terminating 403(b) plan and the employer's other retirement plan may be necessary.

4. *Board resolutions.* In accordance with Rev. Rul. 2011-7, the governing board (or a duly authorized committee thereof) of the 403(b) plan sponsor will need to take action via a binding resolution to (i) cease all contributions and terminate the 403(b) plan as of a specified date, (ii) provide for full vesting for all plan benefits as of the termination date, (iii) authorize distributions of account balances within 12 months following the termination date, and (iv) approve any desired/required amendments to the 403(b) plan (and potentially other employer-sponsored retirement plans, as applicable).

5. *Notify funding providers.* The 403(b) plan funding providers may require formal written notice of plan termination and/or copies of the board resolution effectuating the plan termination.

6. *Employee notice.* Written notice of the plan termination should be prepared and provided to each participant (and each beneficiary of a deceased participant, as applicable) in the terminating 403(b) plan. The notices should include information regarding the following: (i) an explanation of the available distribution options, including rollover options (applicable distribution forms and 402(f) rollover notices should be included); (ii) the deadline for making distribution elections; (iii) an explanation of the distribution default if participants do not make a distribution election (e.g., a rollover to an individual retirement plan); and (iv) any other plan-specific information (i.e., the status and options regarding outstanding plan loans, etc.).

7. *Missing participants and default distributions.* The plan sponsor will need to decide on and implement a default distribution option if there are participants who cannot be located or do not respond to notifications and distribution election requests. Search methods permitted by the DOL should be used to locate missing participants.[33]

8. *Outstanding expenses.* Outstanding administrative expenses, including any withdrawal charges as applicable, will be owed to funding providers or deducted from participant accounts, generally prior to the processing of final distributions.

9. *Distribute plan assets.* All plan assets must be distributed within 12 months of the plan's termination date. In accordance with Rev. Rul. 2011-7, this will include cash distributions (or direct rollovers) or, for amounts held under annuity contracts, issuance of individual annuity contracts (for individual annuity contracts) or individual annuity certificates (for group annuity contracts) to relevant participants and/or beneficiaries. Coordination of tax reporting with the funding providers will also be necessary.

10. *Forms 5500.* A plan sponsor of a terminated ERISA 403(b) plan will need to continue to file Forms 5500 until all assets have been distributed from the plan. A short plan year filing may be necessary for the last plan year (and the final Form 5500 should indicate a final filing).

a contract that is issued by an insurance company . . . that includes payment in the form of an annuity.'')

[33] DOL FAB 2004-02.

ISSN 0747-8607