

ASBO International
FIDUCIARY ISSUES AND THE FINAL 403(b) REGULATIONS

FREQUENTLY ASKED QUESTIONS

Do the Final 403(b) Regulations Cause Public Education Employers to Become Plan Fiduciaries?

ASBO International's members have been asking this and related questions since the final 403(b) regulations were released. These Frequently Asked Questions (FAQs) are designed to provide you with basic information regarding these questions to assist you as you prepare to comply with the requirements of the final 403(b) regulations.

NOTE: The purpose of these FAQs is to provide you with basic information regarding the matters addressed. The responses to the FAQs are provided as an information source for our members and are general in nature. The FAQs are not intended to address the specific facts and circumstances of any one entity. You are advised to consult with legal counsel and/or a tax advisor to determine the application, if any, of this general information to your school's specific circumstances.

Are There Fiduciary Duties Under Final 403(b) Rules?

Question 1: I keep hearing that the final 403(b) regulations make my public school/community college and/or its board a fiduciary with respect to our 403(b) plan. Is that true?

Answer 1: The simple answer is that, no, this is not true.

This is a question that sometimes arises in the context of suggestions that a school is required to review the investment options under the district's 403(b) plan. As a result, it is important to be clear that no such duty is imposed by the final 403(b) regulations. That does not mean that a school *cannot* review the investment products, only that any such review, if it is undertaken, is not related to these regulations.

The final 403(b) regulations focus exclusively on imposing plan compliance responsibilities on the school in order to maintain the tax-qualified nature of this retirement benefit. As a result, the school is responsible for making sure the eligibility, contribution, and distribution rules of Internal Revenue Code section 403(b) are met. As part of these compliance responsibilities, the final 403(b) regulations do require the school to enter into an agreement with the investment providers offered under its 403(b) plan to allocate responsibilities for complying with the final 403(b) rules and to share information as required under the final 403(b) rules. In addition, the final 403(b) regulations do require the school to provide its 403(b) plan participants with a list of the investment providers offered under the 403(b) plan.

The final 403(b) regulations make no reference to the product or investment choices employers must offer, other than simply reminding schools that the Internal Revenue Code only permits 403(b) plans to

purchase either annuity contracts or custodial accounts comprised of mutual funds as investment vehicles. The regulations make no reference to fiduciary responsibilities. In fact, the Internal Revenue Service (IRS) does not have the authority to impose those responsibilities. Further, the final 403(b) regulations do not require the school to perform any monitoring of investment products or providers offered under the 403(b) plan, other than to make sure that the products satisfy the form requirements imposed by the 403(b) rules. In addition, the final 403(b) regulations do not impose any requirements on a school to provide materials to its 403(b) plan participants who are analyzing the investment products or providers offered under the 403(b) plan. Once again, this does not mean that the school cannot decide to do these things. There may be a number of factors that a school would want to consider in deciding whether to do these things, however the 403(b) regulations are not one of those factors.

Are There Fiduciary Duties Under ERISA and/or State Laws?

Question 2: Is it possible that fiduciary duties – and corresponding liability – come from another source?

Answer 2: It is possible for these types of fiduciary duties to arise from other sources, such as Title I of ERISA, state law, or common law. With regard to Title I of ERISA, governmental employers (including public schools and community colleges) are exempt from all of the provisions of ERISA, including its fiduciary provisions. This also means that court decisions interpreting Title I of ERISA will not apply to those governmental employer plans. As a result, if fiduciary duties apply, it is not because of either the IRS 403(b) regulations or Title I of ERISA.

That leaves state and/or common law fiduciary duties as a possible source of such duties.

In general, the applicable state and/or common law has not changed as a result of the final 403(b) regulations. This has two possible implications:

- If fiduciary duties apply, it is possible that they also applied in past years, and perhaps to other benefit programs as well. This may make it even more important for a school and its counsel to proceed carefully and based on accurate information, including the applicable state and/or common law in which the school is located. And,
- Any new fiduciary duties that may arise could be dependent on any new actions that the school and/or its board takes in response to the final IRS 403(b) regulations.

For example, if the school or board only acts to comply with the document and operational compliance responsibilities imposed under the final 403(b) regulations, it is possible that the school or board will assume no new fiduciary responsibilities (or liabilities) under state or common law. In the alternative, if the school or board decides to assume responsibilities for its 403(b) plan regarding the selection of investment providers and/or investment products offered under its 403(b) plan, for example, in addition to the document and operational compliance responsibilities imposed under the final 403(b) regulations, the school and/or its board may be assuming additional fiduciary responsibilities (and liabilities) under its applicable state's trust and/or common law.

State or Common Law Fiduciary Duties:

Question 3: How can I know if such additional duties arise under state law or common law?

Answer 3: This is an area in which your school's legal counsel should be able to advise you. The good news is that this is also likely to be an area that fits squarely within the school counsel's areas of knowledge and expertise. A school's legal counsel may not be as familiar with the Internal Revenue Code or Title I of ERISA; however, they are likely to be very well prepared to advise the school with respect to its duties and potential liabilities under state law.

There are several types of state statutes that your counsel might want to consider. For example:

- State laws that authorize public school districts or community colleges to establish 403(b) plans: Many states have these. A few states place significant limitations on a school's authority to exclude any provider that offers a 403(b)-compliant product. In addition, in some states these statutes authorizing the plans also include specific limitations on the potential liabilities of the school district, in some cases limiting that potential liability to the forwarding of contributions. While such provisions may not guarantee an absence of fiduciary liability, at a minimum they present a significant challenge to any assertion of such liability.
- State laws governing state pension and retirement systems: Most states have these and, in many cases, these laws include fiduciary duties. However, it is very important to determine whether these statutes actually apply to the school's 403(b) plan. In many cases, these statutes do not apply.
- State laws adopting model trust, fiduciary, or prudent investor laws: Again, many states have trust, fiduciary, or prudent investor laws, which generally establish standards for fiduciaries and can address a wide variety of situations. However, it is important to determine whether such a statute actually applies, either generally to functions of a governmental entity, such as the school, or specifically to a supplemental retirement plan offered by the governmental entity, such as the school's 403(b) plan. These statutes generally do not create new fiduciary duties, but instead set the requirements for existing fiduciary duties. As a result, if there is not another authority for such fiduciary duties to be applied to a school, these statutes may not apply to the 403(b) plan. Again, it is important to consult with your legal counsel to determine if these statutes are relevant to activities of the school or board generally, or to the 403(b) plan specifically.

Question 4: This sounds complicated. Should I just assume that I am a fiduciary and proceed accordingly?

Answer 4: This is definitely a question to discuss with the school's counsel. There is a very good chance that the answer will be a strong "No."

There are a variety of opinions in the marketplace as to which specific types of actions a school and/or its board may take, if any, that would result in the assumption of fiduciary duties (and liabilities) under state and/or common law. These tend to fall into at least three camps:

- A school or its board *is* a fiduciary with respect to the plan. As noted above, because each state has its own statutes and regulations, it is unlikely that any blanket statement can be made for all public schools across the United States. If such a statement is made, the school may wish to ask the individual asserting this to provide the legal authority demonstrating why it is true in the particular state where the school is located. It is not unfair to expect that individual to identify the specific source of such duties, citing specific statutes, regulations, or case law, rather than broad categories of laws, regulations, or cases.
- A school or its board *is not* a fiduciary with respect to the plan. Of course, unless there is a specific limitation on the school's liability in current law, proving a negative can present its own challenges. However, if a party asserting the presence of such liability identifies relevant statutes, regulations, and cases, a school's counsel can easily review those cited authorities and advise the school accordingly.
- A school or its board may become a fiduciary by taking on responsibilities over and above the compliance requirements of the 403(b) regulations. This could be the case, for example, if a school that previously offered products from multiple providers now chooses a single provider, for reasons unrelated to the 403(b) regulations. Again, the answer comes down to the specific legal duties imposed on a school under the statutes, regulations, and case law.

Because of the variety of opinions in the marketplace regarding these issues, it is strongly recommended that you consult with your legal counsel before implementing any new policies regarding your 403(b) plan to determine whether, and to what extent, such new policies may impose fiduciary duties (and liabilities) on your school and its board.

If a school and/or its board determines that fiduciary duties would not otherwise apply, there may be nothing prohibiting the school and the board from taking on such duties. However, because undertaking such duties also means taking on additional potential liabilities – for example, those state statutes governing fiduciary standards that did not previously apply now do apply – a school should consult with its counsel before voluntarily assuming such additional duties and potential liabilities. For example, some schools might choose to become more involved in the review and selection of investment products and investment providers offered under their 403(b) plans. Such schools should knowingly consider and make informed decisions about assuming this additional fiduciary responsibility and put procedures in place that will protect them, to the extent possible, from any resulting liability.

Board Policy Regarding Investment Provider Selection:

Question 5: If my board adopts a policy that describes how we will select and de-select investment providers offered under our 403(b) plan, and if that policy is not limited to the compliance requirements of the 403(b) regulations, will the school and/or the board become a fiduciary of the 403(b) plan?

Answer 5: As you can tell from the preceding discussion, the answer to this question may depend on the specific situation. It may be the content of the board policy describing how 403(b) plan investment providers will be selected and de-selected that will determine whether the school and/or the board will be assuming additional fiduciary duties under state and/or common law. You should consult your legal counsel to determine whether the board policy that you are considering will result in the assumption of additional fiduciary duties for the school and/or board. For example, if the board policy provides that an investment provider will be selected if a minimum of five (5) participants will contribute to that

provider, your legal counsel may advise that the school and its board are not assuming any additional fiduciary duties. In the alternative, if the board policy provides that the board will review the annual costs, investment performance, and quality of investments of the investment provider on an annual basis and any investment provider that does not satisfy certain minimum investment criteria for those items will be de-selected for the following plan year, your legal counsel may advise that the school and its board are assuming additional fiduciary duties.

In general, a school and its board may adopt a written policy that describes how 403(b) investment providers will be selected and de-selected. However, it is important that you ask your legal counsel to review the written policy prior to its adoption, so that you can determine if any additional fiduciary duties will be assumed under the board policy and, if that is the case, you can knowingly consider and decide if the school and its board wants to assume the additional fiduciary duties included in the board policy.

Is There an Annual Form 5500 Filing Requirement?

Question 6: I have been advised that the school will now be required to file a Form 5500 – Employee Benefit Plan Annual Information Return – with the IRS for its 403(b) plan. Is this correct?

Answer 6: No, a Form 5500 – Annual Return/Report of Employee Benefit Plan – will not need to be filed for the school’s 403(b) plan. The Form 5500 filing requirement for 403(b) plans only applies to employers who are subject to Title I of ERISA. As noted in the response to Question 2 above, governmental employers (including public schools and community colleges) are exempt from all requirements under ERISA, including the annual information return filing requirement.

This document is provided by ASBO International solely for the use of its members for educational purposes and is not intended, nor should it be used, as a substitute for legal advice. You should consult with your legal counsel. Further, this document is not intended, nor should it be construed, as tax advice. You should consult with your tax advisor. This information is general only and is not intended to address any particular set of facts and circumstances. The reader is advised to consult with legal counsel in order to determine the application, if any, of this general information to the reader’s specific facts and circumstances.