

for public school employers

# retirement plan solutions 403(b) plan compliance guide



## **Table of Contents**

<b>About This Guide</b>	<b>1</b>
AXA Equitable—Experience, Knowledge, and Resources	<b>1</b>
Your Local Financial Professional	<b>1</b>
<b>AXA Equitable’s 403(b) Plan Services</b>	<b>2</b>
For You	<b>2</b>
For Your Employees	<b>3</b>
<b>Key Facts about 403(b) Plans</b>	<b>4</b>
The Final 403(b) Regulations	<b>4</b>
403(b) Plan Basics	<b>6</b>
Post-Employment Employer Contributions	<b>8</b>
<b>Complying with 403(b) Regulations</b>	<b>10</b>
Compliance Checklist	<b>11</b>
Common/Potential Plan Violations	<b>18</b>
What to Do If You Uncover Plan Violations	<b>20</b>
What to Do If Your Plan Is Audited	<b>21</b>
<b>Sample Forms and Notices</b>	<b>22</b>
<b>AXA Equitable — Your 403(b) Resource</b>	<b>23</b>

# about this guide

AXA Equitable created this guide to help you meet the administrative and compliance requirements of your 403(b) plan. It reviews key 403(b) plan regulations; provides a 403(b) compliance checklist; and lists where to find forms, notices, and related documents that will help make the compliance process easier for you.

## AXA Equitable—Experience, Knowledge, and Resources

AXA Equitable is one of the nation's foremost providers of retirement savings plan products and services. We have the retirement plan experience, technical knowledge, and administrative resources to provide the level of support you need to establish and maintain a 403(b) plan or paired 403(b)/457(b) plans in addition to other retirement savings plans that may be appropriate for your organization.

## Your Local Financial Professional

Financial products and services for plan sponsors and their employees are delivered through your local financial professional. Your local financial professional provides financial products and services to meet the retirement needs of those who build and serve our communities: educators and staff in our public schools, colleges, and universities; hospital and municipal workers; and employees of nonprofit organizations.

You can look to your local financial professional whenever you need information or support on retirement plan issues. Your employees can expect personal attention every step of the way. Your local financial professional will provide your employees with the information, resources, services, and support they need to plan for their retirement years. In addition, your financial professional will work with your employees to help them enroll, review their retirement savings strategies, and make sure that their assets are allocated according to their risk tolerance.

# AXA Equitable's 403(b) plan services

## For You

As an investment provider for your 403(b) plan, AXA Equitable offers many services to help you or, if applicable, your third-party administrator (TPA), maintain your plan and comply with Internal Revenue Code (IRC) 403(b) and the final 403(b) regulations.

### These include:

- Transaction-monitoring assistance:
  - Track contributions and contribution limits; monitor loans, withdrawals, and required minimum distributions; and maintain information required by the final 403(b) regulations.
  - Review/approve hardship withdrawals and monitor related suspensions of employee contributions.
- Plan documents and plan document updates, along with contact information for plan document questions.
- Sample information sharing and hold harmless agreements, which will provide the assurances that necessary information will be shared with you and any other investment providers in your plan (required to meet compliance responsibilities under the final 403(b) regulations).
- An employee salary reduction agreement and related employee notices needed for compliance purposes. Your financial professional can provide you with copies of these documents.
- Bulletins, alerts, and personal communications keeping you and your staff up-to-date on 403(b) issues.
- Online access to data needed for recordkeeping and/or compliance purposes through our online account management system:
  - View cumulative account balance information.
- Look at participants' account information, including:
  - Year-to-date and total contributions to their accounts by source;
  - Year-to-date and total rollovers (including transfers and exchanges) to their accounts;
  - Amount and type of distributions taken year-to-date;
  - Current available loan amounts;
  - Hardship withdrawal information.
- Upload contribution files with contribution data.
- View general plan information, including a list of your plan's investment providers, their contact information, and whether they're approved for contributions.

## For Your Employees

AXA Equitable provides a full complement of services to help your employees monitor their accounts so that they can make sound financial decisions.

### These services include:

- Online account access.
- Detailed statements and confirmation notices.
- Retirement savings education materials, enrollment assistance, and individual annual reviews provided by your employees' personal financial professional. These reviews can help satisfy the annual meaningful notice requirement under 403(b) plan universal availability rules.<sup>1</sup>
- Personal attention to help employees identify their financial objectives and ensure their assets are appropriately allocated in each phase of their lives. This personal service can help increase participation in your plan.
- Calculations, made at your employees' request, to aid in meeting and staying within eligible contribution limits (especially important for those employees utilizing catch-up contribution options). These calculations are available from your employees' personal financial professional.



<sup>1</sup> Annual notice of the right to participate or make changes are the minimum requirements under 403(b) regulations. With that said, the Internal Revenue Service (IRS) is increasingly focused on employers providing meaningful opportunity to employees to enroll or change contributions within the 403(b) plan. Employers may accomplish this by providing frequent opportunities coupled with employee education to employees to help boost participation rates in the 403(b) plan.

# key facts about 403(b) plans

Section 403(b) of the Internal Revenue Code allows public schools, colleges, universities, hospitals, and other 501(c)(3) nonprofit organizations to set up retirement savings plans for their employees. These plans are often called “403(b)” or “403(b) tax-sheltered account (TSA)” plans.

Employers who sponsor 403(b) plans can offer annuity contracts and/or mutual funds held in custodial accounts as funding vehicles for plan participants (with the exception of churches and other religious organizations who may offer other investment options under Section 403(b)(9)). Contributions can be made by employees and/or employers. Employee contributions, called voluntary salary deferrals or salary reduction contributions, are elected by your employees on a pre-tax or, in the case of a Roth 403(b) account, an after-tax basis.

For you, a 403(b) plan can be an important recruitment and retention tool. For your employees, a 403(b) plan offers the benefit of tax-deferred savings and the convenience of payroll deductions. It also can provide your employees with the ability to supplement any available pension and/or Social Security payments—an increasingly important consideration when some pension systems are considering a reduction in benefits and Social Security may be facing changes as well.

## The Final 403(b) Regulations

On July 26, 2007, the IRS published an updated version of the regulations for 403(b) plans. These regulations, commonly called the “final” 403(b) regulations, became generally effective as of January 1, 2009.<sup>2</sup>

Most of the final regulations confirm existing practices related to 403(b) plans. They also include related IRS rulings and guidance issued since 403(b) regulations were last released in 1964, eliminate provisions that no longer apply due to changes in law, and provide additional guidance on certain administrative practices. Equally important, the final regulations enable the IRS to focus on a single entity—i.e., you, the plan sponsor—during a 403(b) plan audit.

**2** Church-sponsored 403(b) plans (including 403(b) plans sponsored by qualified church-controlled organizations) became subject to the final regulations as of the start of the first plan year after December 31, 2009. The effective date for collectively bargained 403(b) plans varied depending on the expiration date of current agreements. Other exceptions:

(1) as of September 24, 2007, 403(b) contributions may not be used to fund new life insurance contracts and (2) as of September 25, 2007, all exchanges (tax-free transfers of employee account assets within the same plan) are subject to information sharing for compliance purposes.

## Employers Have Increased Responsibilities under the Final 403(b) Regulations

To comply with the final 403(b) regulations, you need to:

- Adopt and follow the terms of a written plan. The written plan must identify the providers that are included in the plan. This is typically done in an addendum to the plan document.

AXA Equitable can provide you with a plan document and, more important, can provide required amendments to the plan in the event of new legislation or regulations. Once the IRS completes the approval process (estimated to be in 2016 or 2017), AXA Equitable will be able to provide an IRS pre-approved plan document.

- Monitor, either directly (with cooperation from your approved investment providers) or through a designated third party (i.e., a TPA), all plan transactions and the universal availability requirement. Note: transactions include contributions, exchanges, plan-to-plan transfers, rollovers into the plan, withdrawals, loans, qualified domestic relations orders, and required minimum distributions.
- Remit employee contributions as soon as administratively reasonable following the date on which the amounts would have otherwise been paid to the employee, but no later than the 15th business day of the month following the contribution.<sup>3</sup>
- Provide employees with both a written notice and a meaningful opportunity to participate in your plan or make changes to their accounts at least once a year. The IRS has reported that employers with low participation rates in their plan are being questioned about whether the opportunity to participate has been “meaningful.” In fact, Field Examiners are reportedly asking employers to share their employee educational program with the Field Examiner.
- Make a good faith effort to provide any party responsible for making a distribution under your plan with access to information needed to ensure that the distribution complies with 403(b) regulations and the terms of your plan.

### Caution on 403(b) Account Exchanges

Your employees should be aware of the risk of implementing account exchanges without getting confirmation from you, as plan sponsor, that the receiving investment provider has agreed to share information with you or your other investment providers. Employees need to understand that account exchanges from one investment provider to another could be treated as taxable distributions, and might also be subject to tax penalties, if the investment provider receiving the account assets is not either an approved plan investment provider that is receiving ongoing contributions or an investment provider with whom you have an information sharing agreement.

<sup>3</sup> Note that state statutes may require a faster remittance. Check your state statutes to determine if a shorter time frame is required.

- Limit exchanges to:
  - Your plan’s approved investment providers (i.e., those providers receiving ongoing contributions); and/or
  - Investment providers with whom you have agreements to furnish account information needed for compliance and/or recordkeeping purposes.
- Accept tax-free plan-to-plan 403(b) transfers of employee account assets only with approved investment providers in your plan.
- Limit the distribution of employer contributions (if any) to “distributable events” as listed in your written plan, such as attainment of a certain age, a stated event, disability, after a fixed number of years, or severance of employment.

## ERISA Exemptions Still Apply

The final 403(b) regulations do not change a plan’s status under the Employee Retirement Income Security Act of 1974 (ERISA). 403(b) plans sponsored by governmental employers—including public school districts, public universities, district or county hospitals, and some charter schools that are governed by state agencies—continue to be exempt from ERISA (under ERISA 3(32)), including its fiduciary requirements and IRS Form 5500 reporting.

## State Fiduciary Requirements Remain Unchanged

While the final 403(b) regulations do not change state and/or local fiduciary laws in any way, you should still check with your legal counsel to determine if there are any state and/or local fiduciary laws that apply to your 403(b) plan. However, note the following: reports indicate that fiduciary laws in most states generally apply to assets that are required to be held in trust. In these cases, such fiduciary laws would not be an issue for most 403(b) plans, since there is no trust requirement and it is rare to find 403(b) assets held in trust.

## 403(b) Plan Basics

### Universal Availability Provision

403(b) plans are subject to a “universal availability” requirement. Under the universal availability rules, if one employee is permitted to make contributions of at least \$200 per year, virtually all employees must be permitted to do so. The final 403(b) regulations also impose two additional requirements:

- You must provide an annual notice of the right of your employees to participate in the plan, and
- Employees must be given a meaningful opportunity to enroll or make changes to their contributions.

*Violation of this requirement could cause your entire plan to be disqualified.* So while you can exclude certain employees, you can avoid possible violation of the universal availability requirement by permitting every common-law employee the right to participate in your plan.

## Whom Can You Exclude from Your 403(b) Plan?

- Employees who, in their first year of hire, are not expected to work 1,000 or more hours. In subsequent years, employees can be excluded only if they didn't work at least 1,000 hours in the previous year. (Caution: if one employee working less than 1,000 hours is permitted to participate, you must permit all employees working less than 1,000 hours to participate.)
- Employees who will contribute less than \$200 per year.\*
- Employees who already participate in another voluntary salary deferral plan that you sponsor.
- Employees who are nonresident aliens with no U.S. income.
- Students who perform services for a university as described in IRC 3121(b)10.

\* Many providers do not accept small contributions. AXA Equitable will accept as little as \$200 in annual contributions to help ensure that you don't have a discriminatory plan.

## Contribution Limits

The federal government reviews the contribution limits each year and may adjust them due to inflation and/or changes in the law. For 2017, the employee salary deferral limit is \$18,000; the age 50+ catch-up contribution limit is \$6,000; and the 15-year catch-up limit is \$3,000 (with a per-employer lifetime maximum of \$15,000). For 403(b) plans that include employer contributions, the combined limit for employee salary deferrals, the 15-year catch-up (if eligible), and employer contributions is \$54,000—note that for employees who are also eligible for the age 50+ catch-up, the combined limit is \$60,000.

## The Age 50+ Catch-Up Contribution

Age 50+ catch-up contributions are additional contributions that may be made by employees who are age 50 or older by the end of the tax year in which they make the contributions. This catch-up does not impact other 403(b) contribution limits.

A calculation is not necessary for age 50+ catch-up contributions. However, if an employee is eligible for both the age 50+ and the 15-year catch-up in the same year, be sure to require a calculation since 15-year catch-up contributions are counted as though they are made first.

## The 15-year Catch-Up Contribution

If you include the 15-year catch-up feature in your 403(b) plan, you must limit its availability to employees who:

- Have 15 or more years of service with your organization by the end of the tax year,
- Have not contributed an average of \$5,000 or more to your elective deferral plans (or, for years before 2002 only, both your elective deferral plans, and your 457(b) plan) for each year of service, and
- Have not used up the per-employer lifetime limit of \$15,000 available under this catch-up feature. Your financial professional can do a calculation for any employee wishing to make a 15-year catch-up contribution.

## Ineligible Investment Options

Investment options for 403(b) plans are limited to annuities that meet the language requirements outlined in IRC 403(b)(1) and mutual funds that are held in a custodial account as described in IRC 403(b)(7).<sup>4</sup> Ineligible options for 403(b) plans include:

- Self-directed brokerage accounts in which stocks and bonds are included,
- Mutual funds that are not held in the proper custodial accounts, and
- Bank savings accounts.

AXA Equitable's information sharing and hold harmless agreement requires that providers certify that the options they will offer are qualified to be 403(b) options and that the providers will bear the responsibility for any ineligible investment option they offer.

## Post-Employment Employer Contributions

Public schools may make matching or discretionary employer contributions on behalf of their employees. Public schools may also make post-employment employer contributions for up to five tax years after the year of separation on behalf of their employees who have severed employment with them. The ability to make post-employment contributions to a 403(b) plan may enable you (subject to state and local laws) to:

- Adopt early retirement incentive plans by making 403(b) contributions on behalf of employees who choose to take early retirement; or
- Replace more expensive severance pay, including unused sick leave or vacation pay, with post-employment employer contributions.

### Do Employer Contributions Make 403(b) Plans Sponsored by Public School Districts Subject to ERISA?

No, employer contribution features do not make 403(b) plans sponsored by governmental employers—including public school districts—subject to ERISA.

<sup>4</sup> Exception: no such limitation applies to IRC 403(b)(9) retirement income accounts sponsored by churches and certain other religious organizations.

## Contribution Limits

You can make post-employment contributions on an employee's behalf for up to five years following the year the employee leaves your employment. Accrued benefits will stop in the month of an employee's death, and contributions will reflect the elimination of accrued benefits. This reduces the amount of includable compensation that can be considered in a given tax year. Contributions are based on includible compensation—that is, an employee's earnings during the last full 12-month period of service with you.

The annual contribution limit for 2017 is 100% of the employee's includible compensation up to \$54,000. Thus, you could contribute up to \$54,000 per year for each of the five tax years following the year of severance on behalf of any employee who had includible compensation of at least \$54,000 in the final year period that adds up to one full year of service. This amount will be indexed for inflation in subsequent years. If post-employment contributions are made in the year an employee leaves your employment, the annual contribution limit is based on employer and employee contributions combined.

## Nondiscrimination Rules

Governmental employers, including public school districts, are exempt from nondiscrimination rules for employer contributions to 403(b) plans. Governmental employers (and church employers) may make employer contributions for any employee or for any group of employees.

## Do Not Give Individual Employees a Cash (or Any Other) Option

To qualify as an employer contribution, any amounts given to employees cannot be offered as a choice between either:

- Post-employment or in-service employer contributions, or
- A taxable cash benefit.

The decision of who will be eligible for the benefit either must be made unilaterally by you or through the bargaining process with the employees' union(s). Failure to properly implement this procedure risks the reclassification of your contributions as employee contributions, which are subject to payroll taxes, lower annual limits, and limited post-severance contribution opportunity. Contact your AXA Advisors financial professional to learn more about using post-employment contributions.

# complying with 403(b) regulations

A periodic review and analysis of your plan should be part of your standard operating procedures. This is important no matter how you administer your plan—i.e., with assistance from your investment providers and/or a TPA. It is also one of the best ways to ensure that your plan stays in compliance with all pertinent regulations.

## The Final 403(b) Regulations

The following checklist outlines key compliance areas for a 403(b) plan. Use it periodically to help make sure your plan conforms to 403(b) regulations.

The checklist is meant to serve as a guide; it is not intended to be a comprehensive list of all 403(b) compliance requirements. Even if you respond “yes” to each question, it does not necessarily guarantee that your plan is fully compliant. You should consult with your legal counsel or tax advisor to determine the compliance activities and administrative process reviews that best fit your organization’s specific circumstances.





II. Written Plan (cont.)	Yes	No
<p>3. Have you taken steps to ensure that the provider of your plan document will give you timely updates to the document when there are changes in the regulations?</p> <p>AXA Equitable's plan document will be amended as needed for regulatory changes. Just ask your financial professional how to obtain one.</p>	<input type="checkbox"/>	<input type="checkbox"/>
III. Approved Plan Investment Providers (for plans with multiple investment providers)	Yes	No
<p>1. Are your plan's investment providers listed in your written plan?</p> <p>Only approved investment providers can receive employee and/or employer contributions. Transfers and exchanges are limited to your approved investment providers (i.e., those providers who receive ongoing contributions) and/or investment providers with whom you have information sharing agreements. To be an approved investment provider, the provider must be listed in your written plan (see Section II).</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>2. Have you given each of your plan's investment providers a list of all your approved providers and a list of all other investment providers with whom you have information sharing agreements, along with instructions that they must limit transfers/exchanges only to the list of providers that you specify?</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>3. Have you agreed to notify your plan's investment providers of any changes to your plan's list of approved providers or providers with whom you have information sharing agreements?</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>4. Do your investment providers maintain, and make available to you (or your TPA) as needed, periodic reports and employee data demonstrating that they are performing their compliance-monitoring responsibilities?</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>5. Do you have a written procedure to add/drop investment providers?</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>6. Have you obtained written confirmation from your investment providers that their annuity contracts and/or mutual fund custodial accounts qualify as appropriate 403(b) investment options by including language that states (1) annuity contracts are not assignable, (2) the contribution limits, and (3) that eligible rollover distributions may be directly rolled over to either another qualified plan that accepts such distributions or to an IRA?</p>	<input type="checkbox"/>	<input type="checkbox"/>
IV. Universal Availability Requirement	Yes	No
<p>1. Is your 403(b) plan available to all eligible employees, including:</p> <p>a. Full-time and part-time common-law employees (but not leased employees or independent contractors) who are not participating in another salary deferral plan you sponsor, such as another 403(b) plan, or a 401(k) or 457(b) plan?</p> <p>b. Employees who contribute at least \$200 per year?</p>	<input type="checkbox"/>	<input type="checkbox"/>

IV. Universal Availability Requirement (cont.)	Yes	No
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c. Employees who normally work 20 hours or more per week and are either expected to work 1,000 hours or more in their year of hire, or worked 1,000 hours or more in the prior year?



This requires that records be kept on hours worked. To avoid maintaining records on hours worked, you can simply permit all common-law employees to participate.

2. Can new participants start making employee salary deferral contributions to your 403(b) plan without having to meet a minimum age requirement?



The universal availability rules prohibit a minimum age requirement for employee salary deferral contributions. As indicated in question #1, you are permitted to prohibit salary deferrals for certain employees, including those who are not expected to work 1,000 or more hours in their year of hire. In subsequent years, employees can be excluded from making salary deferrals only if they didn't work at least 1,000 hours in the previous year.

Note: Once an employee is permitted to make salary deferral contributions to a 403(b) plan, an employer cannot later preclude the employee from making future contributions.

3. Do you have a procedure in place to provide employees with a written notice at least once a year of their opportunity to make salary deferral contributions?



The regulations require that employees be given a "meaningful opportunity" to participate in your plan and a "meaningful opportunity" would require a notice no less than once each year. In reports of recent audits, the IRS is also requiring that the employer share their employee educational activities to satisfy the "meaningful opportunity" requirement.

4. Does your written notice comply with the requirement that a "meaningful opportunity" be given to employees by including:



a. Eligibility requirements (who can and cannot participate in the plan)?



b. Enrollment procedures (how and when to enroll)?



c. Types of employee salary deferral contributions permitted, such as pre-tax, Roth 403(b) (if your plan permits), and catch-up contributions?



d. How and when employee salary deferral contribution amounts can be changed?



e. Sources for additional information, including information on investment providers?

5. Do you provide a "meaningful opportunity" for employees to begin or change contributions?



A meaningful opportunity could be satisfied with the frequent ability to enroll, change contribution amounts, or redirect contributions to a different investment provider in your plan. Additionally, meaningful opportunity can be satisfied with an employee educational program that would include generic financial literacy workshops. See #6.

Note: According to recent IRS announcements, "Meaningful Opportunity" must show an employer used various methods to allow employees to begin or change contributions.

6. Do you offer employees access to educational workshops that review your 403(b) plan, enrollment periods, and available investment providers?



While not a legal requirement, such services can contribute to a “meaningful opportunity” to participate, and are an outstanding benefit to your employees. Your financial professional is always available to conduct workshops as well as one-on-one employee enrollment meetings and ongoing reviews.

**V. Administrative Procedures**

**Yes**

**No**

**1. Salary Reduction Agreements**

a. Does your salary reduction agreement identify employees who participate in other pre-tax retirement plans e.g., other 403(b) plans, 401(k) plans, SIMPLE IRAs, or SARSEPs?



An employee’s contributions to other pre-tax retirement plans, except to a 457(b) plan, may restrict that employee’s maximum available contribution under your plan. Your financial professional can provide you with a sample salary reduction agreement, which collects information to help you to identify these individuals; your financial professional also can help you calculate your plan’s maximum available contribution amount for any employees in this group.



b. Do you have a procedure in place to:

- Retain copies of all current salary reduction agreements?
- Reject salary reduction agreements if the contribution levels will exceed deferral limits?



**2. Contributions**

Do you have a procedure in place to:

a. Stop accepting employee contributions for an employee when the employee contribution limit is reached?



b. Stop accepting or making all contributions for an employee when the IRC 415(c) limit is reached?



c. Verify the year of birth for employees using the age 50+ catch-up option?



d. Require a calculation from your investment providers or TPA for the 15-year catch-up contribution (if your plan permits)?



e. Remit contributions as soon as administratively reasonable following the date on which the amounts would have otherwise been paid?



Contributions should be remitted no later than the 15th business day of the month following the month contributions were made. In many states, however, state statutes require a faster remittance. Check your state statutes to determine if a shorter time frame is required.



f. If applicable, designate employer versus employee contributions?



g. Correct excess contributions?

V. Administrative Procedures (cont.)	Yes	No
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3. Loans (if permitted under your plan)

- a. Does your plan's loan form collect information on all plan investment providers to whom an employee directs contributions (including contributions to other plans where you permit loans)?



Your financial professional can provide you with a sample loan request form.

- b. Do you require your plan's investment providers to respond to loan information inquiries from other approved plan investment providers or your TPA within five business days, so loan requests can be processed on a timely basis?



- c. Do you require your plan's investment providers to enforce participant loan repayments and limit aggregate loan amounts as required under IRC 72(p)?

Defaulted loans or loans in violation of IRC 72(p) are deemed a taxable distribution and reported as income to the participant.



- d. If an employee with an outstanding defaulted loan requests a new loan, does your plan either (1) prohibit a new loan or (2) require any new loan to be repaid through payroll deduction? Please be mindful that permitting repayments through payroll deductions may exceed the limited involvement requirement to maintain your ERISA exemption.



4. Hardship Withdrawals (if permitted under your plan)

- a. Are your employees required to provide documentation verifying that hardship withdrawal requests meet the definitions and requirements for hardship in the IRC 401(k) regulations?



The sample hardship withdrawal request form available from your AXA Advisors financial professional requires such documentation.

- b. If your plan has adopted the safe harbor rules for hardship withdrawals (as most have), is there a procedure in place to have your payroll department suspend employee salary deferral contributions to the employee's 403(b) accounts (as well as your 401(k) and 457(b) plans, if any) for six months after a hardship withdrawal?



5. Non-Grandfathered Orphan Accounts

Have you made a reasonable, good-faith effort to coordinate information sharing with investment providers who maintain non-grandfathered orphan accounts?

A non-grandfathered orphan account is held by a current employee and is either:

- An account for which, between January 1, 2005, and December 31, 2008, you forwarded contributions to an investment provider that, as of January 1, 2009, is neither one of your plan's approved providers nor a provider with whom you have an information sharing agreement;
- An account in your plan that was exchanged between September 25, 2007, and December 31, 2008, for an account with an investment provider that, as of January 1, 2009, is neither one of your plan's approved providers nor a provider with whom you have an information sharing agreement; or



**VI. Employer Contributions (if offered under your plan) (cont.)**

Yes

No

5. If you make post-employment employer contributions, do you ensure that employees do not have a right to elect these contributions in cash?

You cannot give employees a choice between post-employment contributions or some other arrangement, such as a cash payment. If you do, the IRS would consider the post-employment contributions to be employee contributions and disallow the contributions. Employees cannot make contributions after they have severed employment (except from certain types of compensation they would have received had they stayed, and then only if that compensation is paid before the end of the calendar year of severance, or, if later, within 2½ months following severance). Employer contributions are allowed for up to five tax years following the tax year of severance.



## Common/Potential Plan Violations

The 403(b) regulations require that 403(b) plans be maintained in accordance with plan provisions. This means you are responsible for ensuring that your plan documents comply with IRC 403(b) and the final 403(b) regulations and that the operation of your plan satisfies those requirements. Plan violations to watch out for are:

### General Plan Administration

- No written plan—The written plan must cover all of the plan’s terms and conditions, including eligibility, benefits, contributions, approved investment providers, withdrawals, loans, rollovers, transfers, and distributions. The operation of your plan must be consistent with the terms of your plan.
- Permitting exchanges to investment providers that are neither approved providers for the plan nor providers with which the plan has information sharing agreements—Effective September 25, 2007, all 403(b) exchanges are limited to either your plan’s approved investment providers (because they are receiving ongoing contributions) or to “exchange-only” investment providers that agree to share information for plan compliance purposes. Your financial professional can provide you with a sample information sharing and hold harmless agreement.
- Ineligible investment options—An employer that remits 403(b) contributions to a bank suspense account rather than to qualified investment providers would be using an improper investment option. A mutual fund without a custodial arrangement (as required under the regulations) is an improper investment option, as is an annuity without the required 403(b) regulatory language. In these cases, the IRS would likely disqualify all of the affected 403(b) accounts and may or may not require you to pay all under-withheld federal income taxes for those disqualified accounts.

### Employee Eligibility and Contributions

- Eligible employees have not been given the opportunity to participate in your plan—Because the exclusion of substitute teachers or any specific classification of employees (such as bus drivers who are common-law employees) is a common violation, it is important to permit substitute teachers and other classes of employees to participate if they so choose. To avoid the problem of payroll periods when a substitute may not have generated enough salary to support a flat-dollar contribution, you can permit these types of employees to make contributions based only on a percentage of compensation.

Under the final 403(b) regulations (which were generally effective January 1, 2009), all full-time and part-time common-law employees are eligible to participate; however, you can exclude employees who fall into the following classifications:

- Employees who, in their first year of hire, are not expected to work 1,000 or more hours. In subsequent years, employees can be excluded only if they didn’t work at least 1,000 hours in the previous year. (Caution: if one employee working less than 1,000 hours is permitted to participate, you must permit all employees working less than 1,000 hours to participate.)

- Employees who will contribute less than \$200 per year.<sup>5</sup>
- Employees who already participate in another voluntary salary deferral plan that you sponsor.
- Employees who are nonresident aliens with no U.S. income.
- Students who perform services for a university as described in IRC 3121(b)10.

Individuals who are not eligible to participate under any circumstances include leased employees, independent contractors, and elected officials (except where the elected official's job requires a background in education to qualify for the position, e.g., State Superintendent of Public Education).

- Employee contributions exceed eligible limits—You must monitor all employee contributions, regular and catch-up, to ensure that they do not exceed annual limits. If 15-year catch-up contributions are permitted, you must also be sure that employees' age 50+ catch-up contributions are properly coordinated with their 15-year catch-up contributions. If an employee is eligible for both catch-ups in the same year, the 15-year catch-up is counted first.

#### **Other violations can occur when:**

- An employee's total 15-year catch-up contributions exceed the per-employer lifetime maximum of \$15,000 for these contributions, or
- An ineligible employee makes 15-year catch-up contributions.
- The plan has a minimum age requirement and/or a service requirement of more than 1,000 hours per year before employee salary deferral contributions are permitted—The universal availability requirement prohibits age restrictions on employee participation. Only employer contributions can be subject to a minimum age requirement. And while employee salary deferrals may be subject to a service requirement, the plan may only exclude employees who, in their first year of hire, are not expected to work 1,000 or more hours, or who, in subsequent years, didn't work at least 1,000 hours in the previous year.

## **Loans, Withdrawals, and Distributions**

- Loans have not been administered in accordance with plan regulations—Common loan violations include:
  - Failure to default and properly report the outstanding balance of a loan when payments are not made when due;
  - Granting of a new loan when there is an outstanding defaulted loan, unless the new loan is being repaid through payroll deductions; and
  - Loans from multiple plan investment providers or other plans you sponsor that, in the aggregate, exceed the allowable loan limits.

**5** Many providers do not accept small contributions. AXA Equitable will accept as little as \$200 in annual contributions to help ensure that you don't have a discriminatory plan.

- Pre-age-59½ plan hardship withdrawals have been made by individuals who do not meet the “qualifying event” requirements—Common hardship withdrawal violations involve inadequate documentation proving that the distribution is the result of a financial hardship; or hardship distributions from multiple plan investment providers or multiple plans that, in the aggregate, exceed the amount needed to relieve the hardship. If the safe-harbor method is used to determine hardship, violations can also occur if employees take hardship withdrawals and you do not suspend those employees’ salary deferral contributions to all of your 403(b), 401(k), and 457(b) plans for six months.
- IRS-required minimum distributions have not been made to eligible individuals—Distributions to participants in your plan must begin by the later of the April 1st after the participant reaches age 70½,<sup>6</sup> or the April 1st following the year after the participant is no longer employed by you. The law requires that the participant pay a 50% federal penalty tax on the required distribution if it is not made in a timely manner.
- Income taxes on distributions have not been properly reported—Incorrect distribution codes used on 1099 forms can result in the improper tax treatment of distributions and/or a failure to report the 10% early withdrawal federal penalty tax.

## What to Do If You Uncover Plan Violations

The IRS has two programs you can use to correct plan violations you uncover.<sup>7</sup> The programs are part of the IRS’s Employee Plans Compliance Resolution System (EPCRS). Consult with your legal counsel for more information about these programs and how they may apply to your specific circumstances.

### Self-Correction Program (SCP)

This program is for operational violations, i.e., mistakes that are made when the plan’s operations do not follow the terms of the plan. Examples include failure to keep contributions within deferral limits, failure to offer the plan to all eligible employees, and failure to pay required minimum distributions. The SCP has no fees and you do not have to contact the IRS.

SCP rules require that corrections to significant operational failures be made by the end of the second plan year following the plan year in which the “failure” occurred. Insignificant operational failures can be corrected at any time. There are IRS guidelines on how to distinguish significant from insignificant operational failures—see Revenue Procedure 2013-12<sup>8</sup> or future releases. Using the SCP will not prevent an audit, but it can reduce the number of violations an audit would uncover.

<sup>6</sup> For December 31, 1986, account values that have been tracked, it is the later of age 75 or the April 1st following the year after the participant is no longer employed by you.

<sup>7</sup> There is a third program, the Audit Closing Agreement Program (Audit CAP), for plan violations discovered during an IRS audit. It is described in the following section, “What to Do If Your Plan Is Audited.”

<sup>8</sup> Available online at <http://www.irs.gov/pub/irs-drop/rp-13-12.pdf>.

## **Voluntary Correction Program (VCP)**

The VCP is available if your plan is not being audited. Use it if the plan failure is not eligible for relief under the SCP. You will have to identify each failure and its duration, indicate what correction you have made or propose to make, and indicate what specific measures you have taken to ensure that the failure will not happen again. You will also have to include payment of a pre-established fee based on the number of employees you have. (The fee does not include excise taxes, unpaid FICA taxes, or similar items.) And if the correction involves making changes to your written plan, you may need to correct through plan amendment. (Note: if you adopt an IRS-approved plan document once available, the remedial amendment period will apply, which means the plan language is retroactively corrected effective January 1, 2010 as further explained below.)

If you use the VCP to correct plan violations, your plan will not be audited until the VCP process is complete. And, if the violation is in the form of your written plan, IRS Announcement 2009-89 provides that, with the adoption of a prototype document when available, written plan form defects are retroactively corrected. AXA Equitable will have a pre-approved plan document available for your use once the approval program has been finalized.

## **What to Do If Your Plan Is Audited**

The best preparation for a plan audit is to have an ongoing compliance procedure in place. Your procedure should identify who is responsible for overseeing your plan's compliance activities and who will communicate with the IRS if your plan is audited.

If you have outsourced any or all plan administration to a TPA, your TPA should be able to both oversee compliance activities and communicate with the IRS. If you are not working with a TPA, you should designate someone in your organization to handle these responsibilities. Your compliance coordinator, whether internal or external, should maintain a list of whom to contact at each of your plan's investment providers to obtain any additional information that may be needed during an audit.

## **Audit Closing Agreement Program (Audit CAP)**

The Audit CAP is for violations discovered by the IRS while your plan is being audited. If the IRS uncovers a violation and your plan faces possible disqualification, you may be given the opportunity to correct the violation and potentially pay a penalty, which is usually a percentage of the tax that would be due if the plan were disqualified.

For more information on the Audit CAP and/or other IRS compliance resolution programs, consult your legal counsel.

# sample forms and notices

Your financial professional can provide you with a plan document. You can also look to your financial professional for an information sharing and hold harmless agreement and the following sample forms and notices that will help you keep your plan in compliance:

- Information Sharing and Hold Harmless Agreement—403(b) regulations require you to limit exchanges of employee account assets within the same plan to your plan’s approved investment providers or to providers with whom you have information sharing agreements. Our agreement provides for information sharing and lets you confirm investment providers’ responsibilities under your plan.
- Salary Reduction Agreement—Our sample agreement includes a section that collects information about employee investments in other retirement plans (e.g., other 403(b) plans, 401(k) plans, SIMPLE IRAs, or SARSEPs), which is needed for compliance purposes.
- Loan Request Form—This form gathers important data required for plan compliance, such as all the investment providers under your 403(b) plan—and any other plan you sponsor that permits loans—to which the participant directs contributions.
- Hardship Withdrawal Request Form—This form requires plan participants to provide documentation verifying that a hardship withdrawal request meets plan and IRS requirements. The IRS has noted that lack of such documentation is a common compliance error.

# AXA Equitable — your 403(b) resource

If you need help with your 403(b) plan, have a question, or need information.

## Call

- Your local financial professional.

## Go Online

- For specific information on your 403(b) plan, go to [www.axa.com](http://www.axa.com).

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GE-118077 (8/16) (Exp.8/18)

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