

for 501(c)(3) organizations

retirement plan solutions /  
**403(b) plan compliance guide**





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# 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 403(b) compliance checklists for both ERISA and non-ERISA plans; and lists where to find forms, notices, and related documents that will help make the compliance process easier for you.

The guide has separate sections for information relevant specifically to ERISA and non-ERISA 403(b) plans. The “Non-ERISA 403(b) Plan Compliance Issues” section addresses compliance activities for elective-deferral-only 403(b) plans (i.e., plans with voluntary employee salary deferral contributions only). Included in this section is important information on meeting the requirements of the final 403(b) regulations, such as adopting a written plan while maintaining exemption from the more stringent requirements imposed on ERISA plans.

The “ERISA 403(b) Plan Compliance Issues” section covers the overall responsibilities for maintaining ERISA plans, including additional steps that must be taken to comply with the final 403(b) regulations.

## 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 expertise, technical knowledge, and administrative resources to provide the level of support you need to establish and maintain a 403(b) or a paired 403(b)/457(b) plan, in addition to other retirement savings plans that are appropriate for your organization.

## A Focus on the People Who Build Our Communities

Financial products and services for plan sponsors and their employees are delivered through AXA Advisors, LLC, and its specialized division, the Retirement Benefits Group (RBG). Together, AXA Advisors and the RBG provide wealth management services and financial education 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 AXA Advisors and the RBG whenever you need information or support on retirement plan issues. Our dedicated team of hundreds of insurance-licensed and securities-registered financial professionals serves thousands of school systems, universities, hospitals, municipalities, and nonprofit organizations nationwide. 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, one-on-one, 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 with its EQUI-VEST® variable annuity contracts 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 for all EQUI-VEST® variable annuity contracts:
  - 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 for ERISA and non-ERISA 403(b) plans, along with a toll-free phone number 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 AXA Advisors 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. Our **Employer Plan Administration Center for EQUI-VEST®** lets you and/or, if applicable, your TPA:
  - View cumulative account balance information encompassing all EQUI-VEST® accounts under your plan.

- Look at participants' EQUI-VEST® 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;
  - Outstanding loan balances, dates the loans were taken, and (if applicable) loan default amounts; and
  - Hardship withdrawal information.
- Upload contribution files with EQUI-VEST® 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 with its EQUI-VEST® variable deferred annuity 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 AXA Advisors 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.
- Access to an array of investment options within EQUI-VEST® variable deferred annuity contracts.
- 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 AXA Advisors financial professional.

<sup>1</sup> Annual enrollments are the **minimum** required by 403(b) regulations. However, more frequent opportunities to enroll or change contributions are beneficial to employees because they let employees respond to their changing financial needs more than just once a year.

# key facts about 403(b) plans

Section 403(b) of the Internal Revenue Code allows public schools, colleges, universities, hospitals, and 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 annuity (TSA)” plans.

Employers who sponsor 403(b) plans can offer annuity contracts and/or mutual fund custodial accounts as funding vehicles for plan participants. Contributions can be made by employees and/or employers. Employee contributions called salary deferrals or salary reduction contributions are voluntary contributions that can be made on either a pre-tax or, in the case of a Roth 403(b) account, an after-tax basis. Some plans also have a mandatory employee-contribution feature, which typically requires pre-tax contributions as a condition of employment.

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, the convenience of payroll deductions, and the ability to supplement any available pension and/or Social Security payments.

## Why 501(c)(3) Organizations Choose 403(b) Plans

501(c)(3) organizations tend to sponsor 403(b) rather than 401(k) plans for two major reasons:

- 403(b) plans sponsored by 501(c)(3) organizations that permit only voluntary employee salary deferral contributions are exempt from ERISA if certain Department of Labor (DOL) exemptive requirements are met. This contrasts with 401(k) plans where ERISA requirements apply.
- 403(b) plans are not subject to nondiscrimination testing of employee salary deferral contributions. This exception for nondiscrimination testing of deferrals does not apply to a 401(k) plan except for those plans that meet certain Safe Harbor requirements (which generally limit the employer’s flexibility in plan design).

## How to Determine Whether or Not Your 403(b) Plan Is Subject to ERISA

DOL Reg. 2510.3-2(f) says that ERISA will not apply to a 501(c)(3) organization that sponsors a 403(b) plan where contributions are made solely by employees under a salary reduction agreement, if the following requirements are met:

- Employee participation is completely voluntary.

- All rights under the plan are enforceable solely by the employee or the employee’s beneficiary(ies).
- Employer involvement is limited to:
  - Allowing investment providers to promote products to employees,
  - Requesting and summarizing information from the investment providers to help employees review and/or analyze their available investment choices,
  - Collecting and remitting employee contributions, and
  - Keeping records of all employee contributions.
- The selection of investment providers by the employer is “designed to afford employees a reasonable choice in light of all relevant circumstances.” Relevant circumstances include:
  - The number of providers that have indicated interest,
  - Administrative burdens created by the addition of providers,
  - The variety of currently available products, and
  - The number of employees affected.
- The employer receives no direct or indirect cash payments, or other consideration, outside of reimbursement for reasonable expenses incurred in making the plan available.

## 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—are generally effective as of January 1, 2009.<sup>1</sup>

While most of those regulations simply reaffirm and tie together rulings that have been issued during prior years, there are some substantial changes which primarily impact 501(c)(3) plan sponsors whose plans are exempt from ERISA. The most significant change under the regulations is that employers who offer 403(b) plans that are exempt under ERISA will now be required, for the first time, to have written plan documents. They also will be responsible for seeing that their plans comply with IRC 403(b) and the final 403(b) regulations and operate in accordance with the terms of their plan documents.

Sponsors offering ERISA 403(b) plans in which employer contributions are being made on behalf of eligible employees will also need to make changes to conform to the requirements. Those changes, however, will not impact or supersede what are often the more stringent requirements of ERISA.

<sup>1</sup> Church-sponsored 403(b) plans (including 403(b) plans sponsored by qualified church-controlled organizations) become 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 varies 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.

## 403(b) Plan Basics

### Universal Availability Provision

Under 403(b) plans (as opposed to 401(k) plans), there is no testing of the amount that higher-paid employees can contribute as a salary deferral in relation to the average contributions made by lower-paid employees. However, 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 (your AXA Advisors financial professional can provide you with a sample notice), 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.

### Who 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 salary deferral plan that you sponsor.
- Employees who are nonresident aliens with no U.S. income.
- Certain students who work for you.

\*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 2011, the employee salary deferral limit is \$16,500; the age 50+ catch-up contribution limit is \$5,500; the 15-year catch-up limit is \$3,000 (with a per-employer lifetime maximum of

\$15,000). And for ERISA 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 \$49,000—note that for employees who are also eligible for the age 50+ catch-up, the combined limit is \$54,500.

### The 15-year Catch-up Contribution

Four types of employers are eligible to include the 15+ years-of-service increased limit, which may permit certain employees to increase their contributions by as much as \$3,000 per year:

- Hospitals
- Health & Welfare Agencies, including home health services agencies
- Religious Organizations
- Education Institutions

If you are eligible to 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 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 AXA Advisors 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>2</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
- 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 provider will bear the responsibility for any ineligible investment option it offers.

<sup>2</sup> Exception: no such limitation applies to IRC 403(b)(9) retirement income accounts sponsored by churches and certain other religious organizations.

# non-ERISA 403(b) plan compliance issues

## Impact of the Final Regulations

The final 403(b) regulations increased the administrative and compliance responsibilities of non-ERISA 403(b) plan sponsors. If your 403(b) plan is exempt from ERISA (see page 6, “How to Determine Whether or Not Your 403(b) Plan Is Subject to ERISA”), you must now:

- Adopt and follow the terms of a written plan. The written plan should:
  - Include an addendum identifying the providers that are included, and
  - Name the party or parties to which you have delegated responsibility for the proper administration of your plan.

AXA Equitable can provide you with a plan document, and can provide required amendments to the plan in the event of new legislation or regulations.

- Choose the features you will include in your written plan. AXA Equitable’s plan document includes an Adoption Agreement you can use to select your plan’s features.
- 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.
- Provide employees with both a written notice and a meaningful opportunity to participate in the plan or make changes to their accounts at least once a year.

In this guide, we provide additional information on the more important issues and a detailed checklist to help you be sure that your plan is compliant with the regulations.

# How to Maintain Your Plan's ERISA Exemption under the Final 403(b) Regulations<sup>1</sup>

## Guidance from the Department of Labor

Field Assistance Bulletin (FAB) 2007-02 and FAB 2010-01, which were published by the DOL in 2007 and 2010 respectively, to explain how employers can meet the requirements of the final 403(b) regulations while still maintaining the important exemption from the reporting, disclosure, and fiduciary responsibilities that apply to ERISA plans.

FAB 2007-02 provides that the requirement that non-ERISA plans must be maintained under the terms of a written plan in and of itself **will not** cause ERISA to apply as long as the plan sponsor continues to avoid the direct approval and authorization of transactions such as loans, hardship withdrawals, and exchanges (the movement of one 403(b) account for another 403(b) account). FAB 2010-01 provides clear guidance on the fact that the plan sponsor also cannot contract directly with a Third Party Administrator to authorize those transactions or otherwise make discretionary decisions. Instead, the plan sponsor can require that the investment providers contract with a TPA, to make those discretionary decisions. Alternatively, the plan sponsor can contract directly with a TPA to serve only as an aggregator of data. This would provide a single source of data for the providers to use in determining eligibility for loans and hardship withdrawals, or to authorize exchanges within the plan. You can view both of the Field Assistance Bulletins at <http://www.dol.gov/ebsa/regs/fabmain.html>.

***AXA Equitable can offer a full range of services and support that can help you limit your involvement in the plan and better enable you to maintain your plan's exemption from ERISA.***

## Delegate Certain Administrative Functions for Your 403(b) Plan

While the IRS assigns the ultimate compliance responsibility directly to sponsoring employers, you can and should delegate the transactional processing to your investment providers by contracting with a firm that gathers and aggregates the data to enable those providers to determine eligibility and process transactions. This will permit your plan to maintain your limited involvement to help you remain exempt from ERISA.

The following compliance checklist is based on the understanding that you will impose those requirements. Your responsibility will be to require that all investment providers, via a hold harmless agreement, assume their appropriate responsibilities.

PlanConnect®, a TPA and AXA Financial, Inc., subsidiary, can provide data aggregation services for your plan. Your AXA Advisors financial professional can arrange for a representative from PlanConnect® to meet with you and discuss your specific requirements.

<sup>1</sup> 403(b) plans sponsored by churches and qualified church-controlled organizations as defined in IRC 3121(w)(3)(A) and (B) (respectively), and religious organizations as defined in IRC 414(e), are exempt from the requirements of ERISA unless the plan sponsor chose to file an affirmative election to be covered under ERISA.

## Will Terminating Your Plan Eliminate Your 403(b) Compliance Responsibilities?

The final regulations do include guidance on the termination of a 403(b) plan; however, it is important to note that the following actions must be taken **before** the plan is considered successfully terminated.

- The plan must first comply with the requirements of the final regulations. For plan terminations occurring after January 1, 2009, this means that the written plan must have been adopted and the plan operated in accordance with the terms of the written plan.
- **All** assets held in the plan must be distributed as soon as administratively practicable following plan termination. If those assets are held in individually owned annuity contracts and mutual fund custodial accounts, employees may have to authorize distribution. It is possible that some employees may not authorize distribution—***if all assets are not distributed, the plan has not been properly terminated. This could result in adverse tax consequences for employees holding such assets or rolling them to another workplace plan or individual retirement account (IRA), if the employees have not separated from service.***

Keep in mind that, if all assets can be distributed, employees do have the right to roll over the distributions to an IRA (or to another “workplace” plan, if any).

## Compliance Checklist for Non-ERISA 403(b) Plans

The following checklist outlines key compliance areas for a non-ERISA 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.

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### I. Plan Setup

1. Are you eligible to sponsor a 403(b) plan? **Yes**  **No**

To be eligible, you must be a 501(c)(3) organization. In general, you will hold that designation through a Letter of Determination of your 501(c)(3) tax-exempt status issued by the IRS.

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2. Do you have a procedure in place to require that your plan’s investment providers be responsible for determining the eligibility of plan transactions (e.g., contributions, exchanges, hardship withdrawals, loans, and required minimum distributions)? **Yes**  **No**

Note that your providers must agree to limit any exchanges only to your plan’s approved investment providers and/or investment providers with whom you have information sharing agreements. Your AXA Advisors financial professional can provide you with a sample information sharing and hold harmless agreement.

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3. Do you have information sharing and hold harmless agreements with your plan’s investment providers (or TPA) detailing their responsibilities for plan compliance? **Yes**  **No**

If you would prefer using a TPA as an aggregator of data that your investment providers need when determining eligibility for transactions permitted in your plan, your AXA Advisors financial professional can arrange for a representative from PlanConnect®, a TPA and AXA Financial, Inc., subsidiary, to meet with you and discuss your specific requirements.

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### II. Written Plan

1. Do you have a written plan? **Yes**  **No**

AXA Equitable offers a plan document, which will be updated as needed for legislative or regulatory changes. Note that churches and qualified church-controlled organizations, as defined in IRC 3121(w)(3)(A) and (B) (respectively), are required to have a written plan only if sponsoring a 403(b)(9) retirement income account.

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2. Does your written plan:

a. Specify all terms and conditions under the plan, such as eligibility, benefits, types of employee contributions permitted (pre-tax, Roth [if available], and catch-up contributions), contribution limits, and distributions?

Yes  No

b. Include the plan's requirements for loans, hardship withdrawals, rollovers, exchanges, and transfers?

Yes  No

c. List all investment providers available to receive contributions, exchanges, and plan-to-plan transfers?

Yes  No

AXA Equitable's plan document provides for all of the terms, conditions, and features listed above.

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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?

Yes  No

AXA Equitable's plan document will be amended as needed for regulatory changes.

It is available to employers sponsoring non-ERISA 403(b) plans. Just ask your AXA Advisors financial professional how to obtain one.

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### III. Approved Plan Investment Providers (for plans with multiple investment providers)

1. Are your plan's investment providers listed in your written plan?

Yes  No

Only approved investment providers can receive employee contributions. And, in order to be the recipient of a transfer or exchange, the investment provider must be listed as a part of your plan, either because that provider is receiving ongoing contributions or because that provider has entered into an information sharing agreement with you (see Section II above).

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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?

Yes  No

This step will eliminate the need for you to authorize exchanges and help you maintain your ERISA exemption.

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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? **Yes**  **No**

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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? **Yes**  **No**

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5. Do you have a procedure to add/drop investment providers? **Yes**  **No**

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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 transferred to either another qualified plan that accepts such distributions or to an IRA? **Yes**  **No**

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7. If you do not use the services of a TPA to administer your plan, have your investment providers agreed to administer all employee transactions—including loans, hardship withdrawals, and exchanges—so you can maintain “limited involvement” in the plan (as required to keep your plan exempt from ERISA coverage)? **Yes**  **No**

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8. Regarding DOL Field Assistance Bulletin 2010-01:

a. Have you reviewed the Bulletin, which clarifies (1) the “reasonable investment choice” requirement of the safe harbor exemption and (2) that you are permitted to de-select investment providers that cannot, or will not, agree to review the information on transactions from your single-source data aggregator necessary to review and process employee requests for loans or distributions **Yes**  **No**

b. If only one investment provider is offered, have you both:  
• determined that the investment provider's product includes a variety of investment choices, and **Yes**  **No**

• have you arranged to make another provider available to accept exchanges from the sole provider in your plan? **Yes**  **No**

Note that AXA Equitable's product offerings do provide a variety of choices from which your employees can choose.

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## IV. Universal Availability Requirement

*(Churches and qualified church-controlled organizations are exempt from this requirement.)*

1. Is your 403(b) plan available to all eligible employees, including:

a. Full-time and part-time employees who are not participating in another salary deferral plan you sponsor, such as another 403(b) plan, or a 401(k) or 457(b) top hat plan?

Yes  No

b. Employees who contribute at least \$200 per year?

Yes  No

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?

Yes  No

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.

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

Yes  No

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.*

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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?

Yes  No

The regulations require that employees be given a “meaningful opportunity” to participate in your plan and “meaningful opportunity” would require a notice no less than once each year. Your AXA Advisors financial professional can provide you with a sample annual meaningful notice.

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4. Does your annual written notice comply with the requirement that a “meaningful opportunity” be given by including:

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

Yes  No

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

Yes  No

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

Yes  No

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

Yes  No

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

Yes  No

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5. Do you provide a “meaningful opportunity” for employees to begin or change contributions? Yes  No

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.

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6. Do you offer employees access to educational workshops that review your 403(b) plan, enrollment periods, and available investment providers? Yes  No

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

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## V. Administrative Procedures

### 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? Yes  No

An employee’s contributions to other pre-tax retirement plans, except for a 457(b) plan, may restrict that employee’s maximum available contribution under your plan. Your AXA Advisors 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? Yes  No

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### 2. Contributions

Do you have a procedure in place to:

- a. Require that your investment providers or TPA verify the year of birth for employees using the age 50+ catch-up option? Yes  No

- b. Require a calculation from your investment providers or TPA for the 15-year catch-up contribution (if offered)? Yes  No

The 15-year catch-up option may be offered only in 403(b) plans sponsored by public education institutions, hospitals, churches and church-related organizations, 414(e) religious organizations, and health and welfare service organizations.

Health and welfare service organizations include those that provide medical care, adoption services, home health services (including those provided by home health services agencies), substantial services to the needy (such as meals to needy individuals), services to individuals that have substance abuse problems, or help to the disabled.

- c. Remit contributions as soon as administratively reasonable following the date on which the amounts would have otherwise been paid? **Yes**  **No**

Contributions must be remitted no later than the 15th business day of the month following the month contributions were made.

- d. Require that your investment providers or TPA properly correct excess contributions? **Yes**  **No**

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### 3. Loans (if permitted under your plan)

- a. Have your investment providers or TPA agreed to honor loan requests only after first determining eligibility (i.e., by collecting data from all plan investment providers to whom an employee directs contributions, including contributions to other plans where you permit loans)? **Yes**  **No**

Your AXA Advisors 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 within five days, so loan requests can be processed on a timely basis? **Yes**  **No**

- 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)? **Yes**  **No**

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? **Yes**  **No**

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### 4. Hardship Withdrawals (if permitted under your plan)

- a. Are your plan's investment providers or TPA required to gather documentation verifying that hardship withdrawal requests meet the requirements for hardship under the IRC 401(k) regulations and administer the requests without requiring your direct approval of the distribution (to maintain your ERISA exemption)? **Yes**  **No**

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

- b. Are your plan's investment providers or TPA required to notify your payroll department to suspend employee salary deferral contributions to the employee's 403(b) accounts (as well as 401(k) and 457(b) top hat plans, if any) for six months after a hardship withdrawal?

Yes  No

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### 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?

Yes  No

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**
- An account with an investment provider that after January 1, 2009, is dropped as an approved provider under your plan **and** does not execute an information sharing agreement with you after being dropped from your plan **if** you are going to continue to permit that provider to receive exchanges within your plan.

Non-grandfathered orphan accounts may also be held by former employees or employees' beneficiaries. However, you don't have to make an effort to include these accounts in your plan. Instead, the accounts' providers will be responsible for contacting you or your TPA to determine eligibility if those account holders apply for a loan.

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# ERISA 403(b) plan compliance issues<sup>1</sup>

Portions of the 403(b) regulations apply to both ERISA and non-ERISA 403(b) plans—for example, the application of the universal availability rules (which don't apply to churches and qualified church-controlled organizations), and contribution limits including catch-up contributions. In addition, both ERISA and non-ERISA 403(b) plans are subject to regulations governing plan features, such as loans, hardship withdrawals, and distributions.

Sponsors of ERISA 403(b) plans, however, have additional compliance responsibilities, including the reporting and disclosure of certain plan information, fiduciary responsibility under ERISA, and the satisfaction of non-discrimination rules for employer contributions. These additional responsibilities are described in this section. The compliance checklist starting on page 24 addresses these and many other relevant issues.

## Nondiscrimination Requirements

With the exception of churches and qualified church-controlled organizations, employer contributions to your ERISA 403(b) plan are subject to nondiscrimination rules. The general principle of nondiscrimination rules is that the amount of employer contributions cannot unduly favor highly compensated employees versus those who are not considered highly compensated. In many cases, it is necessary to retain the services of a tax advisor or a TPA to perform testing to determine if your plan is discriminatory in operation.

### Avoiding Nondiscrimination Testing

The expenses of nondiscrimination testing can be avoided in several ways:

- Your organization employs no highly compensated employees. For 2011, a highly compensated employee is one who earned \$110,000 or more. The \$110,000 threshold is indexed annually based on cost of living adjustments.

<sup>1</sup> The information in this section does not apply to 403(b) plans sponsored by churches and qualified church-controlled organizations as defined in IRC 3121(w)(3)(A) and (B) (respectively), and religious organizations as defined in IRC 414(e), unless the plan sponsor chose to file an affirmative election to be covered under ERISA.

- You have highly compensated employees, but do not include them in the employer contribution feature of your 403(b) plan. Ask your AXA Advisors financial professional about a 457(b) top hat deferred compensation plan to benefit any excluded key employees.
- You make employer contributions that are exactly the same percentage of compensation, or exactly the same dollar amount, on behalf of every eligible employee. This approach is automatically considered nondiscriminatory.

Your 403(b) plan will need to satisfy specific nondiscrimination tests if it includes any kind of employer contribution feature—matching or non-matching—under which highly compensated employees could potentially receive an employer contribution that is a greater percentage of pay than non-highly compensated employees.<sup>2</sup>

## Employer Contributions

### Eligibility to Receive Employer Contributions

While you are permitted to have a minimum age and service requirement for 403(b) employer contributions, you generally cannot exclude employees who have attained age 21 and have completed either one year of service, or two years of service if the employer contributions are immediately 100% vested. A year of service is generally defined as a 12-month period in which the employee has worked at least 1,000 hours. You also may not exclude any employee who reaches a “maximum” age (e.g., age 65) from receiving employer contributions.

If you are an educational institution (such as a private college), you can require a participant to be at least age 26 to receive employer contributions if employer contributions are immediately 100% vested and the service requirement for employer contributions is one year or less.

You are permitted to be more liberal in defining which employees are eligible to receive employer contributions. For example, you can begin making contributions for employees who complete 6 months of service.

**Caution: employee salary deferral contributions cannot be subject to any age requirement.** However, there are specific employees that can be excluded. For example, you are permitted to prohibit salary deferrals from 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 from making salary deferrals *only if they didn't work at least 1,000 hours in the previous year.*

<sup>2</sup> Another alternative is to adopt a 403(b) Safe Harbor Plan. For more information, see IRC 403(b)(12)(A)(i).

## Vesting Schedules

Employee salary deferral contributions to your 403(b) plan must always be 100% vested; however, you may have a vesting schedule for your plan's employer contributions. Two types of vesting schedules are permitted:

- *Graded Vesting Schedule*—The 6-year graded vesting schedule for a non-matching plan requires that at least 20% of the employer contributions be vested after two years of service, and an additional 20% be vested in each subsequent year until the contributions are 100% vested after six years of service.
- *Cliff Vesting Schedule*—The 3-year cliff vesting schedule requires zero percent vesting until three years of service has been reached, and 100% vesting afterwards.

Years of Service	6-year Graded Vesting	3-year Cliff Vesting
1	0%	0%
2	20%	0%
3	40%	100%
4	60%	100%
5	80%	100%
6	100%	100%

It is important to note that all employer contributions must be fully vested when your employees reach normal retirement age (usually that age cannot be greater than age 65) as defined in your plan document.

You are permitted to be more liberal than the above schedules if you wish.

## Annual Form 5500 Filing Requirements

You must satisfy the annual IRS 5500 filing requirements and submit the appropriate Form 5500 no later than 7½ months after the close of your plan year. (The abbreviated filing that applied to 403(b) plans for plan years prior to 2009 does not apply to plan years 2009 and later.) In addition, you may be required to have your ERISA 403(b) plan's financial statement audited if you have more than 100 eligible participants as of the beginning of the plan year.

AXA Equitable can provide you with some of the data that you will need for your Form 5500 filing. You can also look to your tax advisor or your TPA (if you've retained a TPA) to complete the appropriate 5500 form for you to submit to the IRS.

## Fiduciary Responsibilities

As a plan sponsor, you are automatically a fiduciary under ERISA and must follow the standards of fiduciary conduct for ERISA plans. In general, this means that you must:

- Act solely in the best interests of participants and their beneficiaries,
- Act for the exclusive purpose of providing benefits to participants and their beneficiaries,
- Act in accordance with the plan document and other materials governing the plan, and
- Diversify investments to reduce the risk of loss.

Because you are a fiduciary, ERISA requires that you be bonded. The amount of the bond shall not be less than 10% of the amount of the funds handled. The minimum amount of the bond is \$1,000 and the maximum required amount ranges from \$500,000 to \$1,000,000 depending on the situation.

### Reducing Your Fiduciary Liability for Investments

In a participant-directed individual account plan, such as your 403(b) plan, you may reduce your fiduciary liability by following the requirements of Section 404(c) of ERISA. In addition to other requirements of Section 404(c), you are required to provide a broad range of investments with different “risk and return characteristics,” and the investment options in your plan must permit participants to change their choices at least once each quarter. AXA Equitable’s products contain a range of investment options sufficient to meet the requirements of Section 404(c) of ERISA, should you wish to take this approach.

Section 404(c) also requires that you give participants a written notice of your intent to comply with Section 404(c) and provide them with enough information about the available investment options so that they can make informed decisions. Your local AXA Advisors financial professional can help you meet this requirement through group education meetings with your employees and one-on-one consultation sessions as needed.

# Compliance Checklist for ERISA 403(b) Plans

The following checklist outlines key compliance areas for an ERISA 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, so even if you respond “yes” to each question, it may not mean your plan is fully in compliance. 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.

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## I. Plan Setup

1. Are you eligible to sponsor a 403(b) plan? **Yes**  **No**

To be eligible, you must be a 501(c)(3) organization. In general, you will hold that designation through a Letter of Determination of your 501(c)(3) tax-exempt status issued by the IRS.

- 
2. Have you updated your written plan to comply with the final 403(b) regulations? **Yes**  **No**

- 
3. Do you have an information sharing and hold harmless agreement with your plan’s investment providers and/or third party administrator (TPA) detailing their responsibilities for plan compliance? **Yes**  **No**

You should distribute copies of the agreement(s) to all involved parties.

- 
4. Have you obtained a fidelity bond for you, your board members, and the staff member(s) that are named as plan administrator(s) in your plan document? **Yes**  **No**
- 

## II. Written Plan

1. Has your governing board authorized you to adopt a written 403(b) plan document? **Yes**  **No**

- 
2. Does your written plan reflect the requirements of the final 403(b) regulations and:

- a. Specify all terms and conditions under the plan, such as eligibility, benefits, types of employee contributions permitted (pre-tax, Roth [if available], and catch-up contributions), contribution limits, and distributions? **Yes**  **No**

- b. Include the plan’s requirements for loans, hardship withdrawals, rollovers, exchanges, and transfers? **Yes**  **No**

c. List all investment providers available to receive contributions, exchanges, and plan-to-plan transfers? **Yes**  **No**

d. Identify the party or parties administering your plan—i.e., a TPA or the investment providers? **Yes**  **No**

AXA Equitable’s plan document provides for all of the terms, conditions, and features listed above.

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3. Does your written plan describe your employer contribution guidelines, including:  
a. Eligible employees? **Yes**  **No**

Eligibility provisions cannot include a “maximum age” limit. In addition, you generally cannot exclude employees who have attained age 21 and have completed one year of service with the employer (two years if employer contributions are immediately 100% vested). A year of service is a 12-month period where the employee is required to work at least 1,000 hours.

b. Employer contribution limits? **Yes**  **No**

c. The vesting schedule? **Yes**  **No**

The vesting schedule can be no greater than a 3-year “cliff” schedule, or a schedule which grades to a 100% vesting after 6 years of employment. Only employer contributions can be subject to a vesting schedule; employee contributions must always be 100% vested.

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4. Have you kept a copy of the plan document in your files in the event that the IRS audits your 403(b) plan? **Yes**  **No**

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5. 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? **Yes**  **No**

AXA Equitable’s plan document will be amended as needed for regulatory changes. It is available to employers sponsoring ERISA 403(b) plans. Just ask your AXA Advisors financial professional how to obtain one.

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### III. Summary Plan Description (SPD)

1. Do you have an SPD for your 403(b) plan which describes the terms of your plan for your employees? **Yes**  **No**

AXA Equitable will provide an SPD to all plan sponsors that use the AXA Equitable ERISA 403(b) plan document.

- 
2. Do you have a procedure in place to distribute the SPD to new plan participants (and to any beneficiary receiving benefits under your plan) within the required 90-day period? **Yes**  **No**

Regulations require that the delivery method you use to get the SPD to participants and beneficiaries be “reasonably calculated to ensure actual receipt of the material.”

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3. Do you have a procedure in place to distribute updates to the SPD whenever your plan is amended? **Yes**  **No**

If your ERISA 403(b) plan is amended in any material manner, the SPD must also be amended and participants should receive a summary of material modifications (SMM) describing the amendment and the change to the SPD. The SMM must be distributed no later than 210 days after the end of the plan year in which the plan amendment is adopted.

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#### IV. Approved Plan Investment Providers (for plans with multiple investment providers)

1. Are your plan’s investment providers listed in your written plan? **Yes**  **No**

Only approved investment providers can receive employee contributions. Transfers and exchanges are limited to your approved investment providers 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 above).

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2. Have you given each of your approved plan 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? **Yes**  **No**

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? **Yes**  **No**

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? **Yes**  **No**

5. Do you have a procedure to add/drop investment providers? **Yes**  **No**
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6. Have you obtained written confirmation from your investment providers that their annuity contracts and/or mutual fund custodial accounts:
- a. Qualify as appropriate 403(b) investment options by including language that states (1) annuity contracts are not assignable, (2) the contribution limits, and (3) eligible rollover distributions may be directly transferred to either another qualified plan that accepts such distributions or to an IRA? Yes  No
  - b. Provide the joint and survivor annuity options required for the spouse beneficiaries of the participants (or support the failure to provide the joint and survivor option with alternatives that are acceptable in ERISA plans)? Yes  No
- 

## V. Universal Availability Requirement

*(Churches and qualified church-controlled organizations are exempt from this requirement.)*

1. Is your 403(b) plan available to all eligible employees, including:
- a. Full-time and part-time employees who are not participating in another salary deferral plan you sponsor, such as another 403(b) plan, or a 401(k) or 457(b) top hat plan? Yes  No
  - b. Employees who contribute at least \$200 per year? Yes  No
  - 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? Yes  No
- 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.
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2. Can new participants start making employee salary deferral contributions to your 403(b) plan **without** having to meet a minimum age requirement? Yes  No

The universal availability rules prohibit a minimum age requirement for employee salary deferral contributions. As indicated in question #1 above, 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.*

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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? Yes  No

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. Your AXA Advisors financial professional can provide you with a sample annual notice.

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4. Does your annual written notice comply with the requirement that a “meaningful opportunity” be given by including:
- a. Eligibility requirements (who can and cannot participate in the plan)? **Yes**  **No**
  - b. Enrollment procedures (how and when to enroll)? **Yes**  **No**
  - c. Types of employee salary deferral contributions permitted, such as pre-tax, Roth 403(b), if available, and catch-up contributions? **Yes**  **No**
  - d. How and when employee salary deferral contribution amounts can be changed? **Yes**  **No**
  - e. Sources for additional information, including information on investment providers? **Yes**  **No**
- 

5. Do you provide a “meaningful opportunity” for employees to begin or change contributions? **Yes**  **No**

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.

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6. Do you offer employees access to educational workshops that review your 403(b) plan, enrollment periods, and available investment providers? **Yes**  **No**

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

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## VI. ERISA Section 404(c)

1. If you intend to follow the requirements of ERISA Section 404(c) to reduce your fiduciary responsibilities for investments in your 403(b) plan, have you:
- a. Ascertained that your plan offers at least three funds that are core investment funds required under ERISA Section 404(c) with different risk and reward characteristics? **Yes**  **No**
  - b. Established that the investment options can be changed at least once per quarter? **Yes**  **No**
  - c. Notified employees that your plan is intended to qualify as a Section 404(c) plan, with an explanation that fiduciaries may be relieved of some of the liabilities for losses that result from the participant’s investment choices? **Yes**  **No**
  - d. Made arrangements, either your own or through your provider(s), to provide plan participants with a description of all investment alternatives, including their risk and return characteristics, underlying assets, and investment managers? **Yes**  **No**

Most prospectuses comply with this requirement as well as other requirements, such as the disclosure of fees and expenses. Your AXA Advisors financial professional will provide a prospectus to each participant.

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## VII. Administrative Procedures

### 1. Nondiscrimination Testing

Have you taken steps to have nondiscrimination testing performed if your plan:

- a. Provides for employer matching contributions **and** permits highly compensated employees to participate? **Yes**  **No**
- b. Provides for non-matching employer contributions that are not the same percentage of compensation or dollar amount for each participant **and** permits highly compensated employees to participate? **Yes**  **No**

Contact your tax advisor or TPA to perform nondiscrimination testing on your plan, if needed.

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### 2. Annual IRS Form 5500 Filing

Have you determined who will complete the annual IRS Form 5500 filing—e.g., you, a TPA, or your accountant—and determined who will be responsible for filing the form?

**Yes**  **No**

You must submit the appropriate Form 5500 no later than 7½ months after the close of your plan year. You also may be required to have your ERISA 403(b) plan's financial statement audited if you have more than 100 eligible participants as of the beginning of the plan year.

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### 3. 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? **Yes**  **No**

An employee's contributions to other pre-tax retirement plans, except for a 457(b) plan, may restrict that employee's maximum available contribution under your plan. Your AXA Advisors financial professional can provide you with a sample salary reduction agreement which collects information to help you to identify these individuals; your financial professional can also 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? **Yes**  **No**
- 

### 4. Employee Contributions

Do you have a procedure in place to:

- a. Require that your investment providers or TPA verify the year of birth for employees using the age 50+ catch-up option? **Yes**  **No**
- b. Require a calculation from your investment providers or TPA for the 15-year catch-up contribution (if offered)? **Yes**  **No**

The 15-year catch-up option may be offered only in 403(b) plans sponsored by public education institutions, hospitals, churches and church-related organizations, 414(e) religious organizations, and health and welfare service organizations. Health and welfare service organizations include those that provide medical care, adoption services, home health services (including those provided by home health services agencies), substantial services to the needy (such as meals to needy individuals), services to individuals that have substance abuse problems, or help to the disabled.

- c. Require that your investment providers or TPA properly correct excess contributions?

Yes  No

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### 5. Remittance of Contributions

Do you have a procedure in place to remit all:

- a. Employee contributions in a timely manner?

Yes  No

Under ERISA requirements, you must remit employee contributions as soon as administratively possible, but in no event later than the 15th business day of the month following the month the contributions were taken from employees' paychecks.

- b. Employer contributions?

Yes  No

Employer contributions are not required to be made until 8½ months after the end of your plan year based on regulations; however, employers typically remit matching employer contributions when they remit employee contributions to encourage participation in your plan.

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### 6. Loans (if permitted under your plan)

- a. Have your investment providers or TPA agreed to honor loan requests only after first determining eligibility (i.e., by collecting data from all plan investment providers to whom an employee directs contributions, including contributions to other plans that you sponsor which permit loans)?

Yes  No

Your AXA Advisors 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 days, so loan requests can be processed on a timely basis?

Yes  No

- 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)?

Yes  No

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?

Yes  No

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### 7. 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?

Yes  No

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

- b. Is there a procedure in place to have your payroll department suspend an employee's salary deferral contributions to your 403(b) plan (as well as 401(k) and 457(b) top hat plans, if any) for six months after a hardship withdrawal?

Yes  No

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### 8. 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?

Yes  No

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**
- An account with an investment provider that after January 1, 2009, is dropped as an approved provider under your plan **and** does not execute an information sharing agreement with you after being dropped from your plan **if** you are going to continue to permit that provider to receive exchanges within your plan.

Non-grandfathered orphan accounts may also be held by former employees or employees' beneficiaries. However, you don't have to make an effort to include these accounts in your plan. Instead, these accounts' providers will be responsible for contacting you or your TPA to determine eligibility if those account holders apply for a loan.

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## ERISA 403(b) Plans Compared to ERISA 401(k) Plans

The following chart compares ERISA 403(b) to ERISA 401(k) plans. It provides general information about two plans that 501(c)(3) organizations can sponsor. Both plans can accept employer contributions and do permit employee deferrals.

	ERISA 403(b) Plans	ERISA 401(k) Plans
Plan document required	Yes	Yes
IRS approval of plan document available <sup>1</sup>	No	Yes
Summary plan description	Yes	Yes
Abbreviated Form 5500 filing		
For the 2008 plan year	Yes	No
For the 2009 plan year and thereafter	No <sup>2</sup>	No
Filing of independent auditor's reports	Yes <sup>2</sup>	Yes
Deferrals of highly compensated employees limited by average deferrals of lower-paid employees	No	Yes <sup>3</sup>
Nondiscrimination testing of employee salary deferral contributions	No	Yes <sup>3</sup>
Nondiscrimination testing of employer contributions <sup>4</sup>	Yes	Yes
Universal availability; no average deferral percentage (ADP) testing for employee salary deferral contributions	Yes <sup>4</sup>	No
Special 15-year catch-up contributions for elective deferral limits allowing for higher contribution limits (other than the age 50+ catch-up contributions)	Yes <sup>5</sup>	No
Reduced fiduciary responsibility	No	No
Investment choices limited to annuities and mutual funds	Yes	No
Vesting schedules permitted for employer contributions <sup>6</sup>	Yes	Yes

1 The IRS is expected to issue approval letters for prototype 403(b) plans in 2011.

2 Beginning with the 2009 plan year, ERISA 403(b) plans will be subject to the same 5500 filing requirements as currently exist for 401(k) plans. (The abbreviated filing that applied to 403(b) plans for plan years prior to 2009 does not apply to plan years 2009 and later.)

3 Unless Safe Harbor 401(k), available on and after January 1, 1999, is used.

4 Unless Safe Harbor 401(k) or 403(b) is used.

5 The employees of educational institutions, hospitals, home health services agencies, health and welfare agencies, and religious organizations are eligible for potentially higher limits with 15 years of service or more with the employer.

6 Be sure that your provider can accommodate a vesting schedule in your ERISA 403(b) plan. AXA Equitable can provide a funding vehicle that can meet that goal.

Note that all 403(b) plans (with the exception of churches and qualified church-controlled organizations) whether subject to ERISA or not, are subject to the universal availability requirements and the annual meaningful notice requirement (see page 8, “Universal Availability Provision”).

### **Moving from a 401(k) Plan to 403(b) Plan**

You may terminate your 401(k) plan and, under regulations announced in July 2003, establish a 403(b) plan into which the 401(k) plan assets may be rolled over. This means that you will not be required to freeze and continue to maintain your ERISA 401(k) plan, since all assets can now be distributed for direct rollover into your newly established 403(b) plan (or to a participant’s IRA). A final IRS Form 5500 filing must be filed indicating that you have terminated the 401(k) plan; however, no further annual reporting forms will be required in subsequent years for the 401(k) plan.

Contact your AXA Advisors financial professional if you have a 401(k) plan and are interested in transitioning to a 403(b) plan.

# common/potential plan violations—ERISA and non-ERISA plans

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 between investment providers that are neither approved providers for the plan nor providers with whom the plan has information sharing agreements*—Effective September 25, 2007, all 403(b) exchanges are limited to either your plan’s approved investment providers or investment providers that agree to share information for plan compliance purposes.

Your AXA Advisors 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.

Additional violations that **apply only to ERISA 403(b) plans** include:

- *Employer contributions fail nondiscrimination testing*—Nondiscrimination testing is required if your 403(b) plan includes highly compensated employees and offers all participants either employer matching contributions or non-matching contributions that are neither the same percent of pay nor the same dollar amount for each plan participant. Plans that fail nondiscrimination testing are subject to fines and penalties. See page 20, “Nondiscrimination Requirements,” for more information.
- *Summary plan descriptions (SPDs) are not distributed*—You are legally obligated to provide SPDs to participants in each of the following circumstances: within 90 days of becoming a participant, on request, and to all eligible employees and beneficiaries at least once every five years (assuming the plan is amended during the five-year period; otherwise, once every ten years).
- *Failure to file an annual Form 5500*—Starting with reporting for 2009 plan years, ERISA 403(b) plans will be subject to the same Form 5500 filing requirements as 401(k) plans. Failure to meet Form 5500 filing requirements may subject your plan to DOL penalties.

## Employee Eligibility and Contributions

- *Eligible employees have not been given the opportunity to participate in your plan*—Under the final 403(b) regulations (which are 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>1</sup>
  - Employees who already participate in another salary deferral plan that you sponsor.
  - Employees who are nonresident aliens with no U.S. income.
  - Certain students who work for you.

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).

<sup>1</sup> 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.

- *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 exceeds the per-employer lifetime maximum of \$15,000 for these contributions,
  - An ineligible employer allows its employees to make 15-year catch-up 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, it 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 make required payments when due, which results in the default of the entire loan;
  - Granting of a new loan when there is an outstanding defaulted loan, unless the new loan is being repaid through payroll deductions;
  - Poor documentation; and
  - Loans from multiple plan investment providers or other plans of the employer that, in the aggregate, exceed the allowable loan limits.
- *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 that hardship distributions have been made from multiple plan investment providers 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, 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. (This requirement has been suspended for the 2009 tax year only.)
- *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.

Additional violations that **apply only to non-ERISA 403(b)** plans include:

- *An employer approves loans, hardship withdrawals, exchanges, and/or other transactions*—Such activities would make a 403(b) plan subject to ERISA, since they violate the “limited involvement” requirement an employer must follow to be exempt from ERISA coverage.

## What to Do If You Uncover Plan Violations

The IRS has two programs you can use to correct plan violations you uncover.<sup>2</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 2008-50<sup>3</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>2</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>3</sup> Available online at <http://www.irs.gov/pub/irs-drop/rp-08-50.pdf>.

## Voluntary Correction Program (VCP)

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 simultaneously submit a determination letter application with its applicable fee once the IRS has made a determination letter program available (expected sometime in 2011).

If you use the VCP to correct plan violations, your plan will **not** be audited until the VCP process is complete. This means you avoid the risk of having your plan disqualified, which could happen if it is audited before you correct the violations.

## 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)

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 Audit CAP and/or other IRS compliance resolution programs, consult your legal counsel.

# sample forms and notices

Your AXA Advisors 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 403(b) plan 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.
- *Annual Notice of Eligibility*—Our sample satisfies the requirement that you provide your employees with a written notice at least once a year about their eligibility to participate in your 403(b) 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*—We have developed a form that 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 whom 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.

These forms, notices, and agreements can also be downloaded from the AXA Equitable 403(b) Information Center website at [www.axa-equitable.com/403b-information-center](http://www.axa-equitable.com/403b-information-center).

# AXA Equitable—your 403(b) resource

You have several resources available to you if you need help with your 403(b) plan, have a question, or need information.

## Call

- Your local AXA Advisors financial professional
- The EQUI-VEST® Service Center at **(800) 628-6673**

## Go Online

- For specific information on your 403(b) plan, log on to the Employer Plan Administration Center<sup>1</sup> at [www.axa-equitable.com](http://www.axa-equitable.com)

## Email

- You can reach us at [EV.Collections@axa-equitable.com](mailto:EV.Collections@axa-equitable.com)

<sup>1</sup> You must register with the EQUI-VEST® Service Center to use the Employer Plan Administration Center (EPAC). To get started, email [EV.Collections@axa-equitable.com](mailto:EV.Collections@axa-equitable.com) or call (800) 628-6673, press 2, and ask to speak to the EPAC technical support representative.



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