

# CLC/Fidelity Webinar

ERISA vs. Non-ERISA

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# Plan Sponsors Stuck In The Middle Between Conflicting DOL and IRS Regulations Regarding ERISA Status



## DOL non-ERISA Safe Harbor

Administration

De-centralized management of plans

Fiduciary

Undefined standards for plan sponsor responsibility

Investment Options

Restrictions on limiting available vendors



## IRS New Regulations

Increased responsibility for plan sponsors to monitor their plans

Federal standards for plan sponsor responsibility

New regulations complicate offering completely unlimited investment choices

Today's session will help you better understand the tradeoffs between electing ERISA status versus remaining Non-ERISA

Tom Peller

# Why There Is a Non-ERISA Safe Harbor

Historical context and regulatory policies.



# Employee Retirement Income Security Act of 1974.



## ERISA covers most deferred compensation plans.

### Why some 403(b) plans are non-ERISA

- ▶ Individually tailored
- ▶ Regulatory supervision of mutual funds and insurers
- ▶ Substantial administrative difficulties of reporting and disclosure

### Four fundamental requirements

- ▶ “Safe harbor” guidance
- ▶ “Limited employer involvement” addressed only six features

# 403(b) Plans Gradually Become More Like Qualified Plans



## Changes to the Internal Revenue Code Requirements for all 403(b) plans

- ▶ Tax Reform Act of 1986 adds nondiscrimination requirements and loan rules
- ▶ Small Business Job Protection Act of 1996
- ▶ Economic Growth and Tax Relief Reconciliation Act of 2001
- ▶ Pension Protection Act of 2006

## Comprehensively updated IRS 403(b) regulations in 2007

- ▶ Plans are established with written plan documents
- ▶ Employers must maintain ongoing compliance with tax rules



# 403(b) Changes Strain the Safe Harbor Limits



## DOL Retains “Limited Employer Involvement” Principle



- ▶ Field Assistance Bulletin 2007-2
  - **Inside** safe harbor examples: plan documents, nondiscrimination testing, certifying facts to providers, fashioning corrections
  - **Outside** safe harbor examples: processing distributions, determinations regarding loans, hardships, or qualified domestic relations orders
- ▶ Field Assistance Bulletin 2010-1
  - **Inside** safe harbor examples: removing plan features or vendors to remain non-ERISA, discretionary determinations made by providers for optional plan features
  - **Outside** safe harbor examples: selection of a third party administrator, discretionary authority to move funds from one provider to another

Mike Webb

# Current State



# Reviewing the ERISA Option



Once considered an unnecessary burden, ERISA compliance now offers distinct advantages and deserves a second look.

## Conventional Wisdom

ERISA means more administrative burden and costs

ERISA means unnecessary fiduciary requirements



## New Reality

ERISA coverage preempts inconsistent state law and gives you more options for outsourcing

ERISA provides consistent and clear federal guidance on fiduciary risks and protections

# ERISA vs. Non-ERISA Plan Administration



- ▶ Decreasing differences in IRS regulatory requirements
- ▶ Uniformity and consistency in multiple jurisdictions increase efficiency and accuracy



# ERISA vs. Non-ERISA Fiduciary Risk



Private non-ERISA plans have a fiduciary responsibility under state law  
ERISA fiduciary responsibility is unique, but not riskier than non-ERISA responsibility

- ▶ “Familiar with such matters” refers to plan types and goals
- ▶ National uniformity simplifies fiduciary responsibilities
- ▶ Extensive regulatory interpretations and guidance

Tom Peller

# The ERISA vs. Non-ERISA Decision

Key considerations



## Plan Administration Factors – 2011



Topic	Outcome
Automatic enrollment	ERISA wins
Employee disclosure with Summary Plan Descriptions and Summary of Material Modifications	Tie
Form 5500 Annual Reports	Non-ERISA wins
Nondiscrimination testing	Tie
Remitting employee contributions	Non-ERISA wins
Remitting employee contributions for plans <100 participants	ERISA wins

Overall Assessment:

*Close call*

# Fiduciary Responsibility Factors – 2011



Topic	Outcome
404(c) protection	ERISA wins
DOL audits	Non-ERISA wins
IRS audits – ERISA wins	ERISA wins
Fidelity bonding	Tie
Participant fee disclosure	TBD
Vendor fee disclosure	ERISA wins

Overall Assessment:

*Close call*

## Two Decisive Factors – (A) Investment Options



- ▶ Safe harbor generally requires multiple vendors
- ▶ Employers cannot proactively choose the non-ERISA vendors
  - Can be selected randomly
  - Can be selected first-come-first served
  - Vendor reductions permitted
- ▶ ERISA authorizes plan sponsors to choose the best quality service providers and best quality investment options
- ▶ Non-ERISA may result in too many uncontrolled vendors

**Investment Option and Vendor Selection – ERISA wins**

## Two Big Decisive Factors – (B) Risk of Noncompliance



- ▶ The 2007 DOL Field Assistance Bulletin says that non-ERISA status depends on “facts and circumstances”
  - Not all plan administration requirements are covered
  - Rapidly evolving environment of available products and services
- ▶ Costs of unintentional IRS and DoL noncompliance can be substantial
- ▶ Acknowledging ERISA status eliminates a worrisome uncertainty

Jeff Levy

# Conclusion



## ERISA or Non-ERISA?



Easy answer in 1974. Harder answer in 2011.





## Get expert assistance

- ▶ Fidelity Perspectives  
([http://dcda.fidelity.com/static/dcle/WPSFidelityPerspectives/documents/FF\\_ERISA\\_POV\\_111510.pdf](http://dcda.fidelity.com/static/dcle/WPSFidelityPerspectives/documents/FF_ERISA_POV_111510.pdf))
- ▶ “To Be an ERISA Plan or Not to Be an ERISA Plan,” by Tom Peller, Journal of Pension Planning & Compliance, Winter 2010
- ▶ IRS’ quarterly “Retirement News for Employers” (IRS.gov)
- ▶ IRS 403(b) website  
(<http://www.irs.gov/retirement/article/0,,id=172874,00.html>)
- ▶ DOL/EBSA 403(b) website  
(<http://www.dol.gov/ebsa/403b.html>)

Fidelity Perspectives

### ERISA vs. Non-ERISA 403(b):

Making the appropriate decision

#### Introduction

Shortly after ERISA was enacted in 1974, federal regulations carved out a “safe harbor,” referred to as “non-ERISA status,” that provided an exemption for certain 403(b) plans from coverage under Title I of ERISA (non-ERISA safe harbor). Since that time, many employers have elected to meet the requirements of the non-ERISA safe harbor because they believe it is the best way to provide 403(b) plan access to employees.

Over the years, the tax-exempt retirement plan market has seen tremendous growth in the choices of investment products and administrative structures for defined contribution plans. More importantly, recent regulatory guidance from the Employee Benefits Security Administration (EBSA) of the Department of Labor (DOL) and from the Department of the Treasury and the Internal Revenue Service (IRS) has directly affected the feasibility and desirability of maintaining non-ERISA status.

Should your 403(b) plan remain a non-ERISA safe harbor plan in light of these changes? This Fidelity Perspectives brief discusses the current regulatory landscape and examines several commonly held beliefs regarding non-ERISA safe harbor status. We then take a close look at the plan sponsor’s important choice: whether to maintain non-ERISA safe harbor status for their 403(b) plan.<sup>1</sup>

<sup>1</sup>It is important to note that this paper does not address many of the complexities of other plan designs similar to the voluntary-only 403(b) plan in the tax-exempt market, such as governmental and nonexempt church plans that are by law not subject to ERISA. It also doesn’t address the complexities of state fiduciary laws. In addition, an employer with a non-ERISA safe harbor 403(b) plan may sponsor a 403(b) plan or a qualified 401(a) plan that is concurrently subject to ERISA, which may have additional considerations not specifically covered in this brief.

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## Thank you!

**Jeff Levy, Tom Peller and Mike Webb**

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# Questions & Answers

