



## Speaker Firms and Organization:

### **Davis & Harman LLP**

Michael L. Hadley  
*Partner*

### **Arnold & Porter LLP**

Mary Cassidy  
*Counsel*

### **Boutwell Fay LLP**

Evan Giller  
*Of Counsel*

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## Partner Firms:

ARNOLD & PORTER LLP

Arnold & Porter LLP is an Am Law 100 law firm providing counsel at the intersection of business, law and regulation. With nearly 800 attorneys practicing in more than 26 distinct areas of the law, the firm provides strategic, client-focused and innovative legal services. Arnold & Porter serves a broad range of clients whose business needs require US, EU, or cross-border regulatory, litigation, and transactional services. Founded in 1946 and guided by the core values of excellence, professionalism, diversity and public service, the firm is committed to seeking creative solutions to help clients succeed in a highly competitive and increasingly regulated world.

DAVIS &  
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Since its founding in 1985, DAVIS & HARMAN LLP has provided tax counseling, planning, and legislative services to a wide range of clients, including financial institutions, insurance companies, other businesses, and trade associations. The firm is proud of its reputation for deep expertise in matters related to employee benefits and ERISA, the taxation of insurance companies and their products, housing incentives, energy, commodities, and employment and excise taxes. DAVIS & HARMAN LLP is committed to helping its clients develop regulatory, legislative, and other solutions to their most pressing challenges. More than half of its partners have significant government experience – which augments the firm's capabilities and perspective as effective advocates with Congress, the Treasury Department, the Internal Revenue Service, the Department of Labor, and other federal government agencies.



## Partner Firms:



Boutwell Fay LLP is a women-owned law firm specializing in employee benefits and ERISA. While our firm provides a high quality of legal services normally associated with large law firms, our smaller size allows us to be more accessible to clients and more responsive to their needs. Our practice areas include the following:

- Qualified and Non-Qualified Plans
- Health and Welfare Plans
- Plan Correction and Government Audits
- Fiduciary and ERISA Consulting
- ERISA Claims and Disputes

Our services include assisting clients in the drafting, qualification, design, administration and operation of employee benefit plans of every classification. Our Firm provides legal counsel to a broad range of business, consulting and financial services firms. Our clients include private employers, plan service providers, financial institutions, government agencies and pension plans. We serve closely-held and public companies of all sizes, with plans ranging from 10 to thousands of participants. The background of the Firm's attorneys includes practice at national law firms. Our attorneys bring to their practice a high degree of sophistication coupled with a unique sensitivity to their clients' overall business and legal needs.

# Significant Issues for 403(b) Plans in 2014

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## Brief Speaker Bios:



**Michael L. Hadley**

Michael L. Hadley is a partner in the law firm Davis & Harman LLP. He practices in the area of employee benefits, advising clients on the full range of tax, ERISA, and other laws affecting benefit plans. He has a particular focus on helping financial institutions that sell products to defined contribution and defined benefit plans, IRAs and similar plans navigate the special rules that govern those plans. He also provides clients with strategic advice, plan design, counseling, and compliance assistance for qualified plans, 403(b) and 457 plans, non-qualified executive compensation, employment agreements, and health and other welfare plans.



**Mary Cassidy**

Mary Cassidy practices in the employee benefits area. Her practice focuses on the tax aspects of employee benefit plans, including tax-qualified retirement plans (including defined benefit pension and 401(k) plans and employee share ownership plans (ESOP)), 403(b) plans, church plans, voluntary employees' beneficiary associations (VEBA), welfare plans, and nonqualified deferred compensation arrangements for tax-exempt organizations. She regularly advises clients on a broad range of employee benefits matters, including the design and implementation of tax-qualified retirement plans and 403(b) plans, benefit plan compliance with federal tax and Employee Retirement Income Security Act (ERISA) requirements, correction of benefit plan defects through Internal Revenue Service (IRS) and Department of Labor (DOL) self-correction programs, and nondiscrimination testing of church plans. She represents clients with respect to obtaining rulings and determination letters from the IRS, obtaining compliance statements from the IRS under its voluntary compliance program, and IRS and DOL audits of employee plans.



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## Brief Speaker Bios:



**Evan Giller**

Evan Giller has worked in the field of employee benefit law and ERISA for over 25 years, specializing in the retirement and deferred compensation plans of tax-exempt organizations and governmental employers. He has extensive experience advising employers and plan service providers on a wide range of retirement plan issues, including plan design, plan documents, operational issues, corrections and fiduciary responsibility, and has particular expertise regarding 403(b) and 457 plans. In addition, Evan's practice includes advising financial institutions on issues relating to the design and regulation of annuity products, in particular annuities used to fund retirement plans.

► For more information about the speakers, you can visit: [http://theknowledgegroup.org/event\\_name/significant-issues-for-403b-plans-in-2014-live-webcast/](http://theknowledgegroup.org/event_name/significant-issues-for-403b-plans-in-2014-live-webcast/)



In a two hour live webcast, a panel of thought leaders and practitioners assembled by The Knowledge Group will discuss the significant issues and latest insights on how to strengthen your 403(b) Plans in 2014.

Some of the major topics that will be covered in this course are:

- 403(b) plans: an overview
- Trends and issues
- Compliance
- Strategies and best practices
- Up-to-minute regulatory updates

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*Partner*  
Davis & Harman LLP



### Segment 2:

**Mary Cassidy**  
*Counsel*  
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### Segment 3:

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## Introduction

Michael L. Hadley is a partner in the law firm Davis & Harman LLP. He practices in the area of employee benefits, advising clients on the full range of tax, ERISA, and other laws affecting benefit plans. He has a particular focus on helping financial institutions that sell products to defined contribution and defined benefit plans, IRAs and similar plans navigate the special rules that govern those plans. He also provides clients with strategic advice, plan design, counseling, and compliance assistance for qualified plans, 403(b) and 457 plans, non-qualified executive compensation, employment agreements, and health and other welfare plans.

Mr. Hadley was formerly Associate Counsel for Pension Regulation at the Investment Company Institute, the national association of U.S. investment companies. His responsibilities included advocating for the Institute's membership before Congress, the Department of Labor, the Department of the Treasury, and the Securities Exchange Commission on retirement security issues and assisting ICI members and staff in understanding tax and ERISA rules. Among other duties he managed ICI's work implementing the Pension Protection Act and responding to 401(k) fee, investment advice, and fiduciary developments in Congress, DOL, and the courts.

Prior to joining ICI, Mr. Hadley was an associate with Covington & Burling LLP, where he advised clients on employee benefit plans and executive compensation arrangements, provided advice on ERISA litigation, and assisted with pension and benefits issues in mergers, acquisitions, and other corporate transactions.

Mr. Hadley is a frequent speaker on the latest retirement savings policy developments coming out of Congress and the regulatory agencies and has testified before Treasury, IRS, and Department of Labor. A sampling of articles he has authored or co-authored: *ERISA Compliance for Investment Advisers: A Q&A Guide To DOL's 408(b)(2) Disclosure Regulation*, Investment Lawyer, Vol. 20, No. 7 (July 2013); *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, 2010 ICI Research Perspective, Vol.17, No. 4 (June 2011); and *401(k) Plans: A 25-Year Retrospective*, ICI Research Perspective, Vol. 12, No. 2 (Nov. 2006).

Mr. Hadley was a law clerk for the Honorable Gerald Tjoflat, U.S. Court of Appeals for the Eleventh Circuit. He received his J.D. from the University of Virginia, where he was Notes Editor of the *Virginia Law Review* and elected to the Order of the Coif. He received his B.A., *cum laude*, from the College of William and Mary.

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*Partner*  
**Davis & Harman LLP**



## Recent Past – Where are We?

- Overhaul of 403(b) regulations in 2007 – generally effective 2009
  - Plan document requirement
  - Coordination among providers and plan sponsor
  - Consolidation in industry
- DOL revises guidance on safe harbor
- Form 5500 (with audit for large plans) required for plan year 2009 and later
- IRS updates EPCRS for 403(b) plans

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## What is the Future?

- 403(b) plans under tax reform
- Pre-approved plan program but no determination letter program



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## Chairman Camp's Tax Reform Plan

- February 26<sup>th</sup> Discussion Draft
  - Comprehensive
  - Statutory Language
  - Revenue Estimates
- Why Now?
- Not Likely for 2014, But Still Important
  - Starting Point for Future Tax Reform Bills
  - Menu for Future Revenue Raising

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## Major Retirement Plan Changes

- Suspend Indexing of Retirement Limits Until 2024
- Funnel Contributions to Roths
  - Employers over 100 required to offer Roth
  - Reduce Large Employer 401(k) and 403(b) Plans Contribution Limit by 1/2
  - 10% Surtax Makes Roth More Attractive
  - Repeal Deductible IRAs and Allow Roth IRAs for All
-

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## 403(b) Plan Contributions

### Current Law:

- Special rules apply to 403(b) plans and governmental 457(b) plans under which additional contributions may be made in certain situations
- 403(b) plans can allow for special catch-up for employees with 15 years of service
- 403(b) plans can make employer contributions for 5 years after employee terminates
- Individual can make contributions to 403(b) in addition to qualified plan unless participant is in control of employer
- Special rules for church employees and foreign missionaries



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## Effect on 403(b) Plans

- **Proposed Changes:**
  - Repeal the special rules for 403(b) plans and governmental 457(b) plans, and require 457(b) contributions to count against other plan limits
- Proposal “consolidates” 403(b) plan limits, but no other consolidation is included in proposal
- Is full consolidation of 401(k), 403(b), and 457(b) plans at risk in the future?

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## Stretch RMDs

### **Current Law:**

- Required minimum distribution rules apply to qualified plans, 403(b) plans, IRAs, etc.
- Beneficiaries can “stretch” post-death payments over their life or life expectancy as long as payments start within a year of death

### **Proposed Changes:**

- “Stretch” payments would be available only for certain “eligible” beneficiaries, such as surviving spouses
- Rules governing 5% owners also would be modified
- Same as a recent Senate bill and Obama budget proposal

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## Other Changes Relevant to Annuities

- Deferred Acquisition Cost (“DAC”) Tax
- Reserve Computations
- Dividends Received Deduction (“DRD”)



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## The Future of 403(b) Plan Documents

- Plan document requirement applies in 2009
- Many providers offered “model documents”
- IRS issues model language for public schools (Rev. Proc. 2007-71)
- IRS announces pre-approved plan document program -- deadline extended to 4/30/15
- No determination letter program

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## What is a Pre-approved Plan?

- Two types
  - Prototype – basic plan and adoption agreement
  - Volume submitter – specimen plan with or without adoption agreement

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## No determination letter program

- “We use an individually designed 403(b) plan document. What does the lack of determination letter program mean for our plan?”

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## Keeping an Eye on Special 403(b) Issues

- Retirement regulatory developments often impact 403(b) plans in surprising ways
  - *Windsor* and same-sex marriage
  - Rollover guidance
  - Department of Labor 408(b)(2) “guide” proposal
- 403(b) plans will continue to have unique issues as regulators include them in regulations and guidance



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## 403(b) Plans and Windsor

- Background on *Windsor* decision
- Plans must be operated consistently with decision on June 26, 2013
- Decision applies to 403(b) plans.
  - State and local plans tread carefully
- Amendments deadline generally 12/31/14, but Q&A on IRS website for 403(b) plans states amendment deadline is based on Rev. Proc. 2013-18.

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## 403(b) Plans and Rollovers

- Revenue Ruling 2014-09 provides streamlined procedures for accepting rollovers
  - For plan to plan, check 5500
  - For IRA to plan, verify payment is from IRA
- Issues for 403(b) plans

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## 403(b) Plans and 408(b)(2) Disclosure

- Background on 408(b)(2) regulation
- In March, DOL releases 408(b)(2) “guide” proposal
  - Would require “guide” with page numbers or section headings for 408(b)(2) information
- Issues for 403(b) annuities and custodial accounts

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## Introduction

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**Mary Cassidy**  
*Counsel*  
Arnold & Porter LLP

## INTRODUCTION

- Employers that are members of the same controlled group (that is, under common control) are treated as a single employer for purposes several employee benefit rules, including:
  - Applicable nondiscrimination rules (excluding the universal availability rule applicable to employee elective deferrals);
  - Determination of whether a severance from employment has occurred;
  - 415 contribution limits;
  - 401(a)(9) minimum distribution rules;
  - 72(p) loan limits ; and
  - 403(b) catch up contributions.

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- Controlled group rules are set forth in Sections 414(b) and (c) of the Internal Revenue Code (“Code”).
- Controlled group status is based on one or more persons or organizations having a controlling interest in one or more other organizations. A controlling interest generally is 80%.
- Prior to 2009, Sections 414(b) and (c) and the regulations defined a controlling interest solely in terms of economic ownership (such as ownership of stock of a corporation or a capital or profits interest in a partnership).
- Effective January 1, 2009, new regulations issued under Section 414(c) set forth rules for determining when two or more nonstock organizations exempt from federal taxation under Section 501(a) (“Exempt Organizations”) are under common control and treated as a single employer.
- Prior to 2009, a reasonable good faith interpretation of the Section 414(b) and (c) controlled group rules applied in determining whether two or more Exempt Organizations were under common control.



**Segment 2:**

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**Mary Cassidy**  
*Counsel*  
Arnold & Porter LLP

## CONTROLLED GROUP RULES FOR EXEMPT ORGANIZATIONS

- Common control exists between an Exempt Organization and another Exempt Organization if:
  - At least 80% of the directors or trustees of the first Exempt Organization are representatives of the other Exempt Organization; or
  - At least 80% of the directors or trustees of the first Exempt Organization are controlled (directly or indirectly) by the other Exempt Organization.
- A “representative” of an Exempt Organization is a trustee, director, agent or employee of the Exempt Organization.
- A trustee or director is “controlled” by another Exempt Organization if the other Exempt Organization has the general power to remove the trustee or director and designate a new trustee or director (that is, the power to “remove and replace”).

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- Whether an Exempt Organization has the power to remove and replace a director/trustee of another Exempt Organization is a facts and circumstances test.
  - For example, the power to remove and replace would not exist if it was extremely limited due to application of other laws.
- Exempt Organizations may choose to be aggregated if the Exempt Organizations maintain a plan covering employees of both Exempt Organizations and both Exempt Organizations regularly coordinate their day to day activities.
  - For example, if a tax-exempt hospital and another Exempt Organization coordinate the delivery of medical services as a regular part of their daily activities, and they maintain a single plan covering the employees of both Exempt Organizations, the two Exempt Organizations may treat themselves as under common control.
- The regulations contain an anti-abuse rule authorizing the IRS to aggregate Exempt Organizations and other organizations where the IRS deems it necessary to prevent the evasion or avoidance of Section 403(b) or other applicable Code requirements.
- Public schools and certain church organizations are exempt from the controlled group rules for Exempt Organizations. Such organizations must use a reasonable, good faith standard for determining controlled group status.



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## Special Controlled Group Rules Applicable to Certain Church Organizations

- Churches and “qualified church controlled organizations” (“QCCOs”) are not subject to the controlled group rules for Exempt Organizations set forth in the 2009 regulations.
  - A church means a church, convention or association of churches, or an elementary or secondary school controlled, operated or principally supported by a church or a convention or association of churches.
  - A QCCO is a church-controlled Exempt Organization described in Section 501(a), other than an Exempt Organization (“nonQCCO”) that:
    - Offers goods, services or facilities for sale to the general public (other than on an incidental basis or for a nominal charge); and
    - Normally receives more than 25% of its support from governmental sources or receipts from admissions, sales of merchandise, performance of services or furnishing of facilities.

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- Examples of nonQCCOs: church-affiliated hospitals, universities, colleges and nursing homes that offer services to the general public and satisfy the 25% support test.
- Churches and QCCOs are subject to a reasonable, good faith standard in determining controlled group status.
- If two or more common law employers participate in a church plan, the participating nonQCCOs may elect to treat any church organizations and QCCOs separately from the nonQCCOs.
  - If the nonQCCOs are disaggregated from the churches and QCCOs, the nonQCCOs remain aggregated with each other even though they may be operated and managed separately from each other.

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## For Profit Organizations -- Parent/Subsidiary Controlled Groups

- A parent/subsidiary controlled group exists where one organization (the parent) owns a controlling interest in one or more other organizations (the subsidiaries). An organization is a corporation, partnership, sole proprietorship, trust or estate.
  - In case of a corporation, a controlling interest is ownership of at least 80% of total combined voting power of all classes of stock entitled to vote or at least 80% of the value of all classes of stock of the corporation.
  - In the case of a partnership, a controlling interest is ownership of at least 80% of the capital or profits interests in the partnership.
  - In the case of a trust or estate, a controlling interest is ownership of at least 80% of the actuarial value of the trust or estate.
- Attribution rules apply in determining ownership for controlled group purposes. An organization may be treated as indirectly having an ownership interest in another organization through attribution from:
  - Options;
  - Corporations;
  - Partnerships; or
  - Trusts and estates.
- In the case of a corporation, certain stock is excluded in determining whether an organization has a controlling interest, including treasury stock and stock that is not outstanding.

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## For Profit Organizations -- Brother/Sister Controlled Groups

- A brother/sister controlled group exists where the same five or fewer persons (individuals, trusts or estates):
  - Have an aggregate ownership interest of at least 80% in two or more organizations; and
  - Have an aggregate ownership interest of least 50% taking into consideration only each such person's identical (or lowest common) ownership percentage in each organization in the group.
- Attribution and excluded stock rules similar (but not identical) to the parent/subsidiary controlled group rules apply in determining ownership under a brother/sister controlled group. The brother/sister controlled group attribution rules also include attribution from family members.
- Brother/sister controlled groups are less common in the Exempt Organization area.





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## Special Controlled Groups Rules Applicable to 403(b) Plans

- A severance from employment occurs on any date on which an employee ceases to be employed by the Exempt Organization maintaining the 403(b) plan ("403(b) Plan Sponsor") and all Exempt Organizations under common control with the 403(b) Plan Sponsor that are eligible to maintain a 403(b) plan. Thus:
  - A severance from employment does not occur if an employee transfers employment from the 403(b) Plan Sponsor to any Exempt Organization under common control with the 403(b) Plan Sponsor that is eligible to maintain a 403(b) plan.
  - A severance from employment does occur when an employee transfers employment from the 403(b) Plan Sponsor to an organization under common control with the 403(b) Plan Sponsor, but the transferee organization is not eligible to maintain a 403(b) plan, such as a for profit subsidiary of the 403(b) Plan Sponsor.
- The universal availability rule for eligibility to make elective deferrals under a 403(b) plan applies on an employer by employer (rather than a controlled group) basis.

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## EXAMPLES OF EXEMPT ORGANIZATIONS UNDER COMMON CONTROL

### Example 1.

- The bylaws of Exempt Organizations B and C provide that Exempt Organization A has the power to appoint 80% of the members of the board of trustees of Exempt Organizations B and C and to remove and replace 80% of the trustees of such organizations.
  - Exempt Organizations A, B and C are under common control.

### Example 2.

- Same facts as Example 1, except that Exempt Organization A does not have the power to remove and replace any trustees of Exempt Organization B.
  - Exempt Organization B is not under common control with Exempt Organizations A and C.

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### **Example 3.**

- The bylaws of Exempt Organization B provide that 100% of the members of the board of directors of Exempt Organization B shall be directors or employees of Exempt Organization A.
  - Exempt Organizations A and B are under common control.

### **Example 4.**

- University A (an Exempt Organization) owns 100% of the shares of all outstanding stock of for profit Printing Company B.
  - University A and Printing Company B are under common control.

### **Example 5.**

- Hospitals A and B are Exempt Organizations that are not under common control.
- On June 1, 2014, Hospitals A and B form Partnership P to provide outpatient medical services, and they each have a 50% capital interest in Partnership P.
  - Neither Hospital A nor B is under common control with Partnership P.

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### Example 6.

- Same facts as in Example 5, except that under the terms of the partnership agreement, Hospital A has the right to buy 35% of Hospital B's capital interest in Partnership P beginning on June 1, 2017.
- Under the option attribution rules of Section 414(c), Hospital A is treated as owning 85% of Partnership P on June 1, 2014.
  - Hospital A and Partnership P are under common control as of June 1, 2014.

### Example 7.

- Church A, Secondary School B (a QCCO) and three Church-affiliated nursing homes are under common control.
- The three nursing homes are nonQCCOs because they receive more than 25% of their fees from the general public.
  - Under the permissive disaggregation rule for church entities, the nursing homes may treat themselves as being under common control with each other, but not with Church A and Secondary School B.



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## EXAMPLES OF APPLICATION OF 403(B) REQUIREMENTS TO CONTROLLED GROUP PLANS

### Example 1.

- Exempt Organizations A, B and C are under common control and are not church or government organizations.
- Organization A maintains a 403(b) plan for the employees of Organizations A and B. John is an employee of Organization A and participates in the 403(b) plan. John transfers employment from Organization A to Organization C, which maintains its own 403(b) plan.
  - Since Organizations A and C are under common control, they are treated as a single employer for purposes of determining whether John has had a severance from employment.
  - John is not eligible for a distribution of his elective deferrals from Organization A's 403(b) plan because he has not had a severance from employment.
  - Organizations A and C are aggregated for purposes of several 403(b) plan requirements, including the contribution limits of Section 415(c) and the loan limits of Section 72(p).

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### Example 2.

- Same facts as in Example 1, except that Organization C is a wholly owned for profit subsidiary of Organization A and does not (and is not eligible to) maintain a 403(b) plan.
  - John's transfer to Organization C is treated as a severance from employment with Organization A since Organization C is not eligible to maintain a 403(b) plan. John is permitted to take a distribution of his elective deferrals upon his transfer to Organization C (to the extent provided by Organization A's 403(b) plan).

### Example 3.

- Same facts as in Example 1, except that Organization A makes a matching contribution to its 403(b) plan on elective deferrals made by John.
- John vests in the matching contributions made by Organization A on his behalf under a 3-year cliff vesting schedule. John works for Organization A for two years before he transfers to Organization C, and he remains employed by Organization C for more than one year.

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### **Example 3 cont'd.**

- Since Organizations A and C are under common control, they are treated as a single employer for vesting and nondiscrimination purposes.
- In applying the nondiscrimination rules applicable to the matching contribution feature of Organization A's 403(b) plan (such as coverage and ACP tests), the employees of Organization C must be counted.
- John's service with Organization C counts towards his vesting service under Organization A's 403(b) plan, and John will be fully vested in his matching contributions under that 403(b) plan after he completes one year of service with Organization C.

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## Introduction

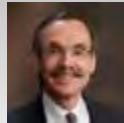
Evan Giller has worked in the field of employee benefit law and ERISA for over 25 years, specializing in the retirement and deferred compensation plans of tax-exempt organizations and governmental employers. He has extensive experience advising employers and plan service providers on a wide range of retirement plan issues, including plan design, plan documents, operational issues, corrections and fiduciary responsibility, and has particular expertise regarding 403(b) and 457 plans. In addition, Evan's practice includes advising financial institutions on issues relating to the design and regulation of annuity products, in particular annuities used to fund retirement plans.

Evan is a frequent speaker on issues relating to the retirement plans of tax-exempt organizations and governments and has presented for the American Law Institute, the SPARK Institute, the National Association of Business Officers, CUPA-HR, and the OECD. He has been a contributing author to the 403(b) Answer Book (Wolters Kluwer) since its original publication in 1994. He has also written articles for the SPARK Journal, the Employee Benefit Research Institute and the New York University Review of Employee Benefits and Executive Compensation 2013.

Prior to joining Boutwell Fay, LLP, Evan was a founding member of Giller & Calhoun, LLC. He previously served in various legal capacities at Teachers Insurance and Annuity Association – College Retirement Equities Fund, including General Counsel, Institutional Client Services.

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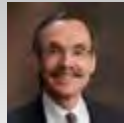
## Selected 403(b) Issues Under the IRC

**Eligibility: Is the employer qualified to establish and maintain a 403(b) plan?**

- Tax exempt entity under section 501(c)(3)
- Educational organization of an employer that is a state or subdivision of a state
- A minister defined under IRC 414(e)(5)(A)

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## Selected 403(b) Issues Under the IRC

**Are the plan's operations consistent with the terms of the plan document?**

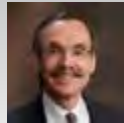
Common Operational Errors:

- Contributions made on an incorrect definitions of compensation
- Contributions in excess of the limit under 401(a)(17)
- Errors in the determination of eligibility



# Significant Issues for 403(b) Plans in 2014

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## Selected 403(b) Issues Under the IRC

### **Does the plan comply with the universal availability requirements?**

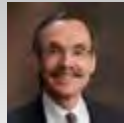
All employees must be permitted to contribute elective deferrals if any employees may do so.

Exceptions include:

- Part-time (fewer than 20 hours a week)
- Non-resident aliens without US source income
- Students performing certain services
- Employees who may participate in other plans allowing elective deferrals

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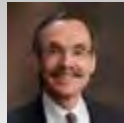
## Selected 403(b) Issues Under the IRC

**Does the plan comply with the contribution limits under 415(c)?**

- Separate 415(c) limits if employer maintains a 403(b) plan and a 401(a) plan
- Aggregation of 415(c) limits if the employee controls an employer that maintains a separate 401(a) plan

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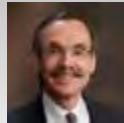
## Selected 403(b) Issues Under the IRC

**Does the plan comply with the contribution limits on elective deferrals including the 15 year catch up election?**

- Common pitfalls:
  - Eligibility for 15 year election
  - Monitoring of lifetime limit
  - Coordination with age 50 catch up election

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## Selected 403(b) Issues Under the IRC

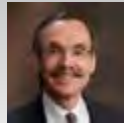
**Is the plan complying with the post-severance contribution requirements?**

- Employer, non-elective contributions only are permitted
- Contributions limited to 415(c) limits based on includible compensation during last year of service.

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## Selected 403(b) Issues Under the IRC

### Is the plan complying with the requirements for plan loans?

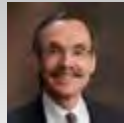
- Common issues:
  - Coordination of loans from multiple investment providers
  - Ensuring operational compliance with limitation on number of loans in plan document
  - Ensuring operation compliance with the types of contribution eligible for loans in plan document



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## Selected 403(b) Issues Under the IRC

### Is the plan complying with the hardship distributions requirements?

- Common issues:
  - Coordination of hardship distributions when plan is funded by multiple investment providers
  - Collection and review of hardship documentation
  - Stopping elective deferrals for 6 months after a hardship distribution

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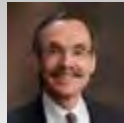
## Selected 403(b) Issues Under the IRC

**Have all necessary steps been taken to permit the plan to terminate?**

- Common issues:
  - All accumulated benefits must be distributed to participants
  - Delivery of an annuity contract or certificate treated as a distribution
  - Distributed annuity contract is still subject to 403(b)
  - No similar provision for custodial accounts

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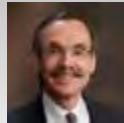
## Selected 403(b) Issues Under ERISA

### **Is a 403(b) elective deferral-only plan really exempt from ERISA?**

- Exemption under ERISA regulation section 2510.3-2(f) requires limited involvement of the employer
  - Has employer ever selected investment funds?
  - Does the employer approve loans and hardships?
  - Is the plan document appropriate for a non-ERISA plan?

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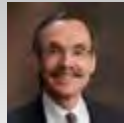
## Selected 403(b) Issues Under ERISA

**Have amounts that a participant has had withheld from wages been remitted to the plan on a timely basis?**

- Timing requirement under ERISA regulation Section 2510.3-102
- This issue is often a focus of the annual audit and in DOL investigations.

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## 403(b) Plans Under EPCRS

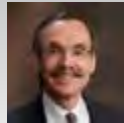
**Significant changes in the IRS program for correcting plan errors (EPCRS) to cover 403(b) Plans**

- EPCRS now covers 403(b):
  - Plan Document Failures
  - Operational Failures
  - Demographic Failures
  - Employer Eligibility Failures
- Effective April 1, 2013



# Significant Issues for 403(b) Plans in 2014

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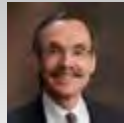
## 403(b) Plans Under EPCRS

### **Failure to Timely Adopt a Written Document**

- For plans that failed to adopt a written document by the deadline, correction can be made under EPCRS
- Plan must adopt a written document and submit it under the VCP program
- Correction will result in plan being treated as if it were adopted timely
- Correction does not constitute a determination that the plan otherwise complies with the requirements of 403(b)
- IRS has released a “VCP submission kit” for late 403(b) plan adopters

# Significant Issues for 403(b) Plans in 2014

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## 403(b) Plans Under EPCRS

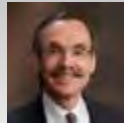
### Operational Failures

- Arises from the failure to follow plan provisions
- Can only occur with respect to 2009 and later years (after the imposition of the plan document requirement)
- Correction methods for 403(b) under EPCRS generally the same as for qualified plans
- Failures that occurred prior to 2009 are subject to the previous version of EPCRS

# Significant Issues for 403(b) Plans in 2014

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## Segment 3:

**Evan Giller**  
*Of Counsel*  
**Boutwell Fay LLP**

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## 403(b) Plans Under EPCRS

### Other EPCRS rules that are specific to 403(b) plans

- Treatment of excess deferrals as 403(c) annuities
- Requirement that plan sponsor obtain the cooperation of all entities involved with the plan
- No Determination Letter required for submission, even if individually designed plan

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## Q&A:



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**Michael L. Hadley**  
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### Segment 2:

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### Segment 3:

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