



Best Practices for 403(b) and  
Related Retirement Plans on  
Working with Investment Providers  
that are Unable or Unwilling to Share  
Information on a Periodic Basis

Version 1.00

September 8, 2010



**Best Practices for 403(b) and Related Retirement Plans  
on Working with Investment Providers that are  
Unable or Unwilling to Share Information on a Periodic Basis  
(the “Best Practices”)**

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**Objective**

Plan sponsors generally depend on their 403(b) plan service providers to collect, maintain and manage participant information, and to suggest ways to address certain compliance issues. The purpose of these Best Practices are to identify options for plan sponsors when an investment provider is not able or is unwilling to share participant data, either according to The SPARK Institute Data Elements Best Practices, or through any other format or method (“non-compliant investment provider”).

**Background**

Options available to plan sponsors related to a specific provider depend on the timing and status of their relationship with the investment provider. Under Internal Revenue Service (“IRS”) regulations and other guidance, there are six major categories which can help determine whether a contract issued by an investment provider is considered part of the 403(b) plan. The following is a general summary of those rules. Specific situations should be reviewed by appropriate legal and tax advisors. (All references to contracts include custodial accounts issued under section 403(b)(7)).

- A. Contract(s) issued before January 1, 2005 where the issuer does not receive contributions under the plan after December 31, 2004 (“grandfathered contract”) are generally not required to be treated as part of a written 403(b) plan and information would not need to be collected from such issuers.
- B. Contract(s) issued as part of a Rev. Rul. 90-24 contract exchange prior to September 25, 2007 (“grandfathered 90-24 contract”) are generally not required to be treated as part of a written 403(b) plan and information would not need to be collected from such issuers.
- C. Contract(s) issued after December 31, 2004 and before January 1, 2009 by an issuer that does not receive contributions under the plan in a year after the contract was issued due to the issuer having been deselected under the plan before December 31, 2008 or because the contract was issued in a post-September 24, 2007 90-24 contract exchange are subject to the “good faith” rules in Rev. Proc. 2007-71. In application, this provision is generally interpreted as applying to contracts that received contributions after December 31, 2004 and before January 1, 2009, even if issued prior to December 31, 2004. Whether these contracts

must be treated as part of a written 403(b) plan and information collected from such issuers is determined by the application of those rules.

- D. Contract(s) issued before January 1, 2009 held by former employees and beneficiaries (as of January 1, 2009), which cease(s) to receive contributions before January 1, 2009 due to the issuer having been deselected under the plan, the employer having ceased to exist, or the contract having been issued in a post September 24, 2007 90-24 exchange are subject to the rules in Rev. Proc 2007-71. These contracts may generally be treated as not part of a written 403(b) plan, except special rules apply if the participant or beneficiary requests a loan.
- E. Contract(s) issued prior to January 1, 2009 by an issuer that has continued to receive contributions under the plan after December 31, 2008 must be treated as part of a written 403(b) plan.
- F. Contracts issued after December 31, 2009 must be treated as part of a written 403(b) plan.

### **Options Available to Plan Sponsors**

The chart included in this document outlines some of the options available to plan sponsors in dealing with non-compliant investment providers. The chart focuses on the requirements for including contracts in a plan and sharing information under Internal Revenue Code Section 403(b) and the regulations and guidance there under. Additional contracts and accounts may be required to be included in an ERISA plan, particularly if the plan was subject to Title I of ERISA at the time an investment provider was deselected. Further, certain actions described in this chart might constitute sufficient employer involvement to cause a plan that otherwise qualifies for the ERISA 403(b) safe harbor to be subject to Title I of ERISA.

**THIS MATERIAL HAS NOT BEEN REVIEWED, APPROVED, OR AUTHORIZED BY THE DEPARTMENT OF LABOR, THE TREASURY DEPARTMENT, THE INTERNAL REVENUE SERVICE OR ANY OTHER REGULATORY AGENCY AS MEETING THE REQUIREMENTS OF ANY APPLICABLE RULES OR REGULATIONS. THE SPARK INSTITUTE DOES NOT PROVIDE LEGAL ADVICE. ANY INFORMATION ABOUT RULES AND REGULATIONS INCLUDED IN THIS DOCUMENT IS FOR GENERAL EDUCATIONAL PURPOSES ONLY. USERS OF THIS MATERIAL SHOULD CONSULT WITH THEIR LEGAL COUNSEL BEFORE TAKING ANY ACTION BASED ON IT.**

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The SPARK Institute may release revised versions of these Best Practices periodically. Anyone with questions about this version should contact Larry Goldbrum at [Larry@sparkinstitute.org](mailto:Larry@sparkinstitute.org).

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The SPARK Institute would like to thank Evan Giller of the law firm of Giller & Calhoun, and Paul Jackson and Ralph Sanna of TIAA-CREF for their contribution to the development of this material.

Provider Category	Proposed Actions	Additional Plan Sponsor Considerations
<p><b>A.</b> Contract(s) issued before January 1, 2005 where the issuer does not receive contributions (to this or any other contract) under the plan after December 31, 2004 (“excludable contract”).</p>	None	N/A
<p><b>B.</b> Contract(s) issued as part of a Rev. Rul. 90-24 contract exchange prior to September 25, 2007 (“grandfathered 90-24 contract”).</p>	None	N/A
<p><b>C.</b> Contract(s) issued after December 31, 2004 and before January 1, 2009 by an issuer that does not receive contributions under the plan in a year after the contract was issued due to the issuer having been deselected under the plan on or before December 31, 2008 or because the contract was issued in a post-September 24, 2007 90-24 contract exchange.</p>	<p><u>Plan Sponsor:</u></p> <ul style="list-style-type: none"> <li>• Conduct an outreach to the investment provider and attempt to incorporate them into adopted compliance procedures. Keep record of outreach efforts.</li> <li>• Restrict loans and hardships only to approved investment providers or those agreeing to enter into an information sharing agreement (“ISA”).</li> <li>• Request one time data feed from non-compliant investment providers of The SPARK Institute Data Elements Best Practices which includes all active/defaulted loans and the previous 12 rolling months of hardship distributions.</li> </ul> <p><u>Investment Provider:</u></p> <ul style="list-style-type: none"> <li>• Conduct outreach to plan sponsor prior to processing a loan or hardship request.</li> </ul> <p><u>Aggregator:</u></p> <ul style="list-style-type: none"> <li>• Assist plan sponsor in conducting good faith outreach to secure data necessary to complete transaction processing.</li> </ul>	<p>If a good-faith effort is undertaken and unsuccessful, the plan sponsor generally does not have to make future attempts at data sharing with the investment provider. The plan sponsor should, however, document that effort and the response.</p> <p>Please note that receiving a one-time feed will allow aggregation of data from non-compliant investment providers, but will not necessarily ensure that the correct amount available for a transaction will be reported. For example, if loan payments continue to be made after the one-time feed, a participant may be eligible to borrow more than what ultimately is approved.</p>

Provider Category	Proposed Actions	Additional Plan Sponsor Considerations
<p><b>D.</b> Contract(s) issued before January 1, 2009 held by former employees and beneficiaries (as of January 1, 2009), which ceases to receive contributions before January 1, 2009 due to the issuer having been deselected under the plan, the employer having ceased to exist, or the contract having been issued in a post September 24, 2007 90-24 exchange.</p>	<p><u>Plan Sponsor:</u> None.</p> <p><u>Investment Provider:</u> Conduct outreach to employer, in particular when a participant requests a loan.</p> <p><u>Aggregator:</u> None.</p>	<p>N/A</p>
<p><b>E.</b> Contract(s) issued prior to January 1, 2009 by an issuer that has continued to receive contributions under the plan after December 31, 2008.</p>	<p><u>All Parties:</u></p> <p>1. Suspend all future loans/hardships - Annual file (or some other frequency agreed upon by both parties).</p>	<p>1. This option will alleviate a need for an ongoing information sharing file, but the data used to determine amounts eligible will be outdated and will not correctly reflect the amount of available for loans and hardships.</p>
	<p><u>All Parties:</u></p> <p>2. Retrieve participant data on a "one-off" basis.</p>	<p>2. There will be a delay in receiving updated participant data and as a result, a participant request may be approved when it should have been denied. For example, the requested loan amount may exceed the \$50,000 threshold. Alternatively, there could be a delay in processing the participant's request.</p>
	<p><u>All Parties:</u></p> <p>3. Do not approve/certify participant's request for a particular transaction.</p>	<p>3. This option will force the participant to exchange their assets to an investment provider that is adhering to the plan sponsors compliance procedures.</p> <p>Please note that this option may frustrate the participant because of the time required to move assets from one investment provider to another.</p>

**APPENDIX A**  
**To The**  
**Best Practices for 403(b) and Related Retirement Plans**  
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**VERSION CONTROL LOG**

<b>Version</b>	<b>Description</b>	<b>Date Published</b>	<b>Page Reference</b>	<b>Description of Revisions</b>
1.00	Initial version	Sept. 8, 2010	n/a	