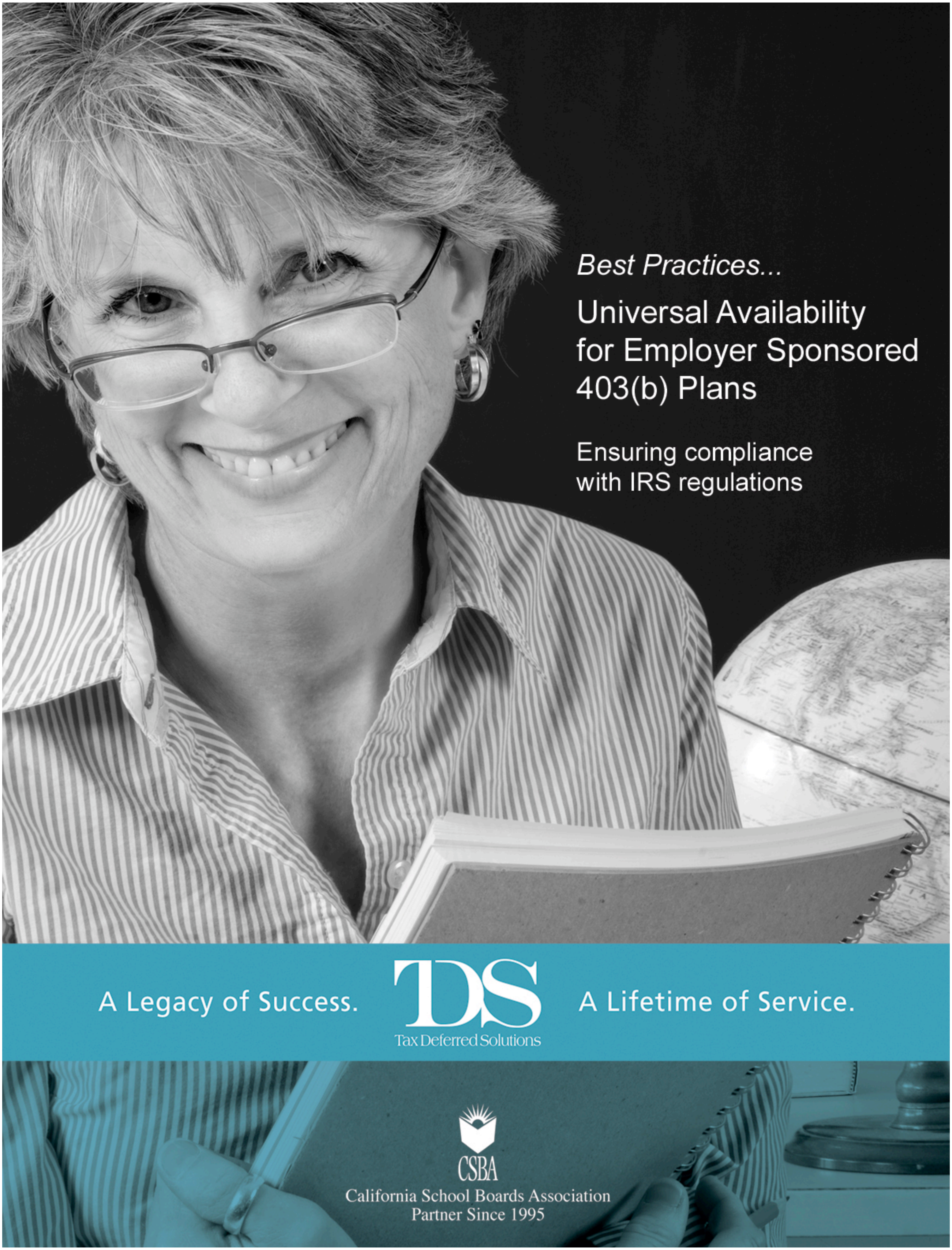

Best Practices...

Universal Availability for Employer Sponsored 403(b) Plans

Ensuring compliance with IRS regulations

A Legacy of Success. A Lifetime of Service.

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Best Practices… Universal Availability is provided as a public service by Tax Deferred Solutions and the California School Boards Association. Our series of *Best Practices* guides are designed to provide answers to frequently asked questions about 403(b) and 457b employer sponsored retirement plans. *Best Practices* are designed to assist those:

- Responsible for ensuring district sponsored plans are IRS compliant
- Seeking a better understanding of the role of the Third Party Administrator in the administration of employer sponsored plans
- Seeking a better understanding of the district's role in employee participation

Tax Deferred Solutions (TDS)

TDS is a California based full service plan administrator providing services to schools and municipalities since 1978. An innovator in the industry, TDS is the largest California based TPA providing Common Remitting services, full 403(b)/457b compliance and management, proprietary 457b plan and implementation. We proudly provide services for employers of all sizes – serving some of the largest districts and county offices in the state as well as districts of moderate size. TDS is a proponent of choice for 403(b) and 457b investment offerings for plan participants.

California School Boards Association (CSBA)

The California School Boards Association is a collaborative group of virtually all of the state's more than 1,000 school districts and county offices of education. It brings together school governing boards and their districts and county offices on behalf of California's children. CSBA is a member-driven association that supports the governance team — school board members, superintendents and senior administrative staff — in its complex leadership role.

Tax Deferred Solutions has been a California School Boards Association Business Service partner since 1995. CSBA proudly works with TDS to provide time saving, cost effective tax deferred compensation management solutions. These solutions are easy, efficient and compliant.

What is Universal Availability?

While the Universal Availability regulation is not new, the sweeping revisions of IRC section 403(b) effective January 2009 created this regulation more prominent in the eyes of many Employers.

Universal Availability is the requirement of an employer to ensure that "all employees of the organization" are permitted to participate in contributing to a 403(b) account provided they contribute at least $200.00 annually. There are three components to Universal Availability that must be satisfied:

- Delivery of Meaningful Notice
- Opportunity of Enrollment
- Eligibility to make contributions

The Universal Availability rule is designed to ensure that employees understand their eligibility and are aware of the benefit in a clear and consistent manner. Note that the Universal Availability rules apply to Roth 403(b) contributions (if available in the plan) in addition to pre-tax 403(b) contributions.

> The tax deferral status of the employer's entire 403(b) plan may be jeopardized if the plan does not comply with the Universal Availability requirement.

Delivery of Meaningful Notice

Every employee must receive *"meaningful"* notice of the plan and their rights to participate in the plan at least once annually. The notice must be provided in a manner designed to ensure delivery to each employee individually.

While the IRS clearly states that the employer must notify eligible employees of their ability to make or change an election to contribute to the plan *at least once per calendar year*, they do not state HOW the employer should conduct 'Meaningful Notice' and uses a 'fact and circumstances' test to determine if the employer satisfied the requirement. For example, posting a notice in the employee lounge by itself is not an acceptable delivery method. However, a group meeting followed up by quarterly payroll stuffers would likely suffice. Regardless of the method, the communication must take place at least once annually and the employer should be able to verify or 'prove' the effort made.

Effective Meaningful Notice Tools

Regardless of the format the employer chooses, the following points should be included in the notification:

- Eligibility Requirements – who can (and can't) participate in the plan
- Enrollment procedures – How and When
- Types of Contributions allowed – Pre-Tax, Catch-up Provisions, Roth (if allowed)
- How and when contribution amounts can be changed
- Sources for additional information – including information on approved providers

Opportunity of Enrollment

The employer is responsible for ensuring that employees have an effective opportunity to participate in the 403(b) plan. Every eligible employee must be given the right to enroll in the plan and change elections at least once per year. It is strongly recommended that enrollments and election changes be available more frequently to accommodate unexpected situations and changes in circumstances.

Eligibility

If any employees are permitted to make salary reduction contributions into a 403(b) plan, then all employees, except those listed below, must be permitted to make salary reduction contributions into the plan. No employees may be excluded from the plan based on classifications such as "part time employees," "substitute teachers," "benefit eligible employees," or seasonal, per diem or temporary employees. A 403(b) plan may continue to exclude the following groups from participating, provided the exclusion is uniformly applied to all employees:

- Employees who contribute less than $200 per year
- Employees eligible to participate in a 401(k) or 457(b) of the same employer
- Students performing services under a work-study program
- Employees who work less than 20 hours per week. This rule can be converted into an annual requirement based on a 'look back' determination. Employees who are expected to work less than 1,000 hours per year can be excluded from participating in the plan, but at the end of each 12-month period, the employer must look back and count actual hours worked. *This interpretation effectively requires an employer to keep track of actual hours worked for ALL employees if the plan excludes any employees under the 20-hour per week exclusion*.

Note that each exclusion is optional and can create future compliance issues if an employee's status changes to eligible. The employer must be able to track the 'movement' of employees from one status to the other. Also, if an exclusion is used, it must be applied uniformly to all similar employees. For example, a non-uniform exclusion would be permitting all part-time employees, but excluding substitute teachers.

For ease of ongoing compliance, an employer may elect to allow all employees to participate in the 403(b) plan.

IRS Focus on Universal Availability

With the new regulations in place, the IRS has indicated that it has changed its focus now to ensuring plan compliance. While Universal Availability is only one component of plan, the IRS has previously indicated by its activities that it is an area of continued scrutiny. Before the enactment of the regulations, the IRS, under "Project Universal Availability" sent out inquiries to public school employers aimed at determining whether 403(b) plans give all eligible employees the opportunity to contribute a portion of their salary to the plan on a pre-tax basis. While the results of their inquiries were not published, based on communication from the IRS since, it would appear that many plans were not satisfying the requirement. The audit of a 403(b) plan which does not meet the Universal Availability requirement could result in the loss of tax-favored status of ALL funds in the plan.

Conclusion

In the past, public school employers often asserted limited responsibility for proactively communicating the 403(b) benefits to its eligible employees. Moreover, permitted exclusions and eligibility rules may not have been closely monitored.

The final regulations now in force provider a clearer guidance on the IRS expectations for Universal Availability, and made important changes. Employers must become knowledgeable of the rules and changes to ensure their plan operates in accordance with current regulations. Doing so will help reduce exposure to plan operational deficiencies that may be uncovered by an IRS audit.

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