

# FBA News Notes

Summer 2009

News and Information on Employee Benefit Plans

## PSCA Releases 52nd Annual Survey of Profit Sharing and 401k Plans

The Profit Sharing/401k Council of America (PSCA), a national nonprofit association committed to retirement savings through employee-sponsored defined contribution programs, has released its 52nd Annual Survey of Profit Sharing and 401k Plans, which provides the most up-to-date information available on current practices and trends in profit sharing and 401k plans. Plans represented in the survey are diverse, representing companies of all sizes and regions across the United States.

The survey covers a wide variety of topics relevant to plan sponsors and the industry at large, including data on participation rates, catch-up contributions, company contributions, asset allocation, investment options, company stock, professional management, investment advice, automatic enrollment, and more.

Below are some highlights from the 2008 plan-year experience survey:

**Automatic Enrollment** - Following a big increase in 2007, the rate of addition of automatic enrollment has slowed but continued. 39.6% of all plans and more than half of large plans currently use automatic enrollment.

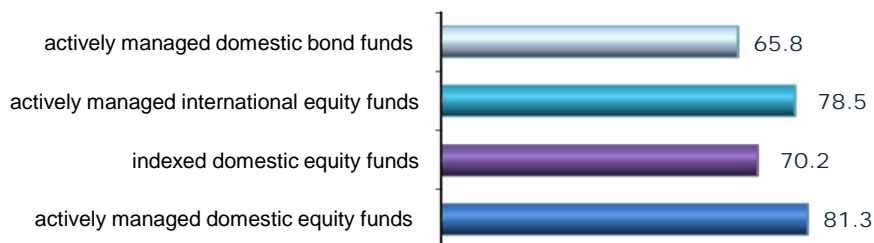
**Safe Harbor Plan Design** - 23.6% of plans offer a safe harbor match, and six percent of plans offer a non-elective safe harbor contribution. Of plans that offer a safe harbor match, 30.4% offer the automatic enrollment safe harbor match.

**Company Contributions** - Company contributions average 4.1% of payroll, the same as in 2007. They are highest in profit sharing plans (9.3 percent of pay) and lowest in 401k plans (2.9 percent of pay). *One percent of respondents indicated that they suspended their employer match.* Numerous formulas are used to determine company contributions. In plans permitting participant contributions, the most common formula is a fixed match only, present in 24% of plans. For plans with fixed matches, half of plans match \$0.50 per \$1.00, most commonly up to the first six percent of pay (29% of plans). Among profit sharing plans, the most common type of company contribution is a discretionary profit sharing contribution only, which is present in 67.9 percent of plans.

**Roth 401k** - 36.7% of plans permit Roth 401k contributions, up from 30.3% in 2007. 15.6% of those eligible to make Roth contributions are doing so.

**Investment Fund Structure** - Overwhelmingly, money is managed in mutual funds, although larger companies also use collective trusts and separately managed accounts.

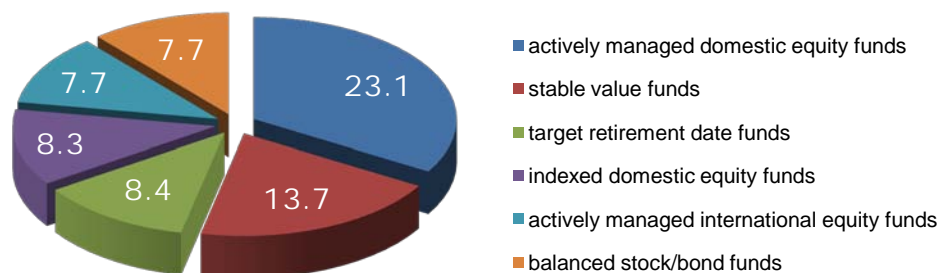
**Investment Options** - Plans offer an average of 18 funds for participant contributions. The funds most commonly offered for participant contributions are:



**Target-Date Funds** – Plans offering target-date funds continues to grow, with 57.7% of plans now making them available. 91.6% of companies offering target-date funds use a packaged product. Larger companies are more likely to customize their own funds.

**Self-Directed Accounts** - Self-directed brokerage windows are offered in 15.5% of plans, while open mutual fund windows are offered in 8.3% of plans. On average, plans invest 2.2% of plan assets through brokerage windows and 1.5% through mutual fund windows.

**Asset Allocation** - The typical plan has approximately seventy percent of assets invested in equities, down only five percent from 2007. Assets are most frequently invested in:



**Vesting** - Immediate vesting is present for matching contributions in 37.1% of plans and for non-matching contributions in 26.1% of plans. Among plans that do not have immediate vesting, graduated vesting tends to be the most common arrangement for all plan types.

**Small Pre-Retirement Distributions** - Half of plans transfer balances between \$1,000 and \$5,000 to an IRA and pay out balances less than \$1,000. Forty percent of plans retain balances of more than \$1,000 in the plan, and ten percent of plans retain all small balances in the plan.

**Employee Participation** - 82.7% of eligible employees have balances in their 401k plans, up from 81.9% in 2007. Pre-tax participant deferrals average 5.5% of pay for non-highly compensated workers and 6.6% of pay for highly compensated workers.

**Investment Advice** - The availability of investment advice continues to increase; for the first time, more than half of all plans (51.8%) offer investment advice to participants. More small companies offer investment advice than large companies.

**FBA Note:** PSCA's annual surveys are frequently used by companies to provide benchmarks for their plans and by the government as a resource for public policy decisions. PSCA's 52nd Annual Survey of Profit Sharing and 401k Plans is available for purchase for \$375 for non-PSCA members and \$145 for members. Order online at [www.psc.org](http://www.psc.org) or call (312) 419-1863.

# Plan Documents Must be Restated for EGTRAA by April 30, 2010

This is a reminder that pursuant to IRS Revenue Procedure 2005-66 all plan documents must be rewritten/restated to incorporate various law changes into one document which the IRS has entitled the EGTRRA restatement. The IRS is requiring that all restatements must be completed and adopted by the employer no later than April 30, 2010.

Fringe Benefit Administrators, Ltd. and all plan document sponsors are in the process of restating documents. If you haven't received your restatement, you should be receiving it soon. Plan sponsors should respond promptly and thoroughly when information is requested so the April 30, 2010 deadline can be met.

Plans that do not meet the deadline can become disqualified (loss of tax-deferral benefits) which means:

- You would lose the deductibility of employer contributions to the plan;
- Your employees' vested account balances would become immediately taxable;
- The trust would lose its tax-exempt status and become a taxable trust; and
- Inability to rollover balances until the plan is re-qualified

Many FBA clients use a FBA-sponsored plan document; however, other clients use a plan document sponsored by a company other than FBA. Please contact us or your plan document sponsor with questions about how the deadline applies to your particular situation.

## Plan Amendment Required During 2009

The Pension Protection Act ("PPA") became law in 2006. Defined contribution plans will require an amendment by December 31, 2009 to comply with the PPA if that amendment is not produced along with the required restatement (EGTRAA). Plans must also be amended by the end of 2010 to comply with the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART" Act). Our standard approach will be to include the provisions of the Heroes Earnings Assistance and Relief Act of 2008 ("HEART") into the PPA amendment to avoid having to amend the plan again next year. Only individually designed plans that are restated during 2009 avoid the amendment requirement. These plans are typically cash balance plans for sponsors whose EIN ends in "4" or "9." The consequences of failing to timely amend a plan for PPA could range anywhere from monetary penalties to revocation of tax-qualified status in egregious cases.

## We Need Your Signed Plan Documents!

The Internal Revenue Service scrutinizes adoption dates of plan restatements and amendments for timeliness. When we send plan documents for your review and adoption, we indicate the date by which the amendment or restatement must be signed. It is important that you return a copy of the signed documents to us. If an amendment has not been signed in a timely manner, then the plan has to go through a correction procedure with the IRS. It is important that you retain copies of all plan documents (including amendments and IRS letters) from the plan's original effective date to insure that you can provide them should the IRS ask to see them.

# Reducing or Eliminating Safe Harbor Contributions

Due to the economic downturn, many employers have been forced to look for ways to cut costs, and many have reduced or suspended employer contributions under their 401(k) plans. For plans that are not Safe Harbor, this may be as easy as amending the plan to reflect the reduction and notifying the participants. However, if the plan is a Safe Harbor 401(k) plan, the issue becomes more complicated. Fortunately, recent relief gives companies sponsoring Safe Harbor 401(k) plans more flexibility in eliminating contributions than in the past.

## Reducing or Eliminating a Safe Harbor Match

For many years, regulations have allowed employers to reduce or eliminate Safe Harbor matching contributions mid-plan year. Before you reduce or suspend the Safe Harbor matching contributions, you need to provide all eligible employees with a written supplemental notice at least 30 days before the change goes into effect. The notice must explain the consequences of the plan amendment that reduces or suspends matching contributions on future employee elective contributions, the procedures for changing their elective contribution elections and the effective date of the amendment. Eligible employees must be given a reasonable opportunity prior to the reduction or suspension of Safe Harbor matching contributions to change their elective contributions to the 401(k) plan.

## Reducing or Eliminating a Safe Harbor Non-Elective Contribution

Until now, employers providing a Safe Harbor non-elective contribution have had no alternative but to terminate their plan if unable to make promised contributions. The IRS has issued proposed regulations that allow employers experiencing “business hardships” to reduce or eliminate Safe Harbor non-elective contributions. Factors taken into account in determining such hardship include, but are not limited to, the following:

- (a) the employer is operating at an economic loss;
- (b) there is substantial unemployment or underemployment in that industry; and
- (c) the sales and profits of the industry are depressed or declining.

(Note that plans are still permitted to reduce or eliminate Safe Harbor matching contributions without a substantial business hardship requirement.)

The employer must provide notice to participants at least 30 days before reducing or eliminating the non-elective contributions. The notice must explain the consequences of the amendment suspending or reducing future non-elective contributions, the procedures for changing deferral elections, and the amendment's effective date. Eligible participants must be given a reasonable opportunity to change their salary reduction contributions.

The proposed regulations stress that an employer cannot reduce or eliminate a Safe Harbor non-elective contribution retroactively at the end of a plan year, even though the contribution is normally paid to employee accounts at that time. Again, a reduction or elimination cannot take effect until the later of 30 days after employees receive notice, or the amendment adoption date.

Review the proposed guidance at <http://edocket.access.gpo.gov/2009/pdf/E9-11481.pdf>.

## Consequences

### ADP/ACP Testing

The use of the Safe Harbor match permits an employer to automatically pass the ADP and ACP Tests. The use of the Safe Harbor non-elective contributions permits an employer to automatically pass the ADP Test. The consequence of reducing or eliminating a Safe Harbor match or a Safe Harbor non-elective contribution is that the employer's 401(k) plan may not pass the ADP or ACP testing. The result is that the employer may need to make additional contributions or refund some or all of the HCE's salary reduction contributions and matching contributions.

When an employer reduces or eliminates the Safe Harbor match or Safe Harbor non-elective contributions it must also amend its plan to utilize current year testing for ADP and ACP testing. Even if the change was made mid-year, the testing must be done for the entire plan year. Simply put, there is no automatic pass for the portion of the year the employer made Safe Harbor contributions. The employer must, however, still make the Safe Harbor contributions for the period of the plan year prior to the reduction or elimination. The compensation limit taken into consideration for purposes of allocating contributions must be pro-rated. For 2009, the limit is \$245,000. The IRS has indicated that for purposes of calculating and allocating Safe Harbor matching contributions or Safe Harbor non-elective contributions, the \$245,000 limit must be pro-rated if the 401(k) plan is amended to eliminate or reduce the Safe Harbor contribution. For example, if the 401(k) plan is amended to eliminate the Safe Harbor contribution six months into the plan year, the limit would be \$122,500 (i.e., 6/12 of \$245,000).



### Top Heavy Testing

Another important consideration is that Safe Harbor plans which only made the Safe Harbor match or Safe Harbor non-elective contributions (and no other true employer contributions) are deemed to satisfy the top heavy minimum contribution. Once the Safe Harbor contributions are eliminated, the employer will still need to satisfy the top heavy minimum contribution requirement if the plan is top heavy and if a contribution is made on behalf of a key employee (this includes the key employee's own salary reduction contributions). For an employer seeking to cut expenses, the mandatory top heavy minimum contribution may be an unwelcome surprise.

### Employee Morale

Employers need to consider the impact that reducing or eliminating contributions will have on the morale of their employees. It is important to provide an accurate explanation as to what the changes are and why they are being made. In addition, if the reductions are permanent, or continue indefinitely, such changes are likely to impact job satisfaction, retirement readiness and employee morale.

**FBA Note:** These proposed rules help level the playing field for safe harbor plans by permitting both safe harbor matching and non-elective contributions to be reduced or suspended mid-year. (The key distinction remains the substantial business hardship requirement for non-elective contributions.) Plan sponsors facing the possibility of terminating their plans in light of current economic challenges will appreciate having a less drastic option available to reduce their plan-related financial commitments.

Please call us if you have questions about reducing or suspending your safe harbor plan contributions.

# Expanded Automatic Enrollment Guidance and the Updated Model Rollover Notice

The IRS has issued revenue rulings and notices collectively intended to encourage retirement savings. The new guidance expands opportunities for automatic contribution arrangements and also updated the IRS's model rollover notice. These releases are described below in more detail.

Outside the range of this summary are two more initiatives, Notice 2009-66 and Notice 2009-67. These companion notices provide guidance and a sample amendment for the establishment of automatic enrollment in SIMPLE IRAs. These notices can be found at <http://www.irs.gov/pub/irs-drop/n-09-66.pdf> and <http://www.irs.gov/pub/irs-drop/n-09-67.pdf> respectively.

## Automatic Enrollment

**Revenue Ruling 2009-30.** <http://www.irs.gov/pub/irs-drop/rr-09-30.pdf>

Automatic Contribution Increases under Automatic Contribution Arrangements. This Ruling addresses automatic enrollment in 401(k) plans that contain an "escalator" feature under which employee compensation contributed to the plans automatically increases each year (assuming no affirmative election by the employee). The revenue ruling addresses two separate issues. First, the ruling concludes, based on the facts presented, that default contributions under an automatic contribution arrangement will not fail to be considered elective contributions merely because they are automatically increased based in part on increases in the employee's pay. Second, an employee's automatic eligible default percentage may be increased on a date other than the first day of a plan year without running afoul of the qualified percentage requirement for qualified automatic contribution arrangements (QACAs) or the uniformity requirement for eligible automatic contribution arrangements (EACAs).

**Notice 2009-65.** <http://www.irs.gov/pub/irs-drop/n-09-65.pdf>

Adding Automatic Enrollment to Section 401(k) Plans. This Notice contains two sample plan amendments to facilitate the use of automatic enrollment. Sample Amendment 1 can be used to add an automatic contribution arrangement (ACA) to a 401(k) plan. Sample Amendment 2 can be used to add an eligible automatic contribution arrangement (EACA) permitting 90-day withdrawal to a 401(k) plan. The notice states that these are sample, not model amendments, and plans are not required to adopt either amendment verbatim, noting that plans may need to modify the chosen amendment to conform to a plan's terms and administrative procedures.

These sample amendments must be adopted by the later of the end of the plan year in which the amendment is effective or, if applicable, the last day of the first plan year beginning on or after January 1, 2009. Evidence of the amendment's timely adoption is a written document signed and dated by the employer. Affected employees must receive notice about the features of the amended plan within a reasonable period before the amendment is effective.

**FBA Note:** The IRS anticipates that the pre-approved automatic enrollment language will allow employers to amend their plans to adopt automatic enrollment more quickly, and without the need for case-by-case approval from the IRS. However, due to the current economic climate, many employers may believe that their employees are not in the financial position to support even the three percent automatic deferral, let alone add the savings rate escalation to their plan.

## Updated Model Rollover Notice

**Notice 2009-68.** <http://www.irs.gov/pub/irs-drop/n-09-68.pdf>

Updated Model Rollover Notice Under Code Section 402(f). This Notice sets out two updated safe harbor explanations to be provided to recipients of eligible rollover distributions (ERDs). These explanations update the current safe harbor explanations from Notice 2002-3, sometimes referred to as the “special tax notice” or “402(f) notice”. The Notice provides two safe harbor explanations: one to be used for eligible rollover distributions made from designated Roth accounts, and the other to be used for eligible rollover distributions not made from designated Roth accounts. Thus, a plan participant could receive either one or both of the explanations, depending on the source(s) of the eligible rollover distribution.

The updated notices are intended to simplify the presentation, to reflect numerous law changes over the past seven years, and to explain rules that apply in special situations. These include, but are not limited to:

- Automatic rollovers for certain mandatory cash-outs;
- Non-spouse beneficiary rollovers;
- Direct rollovers to Roth IRAs;
- The ability to add a designated Roth account feature to defined contribution plans; and
- Withdrawals from eligible automatic contribution arrangements (EACAs) within 90 days of enrollment.

Plan sponsors may immediately use these model notices or continue to use their current safe harbor explanations through the end of 2009, so long as the explanations have been updated (or supplemented) to reflect law changes. Note that plan sponsors are not required to use the safe harbor explanations, so long as they provide an alternative notice that contains the information required by Section 402(f) of the Internal Revenue Code (Code) and the notice is written in a manner designed to be easily understood.

**FBA Note:** Employers and administrators will appreciate having updated model rollover notices in hand, given that the prior safe harbor explanation was over seven years old.

## IRS Issues Guidance on Rollovers from Employer Plans to Roth IRAs

**Notice 2009-75.** <http://www.irs.gov/pub/irs-drop/n-09-75.pdf>

Rollovers from Employer Plans to Roth IRAs. This Ruling describes the tax consequences of rolling over an eligible rollover distribution (ERD) from qualified defined contribution plans to a Roth IRA. It explains that the amount of an ERD (other than after-tax contributions) that is rolled over to a Roth IRA is generally includible in the gross income in the year of the distribution. However, when an individual rolls over an ERD from a designated Roth account, regardless of whether it is a qualified distribution, this rollover is not includible in his or her gross income.

Prior to January 1, 2010, individuals that did not meet the income and filing status eligibility requirements are not allowed to roll over an ERD from an eligible employer plan (other than from a designated Roth account) to a Roth IRA. At the end of 2009, the income and filing status eligibility requirements will be eliminated. This ruling explains that any ERD made before 2010 that is ineligible to be rolled over to a Roth IRA due to the restrictions, may be rolled over to a non-Roth IRA that can then be converted into a Roth IRA on or after January 1, 2010.

# Additional Guidance on 2009 Waiver of Required Minimum Distribution

**Notice 2009-82.** <http://www.irs.gov/pub/irs-drop/n-09-82.pdf>

Guidance on 2009 Required Minimum Distributions. The Worker, Retiree, and Employer Recovery Act of 2009 (WRERA) waived required minimum distributions (RMDs) for defined contribution plans and IRAs for 2009. (*Note - the waiver does not affect RMDs for prior years that are made in 2009 or RMDs for years after 2009.*) The IRS issued Notice 2009-82 in response to questions about implementation of the 2009 RMD waiver. The Notice provides sample plan amendments, transitional relief, and answers to rollover issues.

## Plan Amendments

The IRS has provided two alternative sample amendments to assist in the implementation of RMD waivers [use the web address provided above to review the sample amendments]. Both amendments permit participants and beneficiaries to choose to receive or not receive 2009 RMDs, but only if the distribution(s) are: (1) equal to the 2009 RMDs; or (2) one or more payments in a series of substantially equal distributions that include the 2009 RMDs (which the Notice calls "extended RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary or at least 10 years.

Depending on which sample amendment a plan chooses to adopt, the plan can cease **or** continue making 2009 RMDs, unless a participant or beneficiary elects otherwise. Also, both sample amendments permit a direct rollover option of 2009 RMDs and extended RMDs (in addition to those already offered by the plan).

## Transitional Relief

The IRS recognizes that many plans, due to the enactment of WRERA shortly before the beginning of 2009, were unable to timely modify their administrative procedures to stop, or give participants and beneficiaries the choice to stop, 2009 RMDs. Therefore, the IRS will **not** consider a plan to have failed to operate in accordance with its terms merely because during the period beginning on January 1, 2009, and ending on November 30, 2009, the plan's operation conflicts with the adopted sample amendment. This transitional relief is granted whether or not a plan:

1. paid or did not pay 2009 RMDs or extended RMDs;
2. failed to give participants and beneficiaries the option to take 2009 RMDs or extended RMDs; or
3. offered or failed to offer a direct rollover option for 2009 RMDs or other amounts that could be rolled over under the Notice.

## Rollover Relief

The Notice affirms that both 2009 RMDs and extended RMDs may be rolled over so long as other rollover rules (modified by exceptions to the direct rollover, rollover notice, and 20% mandatory withholding requirements for 2009 RMD waiver amounts) are met. Moreover, for plan participants and IRA owners who have already received 2009 RMDs and the 60-day rollover period has expired, the IRS is extending the period to roll over most of such distributions until November 30, 2009. However, for IRAs, only one distribution per IRA will be eligible for this rollover relief due to the one-rollover-per-year rule, which was unchanged by WRERA.

**FBA Note:** FBA may need to tailor the sample amendment to a plan's particular terms and administration procedures. The amendment must be adopted no later than the last day of the first plan year beginning on or after Jan. 1, 2011 (Jan. 1, 2012 for governmental plans).

# Getting Ready for the 2009 Form 5500 Electronic Filing

Beginning with the 2009 plan year, the Department of Labor (DOL) will **require** retirement and welfare plans to file their annual reports (Form 5500) electronically. The system is called the ERISA Filing Acceptance System (EFAST2), and it's expected to be up and running as of January 1, 2010. As your TPA, we will still be able to prepare the form and help facilitate the electronic filing. As the plan sponsor, you will be **required** to obtain electronic signature credentials. You will be receiving more information regarding this new process as we get closer to the end of the year. A complete list of Frequently Asked Questions (FAQs) about EFAST2 can be found at <http://www.dol.gov/ebsa/faqs/faq-EFAST2.html>.

## **Q. Must all retirement plans file electronically?**

A. With the exception of a plan covering the sole owner (and his/her spouse) or partners in a partnership (and their spouses) and no employees ("owner only plan"), all plans, including retirement, welfare and 403(b) plans, will need to file their 5500s electronically.

## **Q. How does the plan sponsor obtain electronic signature credentials?**

A. The plan sponsor will go to a DOL website (IREG) and enter certain personal information. The plan sponsor then will receive an e-mail with a link to a website where you will receive the credentials (signor ID and PIN code). The credentials are personal to the individual obtaining the credentials. If a plan sponsor might have different company officers signing the 5500, each officer would need to obtain his/her own credentials.

## **Q. May a TPA or financial institution obtain signer credentials on behalf of its clients?**

A. No. Every individual who signs a Form 5500 or schedule must obtain his/her own signer credentials. Furthermore, the government limits one set of credentials per e-mail address.

## **Q. How do you use the signing credentials in filing a Form 5500 electronically?**

A. For filers using FBA, Ltd. as the 5500 preparer, we will send the plan sponsor an e-mail stating that the Form 5500 is ready for review and electronic signing. The plan sponsor will enter the signing credentials and the forms will be submitted to the DOL.

## **Q. How is a plan audit electronically filed?**

A. The DOL requires the auditor to complete the audit on its firm's letterhead with the name of the firm and its address. The audit must be signed by the accountant completing the audit. Once the preparer receives the audit report, it's converted to PDF format and electronically attached to the Form 5500 filing.

## **Q. May a plan file a Form 5500 without the accountant's opinion?**

A. Unless the plan is exempt from the accountant's opinion requirement, the filer may NOT file the Form 5500 without the accountant's opinion. The DOL will not accept the filing without the audit.

**FBA Note:** Keep in mind the 2009 Form 5500 is not filed until 2010 so we have some time to get ready for the big change. The transformation from paper filing to electronic filing will result in significant procedure changes for those of us involved in plan administration.

\*This summary is intended for information and educational purposes only and does not constitute financial, tax, or legal advice. Further, this information is general in nature and is not intended to address the particular needs of any specific plan. Please contact your financial, tax, or legal advisor for information about your specific situation.

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## **FULL SERVICE SUPPORT**

FRINGE BENEFIT ADMINISTRATORS, LTD. (FBA) and its strategic alliance partners, delivers all of the features you need to make your plan a success:

### ***Plan Design & Implementation***

- ▲ Flexible Plan Design
- ▲ Installation / Conversion Support
- ▲ Plan Documents & Administrative Manual

### ***Recordkeeping & Compliance***

- ▲ Daily Account Valuation
- ▲ Timely, Consolidated Quarterly Statements
- ▲ INVEST-Net / Internet Account Access
- ▲ Efficient Distribution & Loan Processing
- ▲ Compliance Testing & Government Reporting
- ▲ Newsletters & SuperStatements (Optional)

### ***Education & Enrollment Support***

- ▲ Educational Enrollment Materials
- ▲ On Site Enrollment Meetings
- ▲ Ongoing Participant Communications

### ***Varied Investment Options***

- ▲ Virtually Unlimited Mutual Fund Selection
- ▲ Individually Directed Brokerage Accounts
- ▲ LIFESTYLE "Model Portfolios" (Optional)

### ***Trustee & Custodial Services***

- ▲ Complete Trustee / Custodial Services
- ▲ Tax Withholding & Reporting

## **WHO TO CALL**

For information concerning items in this newsletter, or information about our services, please ask for one of the following people. They will be pleased to assist you.

- ▲ **Your Plan Administrator**
- ▲ **Dick Watson - ext. 1030**
- ▲ **J. R. Piper - ext. 1037**
- ▲ **Steve Cranfield - ext. 1024**
- ▲ **Ed Dorman - ext. 1010**

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[www.fbanet.com](http://www.fbanet.com)