

Window for Fixing Current 403(b) Document to Close in 2020

IRS will allow 403(b) plan sponsors until March 31, 2020 to correct document defects and/or adopt a pre-approved plan restatement, assuming an initial plan document was adopted timely under its 2007 regulations and subsequent guidance.

Background

Unlike rules for plans qualified under IRC 401 – 401(k) plans, pension plans, etc. – that have always required a plan document, it wasn't until final regulations were issued in 2007 that a written plan document requirement was imposed on 403(b) plans. Existing 403(b) plans were initially required to adopt plan documents by the end of 2008 (extended to the end of 2009 by [Notice 2009-3](#)). IRS subsequently kicked off a new approval mechanism for prototype and volume submitter plans in 2013 as we described in our [April 3, 2013 For Your Information](#). IRS' new program would only offer opinion and advisory letters on qualification for prototype and volume submitter plans, so sponsors of individually designed plans have no way to know if their newly adopted plans comply with the Code.

In [Revenue Procedure 2013-22](#), IRS provided sample language for the prototype plans – supplementing earlier language provided in [Revenue Procedure 2007-71](#) for public school 403(b) plans – and promised that future guidance would set a deadline for the end of the first remedial amendment period under the new system. Employers who had adopted plans by the 2009 year as required by the regulations would have from the beginning of 2010 until the end of this remedial amendment period to fix document flaws – perhaps by adopting one of the approved prototype or volume submitter plans.

On its website, IRS provides document [support materials](#), including a [list](#) of the plans approved (that is, soon to be approved) under the program, and a [Fix-It Guide](#) that covers document failures.

Pre-Approved Plans

There are two types of pre-approved plans: prototype plans and volume submitter plans. A prototype plan is generally a plan document with fixed provisions (a basic plan document) and an adoption agreement from which an employer may select plan features. Volume submitter plans similarly allow the plan sponsor to select among plan features, but they can accommodate a wider range of choices and they do not have to follow the basic plan document with adoption agreement format.

Remedial Amendment Period Announced

In [Revenue Procedure 2017-18](#) IRS has announced that the last day of the remedial amendment period for 403(b) plans is March 31, 2020. The remedial amendment period is available only if an employer adopted a written plan intended to satisfy the 403(b) requirements on or before January 1, 2010, or the plan's effective date, if later (the first day of the plan's remedial amendment period). By the end of the remedial amendment period, all provisions of the plan that are necessary to satisfy Section 403(b) must have been adopted and made effective retroactive to the beginning of the plan's remedial amendment period. For individually designed plans this may be a challenge, because we still only have the IRS sample language as a guide and no IRS approval on the plan's qualification. For pre-approved plans, it will just be a matter of adopting a plan document that has been pre-approved by the IRS – when provided by the plan document vendor. In either case, the plan document must incorporate all amendments that have been made and reflect the plan's operation from the first day of the remedial amendment period to the date of adoption – assuming that the plan's operations were not out of compliance with Section 403(b).

Future guidance will address the need for amendments after March 31, 2020.

Comment. If the 2009 deadline was missed (or a deadline is missed in the future), the plan sponsor can correct using a Voluntary Compliance Program (VCP) filing.

In Closing

Although an assignment to correct faulty document language or adopt a pre-approved plan by a deadline three years away seems generous, plan sponsors should keep in mind that if a retroactive change is needed to correct an impermissible feature, then operations may require adjustments all the way back to 2010 and may require IRS approval using VCP. Consider assessing the need for changes now to leave time for operational as well as document adjustments.

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