

### **IRS Sets Deadline for Retroactive Fixes to 403(b) Retirement Plan Documents**

In January 2017, the IRS published Revenue Procedure 2017-18 which set March 31, 2020 as the last day to take advantage of the remedial amendment period under Revenue Procedure 2013-22 to retroactively fix defects in 403(b) retirement plan documents. Tax exempt, church-related, and eligible governmental employers who sponsor 403(b) retirement plans should keep this deadline in mind as they conduct regular compliance review of their 403(b) plans, and particularly if they are considering the adoption a pre-approved 403(b) plan (when they become available) in the near future.

#### **Background**

Certain tax exempt, church-related, and eligible governmental employers are able to make contributions on behalf of employees to a 403(b) plan, to be funded through an annuity contract meeting the requirements of Section 403(b) of the Internal Revenue Code (the "Code") or a custodial account meeting the requirements of Sections 401(f)(2) and 403(b)(7) of the Code, or a combination of those funding vehicles, in each case, on a tax deferred basis (i.e., such amounts can be excluded from the employee's gross income when contributed).

The final regulations under Section 403(b) of the Code, published on July 26, 2007 (the "2007 Regulations"), established the requirement that a 403(b) annuity contract, custodial account, or retirement income account must be maintained pursuant to a written plan that, both in form and operation, satisfies the requirements under the 2007 Regulations. The deadline to adopt a written 403(b) plan was December 31, 2009, and IRS correction procedures can be followed in the event an employer failed to adopt a written plan by that date.

Prior to 2013, the IRS had not maintained a program for the issuance of determination letters regarding whether or not a 403(b) plan document meets the requirements of Section 403(b) of the Code and the 2007 Regulations. With the publication of Revenue Procedure 2013-22, the IRS started a program for the pre-approval of prototype and volume submitter 403(b) plans that are designed to meet such requirements and that eligible employers will be able to adopt and rely on from a documentary compliance perspective. Many retirement plan service providers and volume submitter practitioners submitted prototype and volume submitter 403(b) plans to the IRS for approval under this program. While no opinion or advisory letters have been issued for any prototype of volume submitter 403(b) plan as of the date of this alert, practitioners anticipate that with the setting of the remedial amendment period deadline by the IRS, the arrival of pre-approved 403(b) plans may soon follow.

#### **Remedial Amendment Period**

Recognizing the difficulty of maintaining a compliant written 403(b) plan document in the absence of pre-approved 403(b) plans, the IRS also established, under Section 21 of Revenue Procedure 2013-22, a remedial amendment period under which an eligible employer, who timely adopted a written plan by the December 31, 2009 deadline, can retroactively correct defects in the form of its 403(b) plan document in order to satisfy the written plan requirements under the 2007 Regulations. If an eligible employer amends its 403(b) plan on or before the last day of the remedial amendment period (i.e., March 31, 2020) to correct any form defects with effectiveness retroactive to the first day of

the remedial amendment period (which is the later of January 1, 2010 and the plan's effective date), that plan will be considered to have satisfied the written plan requirements retroactive to that first day of the remedial amendment period.

Note that to take advantage of the remedial amendment period and the ability to retroactively correct form defects in a 403(b) plan, there is no requirement that an employer adopt a pre-approved 403(b) plan. An employer who has an individually designed 403(b) plan could continue to maintain such plan and adopt such amendments as necessary to bring its 403(b) plan into compliance with applicable legal requirements, but such plan document may still be subject to IRS review and challenge in the event of an audit.

Adopting a pre-approved 403(b) plan (once the IRS approves those documents) on or before the last day of the remedial amendment period will be an alternative to crafting individual amendments for individually designed 403(b) plans. The main benefit of using a pre-approved 403(b) plan with an opinion or advisory letter is that such plan will be automatically deemed to have satisfied all applicable written plan requirements (by virtue of it having already cleared IRS review). It is anticipated that there will also be the added benefit of being able to utilize standardized amendments prepared by the volume submitter practitioner (or other plan service provider) to keep the 403(b) plan up to date with changes required by law.

### **Next Steps**

As always, employers should regularly review their 403(b) plans for compliance with legal requirements. With the IRS's establishment of the last day of the remedial amendment period, employers will have the next three years (until March 31, 2020) to adopt amendments to retroactively correct defects in the form of their written 403(b) plan document. When pre-approved 403(b) plans finally arrive, there should be additional opportunities for employers to take advantage of the remedial amendment period, and also maintain their 403(b) plan going forward, in a convenient and cost-effective manner.

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