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IRS launches 403(b) opinion and advisory letter program

The IRS has released a revenue procedure detailing the available options for obtaining their stamp of approval on plan documents used for 403(b) plans. The new program is limited to opinion and advisory letters for prototype and volume submitter plans (referred to as “pre-approved” plans).

The revenue procedure announces that, due to limited resources, the IRS will not establish a program for obtaining a determination letter for individually designed 403(b) plans. Employers who currently sponsor these plans must restate them onto pre-approved plans if they wish to obtain reliance that the terms of the plan comply with section 403(b) of the Code.

Vendors who intend to offer the pre-approved plans can begin submitting prototype and volume submitter plan documents for IRS approval starting June 28, 2013. The submission window will close April 30, 2014. Eligible employers will not have to adopt pre-approved plans until at least one year after the IRS announces it has ruled on all of the vendor applications that it received during the window (so, no earlier than April 30, 2015).

Background

The IRS has long maintained a program for reviewing qualified retirement plans under Code section 401(a). Following the 2007 issuance of 403(b) plan final regulations that require a written plan, in 2009 the IRS floated the idea of establishing a similar program for reviewing 403(b) documents. See our December 16, 2009 *For Your Information*. The program contemplated at that time would have allowed an employer that adopted a written 403(b) plan by December 31, 2009 (as required by Notice 2009-3) to either adopt a pre-approved plan that has received a favorable opinion letter or apply for an individual determination letter to correct any defects in its plan documents retroactive to January 1, 2010. Further, the employer would have reliance that the form of its written plan satisfies section 403(b) and the regulations retroactive to January 1, 2010, by retroactively correcting any defects in the plan.

Under the proposal, an employer that first established a 403(b) plan on or after January 1, 2010, would have been deemed compliant with section 403(b) retroactive to the plan’s effective date as long as the employer either adopted a pre-approved plan or submitted its individually designed plan to the IRS for a determination letter and retroactively corrected any defects.

New program limited to prototypes and volume submitters

Revenue Procedure 2013-22 rolls out the anticipated program, but with significant changes. Unlike the proposal, there is no option for an individual employer to request a determination letter about the status of an individually designed plan. The program is limited to prototypes (an IRS pre-approved basic plan and adoption agreement sponsored by a vendor such as a financial institution or other document provider) and volume submitters (an IRS pre-approved sample plan of a practitioner). The prototype vendor or practitioner submits plan documents to the IRS to receive an advance opinion letter or advisory letter that the plan document complies with the requirements for 403(b) plans. By adopting a plan that has received an opinion or advisory letter under the program, the employer satisfies the written plan requirement in the 2007 regulation and obtains assurance that its plan meets the requirements of Code section 403(b) retroactive to January 1, 2010.

> Buck comment. 403(b) sponsors that invested time and money to draft an individually designed plan document may be disappointed to learn that they cannot obtain a determination letter that they can rely on to ensure their plan meets the 403(b) requirements. Employers that have adopted 403(b) plans that are individually designed may want to consider adopting a pre-approved 403(b) plan document that they can rely on under this program. Church-related organizations may also consider sponsoring their own pre-approved plans since the usual requirement to have at least 30 employers that intend to adopt a pre-approved plan is waived for 403(b)(9) retirement income account plans sponsored by church-related organizations.

Limits on Reliance

There are two forms of 403(b) prototype plans under the revenue procedure: a “standardized plan” and a “nonstandardized plan.”

An employer that adopts a standardized plan and follows the terms of the plan can rely directly on the opinion letter for the plan. A standardized plan that provides for contributions other than elective deferrals and matching contributions must provide that any nonelective contributions will be allocated to all nonexcludable employees of the employer (including all nonexcludable employees in the employer’s controlled group or affiliated service group, and leased employees) in an amount that meets a nondiscrimination safe harbor design (such as a uniform percentage of safe harbor compensation for each eligible participant).

A nonstandardized plan is a 403(b) prototype plan that is not a standardized plan. An employer that adopts a nonstandardized plan generally can rely directly on the opinion letter for the plan if the plan is a governmental plan or the employer is a church or qualified church-controlled organization. In all other cases, an eligible employer that adopts a nonstandardized plan generally can rely directly on the opinion letter except for asserting that the plan satisfies the requirements for coverage and nondiscrimination for contributions other than elective deferrals.

An adopting employer of a 403(b) volume submitter plan can generally rely on the advisory letter for the approved specimen plan, except to the extent that the employer’s plan is not identical to the approved plan. The adopting employer would not be able to rely on the advisory letter without performing tests to ensure that coverage and nondiscrimination rules are satisfied. As above, the coverage and nondiscrimination rules would not be a concern

for a governmental plan or where the employer is a church or qualified church-controlled organization or where the only contributions under the plan are elective deferrals.

Note that even for a standardized prototype plan, if the plan offers matching or after-tax contributions, the plan will be subject to the actual contribution percentage (ACP) test each year unless the plan is a governmental or church plan, or the 403(b) plan only provides for matching contributions that satisfy one of the ACP test safe harbors under sections 401(m)(11) or 401(m)(12) of the Code.

Plan terms must trump terms of investment arrangements

IRS will not review the terms of any investment arrangement that may form a part of the employer's plan. The language of the pre-approved plan must satisfy the 403(b) requirements independent of language in the investment arrangements and must state that, although the terms of the investment arrangements are incorporated in the plan by reference, the pre-approved plan terms overrule any conflicting terms in the investment arrangements. This does not preclude investment arrangements from having different rules provided that such rules comply with section 403(b). For example, a particular investment arrangement can provide for loan or withdrawal rules that are more restrictive than required by section 403(b) or the terms of the pre-approved plan but cannot provide restrictions that would cause the 403(b) plan to violate the minimum distribution rules.

Sponsors amend and notify

Vendors who sponsor prototype and volume submitter documents will be required to take on responsibilities under the new program to keep the pre-approved documents up-to-date for changes in the law and notify adopting employers when these changes are made. Each pre-approved 403(b) plan must allow the pre-approved plan's sponsor to make required amendments on behalf of the adopting employers.

Vesting accommodated

Under the earlier draft of the revenue procedure, every 403(b) prototype would have been required to provide for full and immediate vesting of all contributions under the plan. In Revenue Procedure 2013-22, pre-approved plans may generally apply vesting schedules for nonelective employer contributions. The schedules must vest contributions at least as rapidly as the ERISA minimum vesting schedules require even if the plan is not subject to ERISA. However, volume submitter plans designed for non-ERISA plans, such as governmental plans, are not held to this requirement. To the extent a vesting schedule is used, amounts that are not vested must be maintained in a separate 403(c) contract (or a separate 401(a) qualified plan account in the case of a mutual fund custodial account arrangement). As amounts become vested, they move into the 403(b) accounts. These separate nonvested contracts (or nonvested accounts) must become fully vested upon plan termination.

Sample language

Revenue Procedure 2013-22 provides a detailed list of required plan language elements. Sample plan language that satisfies these requirements is provided in IRS' March 2013 Listing of Required Modifications for § 403(b) plans. The sample provisions have been written for section 403(b) prototype plans, but are also generally suitable for use in volume submitter plans that include an adoption agreement and may be modified for approaches that fold the adoption terms into the specimen document. Insurance companies and custodians generally may also use the sample provisions for drafting corresponding terms of annuity contracts and custodial accounts.

Until further notice, IRS also says that public schools and other eligible employers may continue to utilize the language in Revenue Procedure 2007-71 as model or sample language.

Six-year remedial amendment cycle proposed

The IRS expects that future guidance will be issued that requires every pre-approved 403(b) plan to be restated by the plan sponsor every six years to reflect subsequent changes in the law, regulations, revenue rulings, or other IRS guidance. Once the IRS rules on the submissions, employers using the pre-approved documents will be required to adopt restated plans within a specified time frame. This six-year remedial amendment cycle is modeled after the pre-approved plan program for qualified plans.

In closing

The next step is for 403(b) vendors to develop and submit their prototype plans and volume submitter specimens to the IRS. After the IRS completes its review, plan sponsors will be given a suitable deadline for adopting the pre-approved materials. The IRS will accept vendor applications from June 28, 2013 through April 30, 2014. Once the IRS determines that its review of all of the pre-approved plans submitted by the April deadline is complete, it will announce a deadline for employers to adopt the pre-approved plans that is no earlier than one year from the date of the announcement. Employers who intend to adopt a pre-approved plan will want to confirm with their vendor that they intend to meet these deadlines, and be prepared to timely adopt the plan after the IRS announces the deadline for employers.

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