

IRS Proposes Sample Plan Language and Procedure for Approval of Section 403(b) Prototype Plans

The IRS has taken the next step toward eliminating the differences between its regulatory frameworks for section 403(b) plans and qualified retirement plans such as 401(k) plans. Announcement 2009-34 asks for comments from the public on a proposed procedure for pre-approval of 403(b) prototype plans. The IRS has also proposed and asked for public comment on sample plan provisions for both prototype and individually designed 403(b) plans. In addition, the IRS has confirmed its intention in the near future to propose a determination letter program for individually designed (i.e., non-prototype) 403(b) plans, similar to the current determination letter program for qualified retirement plans.

The new proposals are primarily of interest to the financial services industry and other service providers that may want to develop prototype plans for sale to employers that offer 403(b) plans to their employees. But a few points in the proposed procedure will also interest those sponsoring employers themselves, whether they choose to adopt prototype plans or their own individually designed plans.

- An employer will be permitted to correct defects in the form of its written 403(b) plan retroactively by timely adopting a pre-approved 403(b) prototype plan. The deadline for a vendor to submit its prototype plan to the IRS for pre-approval (i.e., an IRS opinion letter) will be announced in future guidance, but will not be earlier than March 15, 2010. Similarly, the deadline for adoption of such a pre-approved prototype plan by an eligible employer will be announced in future guidance.
- An employer that does not adopt a prototype plan may also correct defects in the form of its written 403(b) plan retroactively by amending and submitting its plan to the IRS for a determination letter in a timely manner. Again, the deadline for submitting a determination letter request will be announced in future guidance, but will not be earlier than March 15, 2010.
- In either case, an employer must adopt a written 403(b) plan by the end of 2009 that is intended in good faith to comply with final regulations.
- As part of its pre-approval process for prototype plans, the IRS will not review the terms of any investment arrangements or documents other than the basic plan document and adoption agreement for the prototype plan. In addition, the proposed approval procedure does not include any restrictions on the types, number, or features of investment arrangements that may be offered under a 403(b) prototype plan. The terms of the prototype plan, however, must expressly override any inconsistent provisions of investment arrangements under the plan. Presumably, such overriding provisions will also be required in any individually designed plan that is submitted for a determination letter.

If you have questions or would like additional information about the 403(b) written plan requirements or the proposed pre-approval program for prototype plans, please feel free to contact Brian Dougherty at (215) 587-5919 or bdougherty@postschell.com.

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