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IRS Issues Rules for Correcting 403(b) Plan Document Defects

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Nonprofit or governmental employers that sponsor 403(b) plans generally have until March 31, 2020, to correct any defects in their 403(b) plan documents by adopting a pre-approved plan document or by amending their individually designed plans to comply with the requirements of the Internal Revenue Code. In Rev. Proc. 2019-39 the IRS provided guidance on amendments to 403(b) plans after the March 31, 2020 deadline.

Background. Although 403(b) plans sponsored by nonprofit or governmental employers are similar in many respects to 401(k) plans and other qualified retirement plans, there are some key differences. One difference is that, unlike qualified plans, the IRS has not historically maintained a regular program under which 403(b) plan sponsors can obtain a determination letter from the IRS that they can rely on to show that the plan document complies with all legal requirements, including the Internal Revenue Code and IRS regulations and guidance.

IRS regulations first required 403(b) plans to be maintained under a written plan document effective January 1, 2009, which had to be adopted by December 31, 2009. The IRS announced a determination letter process for "pre-approved" 403(b) plans in 2013. Under this program, vendors may obtain a determination letter on the form of their plan documents, which an eligible employer that adopts the plan can rely on. A pre-approved plan document is in the form of a "basic plan document", which includes the general plan terms, and an "adoption agreement", under which an eligible employer can adopt the plan and elect among certain optional plan terms. The IRS has not provided a process for individually designed 403(b) plans to obtain an IRS determination letter.

March 31, 2020 Deadline. The IRS has provided a "remedial amendment period" for 403(b) plans that generally ends on March 31, 2020. A remedial amendment period is a period under which plan sponsors can retroactively amend their plans to comply with legal requirements without penalty.

403(b) plan sponsors can take advantage of this opportunity by:

- Adopting a pre-approved plan by March 31, 2020, which is effective retroactive to January 1, 2010 (or, if later, the 403(b) plan's original effective date).
- Amending an individually-designed plan retroactively by March 31, 2020 to comply with the requirements of the Internal Revenue Code.

In addition, Rev. Proc. 2019-39 extends this period beyond March 31, 2020, to the extent that a remedial amendment period would not have expired with respect to a form defect in taking into account the ongoing amendment deadlines noted below in the "After March 31, 2020" section. But to the extent that a form defect results from a legal change that was effective before 2019, the remedial amendment period will not be extended beyond March 31, 2020.

The opportunity to cure form defects by retroactive amendment is an important opportunity for 403(b) plan sponsors. However, this opportunity relates only to defects relating to the form of the plan document. If the 403(b) plan has not been operated in

compliance with the retroactive amendment or legal requirements, further corrective action would be required under the Employee Plans Compliance Resolution System (EPCRS), the IRS's correction program for qualified retirement plans and 403(b) plans, as noted below in the "Plan Corrections" section.

After March 31, 2020. After March 31, 2020, individually designed 403(b) plans will have a remedial amendment period that is similar to the remedial amendment period that applies to qualified plans. The IRS will also publish required 403(b) amendments resulting from legal changes on the "Required Amendments List" and include required changes in operation of 403(b) plans on the "Operational Compliance List", both of which are published annually.

The remedial amendment period for individually designed non-governmental 403(b) plans will be as follows:

- *Required Amendments*. Plan sponsors must amend the plan to comply with changes in legal requirements by the last day of the second calendar year after the year in which the change is included on the Required Amendments List.
- *Amendment to Existing Plans*. To the extent that a form defect results from an amendment to an existing 403(b) plan, the form defect may be corrected by the last day of the second calendar year following the later of the year in which the amendment is adopted or the year in which the amendment is effective.
- *Discretionary Changes*. Discretionary amendments (other than form defects) must be put into place by the end of the plan year in which the amendment is put into effect operationally.
- *New Plans*. Form defects in new plans may be corrected by the last day of the second calendar year after the year in which the plan becomes effective.

These amendment deadlines are extended for governmental plans to take into account that their plan amendments may need to be approved by a legislative body.

Pre-approved 403(b) plans will continue to be eligible to receive updated determination letters periodically based on cycles that the IRS will announce in future guidance. This guidance will also announce deadlines for plan sponsors that have adopted pre-approved plans to adopt updated versions of the pre-approved plans. The IRS has previously announced that it anticipates that pre-approved plans will need to be restated every six years.

Plan Corrections. As noted above, the remedial amendment period relates only to the form of the 403(b) plan document. To the extent that a 403(b) plan has not been *operated* in compliance with legal requirements, this cannot be corrected merely by adopting a retroactive amendment that reflects the legal requirements. If the plan has not been operated in compliance with legal requirements or the terms of a retroactive amendment, correction under EPCRS would be required. Further, to the extent that a plan is not amended to comply with legal requirements within its remedial amendment period, form defects can be corrected under EPCRS, but this may not be penalty free.