New IRS 403(b) Plan Document Compliance Program
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Summary

The IRS has issued Rev. Proc. 2019-39, which represents the next step in the evolution of plan document compliance for 403(b) plans by describing an ongoing, systemic approach that is similar to the regime used for 401(k) and other qualified plans. Rev. Proc. 2019-39 provides rules for when 403(b) plans must be amended for both discretionary and required amendments, establishes remedial amendment periods (RAP) for correcting 403(b) plan document related failures, and describes the basic process that sponsors of pre-approved 403(b) plans will use to request IRS approval of these plans and for eligible employers to adopt the approved plan documents. Unfortunately, the IRS has decided not to offer an option for sponsors of individually designed 403(b) plans to receive IRS approval for their plans (such as a determination letter type program).

Timing

The guidance applies immediately, but the initial remedial amendment period/opportunity to correct any plan document related defects remains open until March 31, 2020.

Background

Plan document compliance has historically been a challenge for 403(b) plan sponsors. These challenges are often highlighted in connection with mergers and acquisitions, when it is common to face obstacles collecting plan documents and copies of signed plan amendments. These issues are further heightened following transactions involving smaller entities, which are more likely to have adopted a pre-approved plan sponsored by less responsive vendors and to have allocated fewer resources to ensuring compliance with plan document requirements.

Prior to the IRS's issuance of the 2007 final 403(b) regulations, 403(b) plans were subject to much lower levels of compliance scrutiny by the IRS and DOL than qualified plans such as 401(k) and pension plans. In particular, there was no Internal Revenue Code (IRC) based requirement for 403(b) plans to be maintained pursuant to a written plan document. Although the Employee Retirement Income Security Act of 1974 (ERISA) imposed a plan document requirement on 403(b) plans subject to ERISA, there was ambiguity regarding the deadline for 403(b) plans to adopt plan amendments.

In the final 403(b) regulations, the IRS imposed a plan-document requirement for most 403(b) plans, and subsequently began a regulatory process in which the IRS issued additional guidance to fill in gaps and to enhance 403(b) plan document compliance. For instance:

- Rev. Proc. 2007-71 provides guidance regarding compliance with the 2007 regulations and includes model plan language that may be used by public schools or as sample language by other eligible employers. Rev. Proc. 2007-71 also provides that other eligible employers may use the model language as sample language to comply with one or more of the requirements imposed by the 2007 regulations.

- IRS Notice 2009-3 provides that all 403(b) plans must adopt a plan document by December 31, 2009 (which date was an extension from the original December 31, 2008 deadline).
Rev. Proc. 2013-22 establishes a pre-approved program for 403(b) plans. This Revenue Procedure also creates an initial "remedial amendment period" (RAP) for these types of 403(b) plans, during which plan document defects may be corrected through an amendment that is retroactive to the beginning of the RAP. This Revenue Procedure provides that the initial 403(b) plan RAP began on January 1, 2010, or the plan’s effective date, if later. The Revenue Procedure specifies that the end-date of the RAP would be identified in future guidance and will be sometime after the issuance of opinion or advisory letters under the pre-approved program (letters were issued in March of 2017).

- 403(b) plan sponsors that choose to adopt a pre-approved plan can rely on the plan’s opinion or advisory letter as confirmation that all the provisions required by IRC §403(b) are properly incorporated.
- In contrast, the IRS does not intend to establish a determination letter program for individually designed 403(b) plans due to budget constraints. Accordingly, sponsors that choose to maintain individually designed 403(b) plans (or those that are forced to do so because no suitable pre-approved plan exists) have to look to other resources (e.g., third-party advisers) to determine whether any provisions in their 403(b) plan documents need to be modified to meet the requirements of IRC Section 403(b), the regulations or any other applicable guidance.

Rev. Proc. 2017-18 provides that the initial RAP for 403(b) plans will end on March 31, 2020. The Revenue Procedure further provides that a plan that does not satisfy the 403(b) plan document requirements during the initial RAP will be considered to have satisfied those requirements if all necessary amendments have been adopted prior to March 31, 2020.

**Revenue Procedure 2019-39**

Rev. Proc. 2019-39 establishes separate plan document compliance regimes for pre-approved plans (which are prototype or volume submitter plans) and individually designed plans (defined as any plan that is not a pre-approved plan). In general, Rev. Proc. 2019-39 builds upon earlier guidance that established the first RAP and establishes a system of recurring RAPs. It also provides rules for when both discretionary and required amendments must be adopted and includes information regarding when a plan sponsor will be able to correct any "form defects".¹

A form defect is generally defined as a failure of a 403(b) plan to satisfy applicable requirements because the plan has not been properly amended to reflect a new legal requirement or a change in an existing requirement (including provisions integral to the change).

It is particularly noteworthy that during the initial RAP, the ability to adopt amendments that are retroactive to as early as January 1, 2010 apparently can be used where the plan’s operation conflicts with the terms of the plan document, but such operation does not violate any other 403(b) legal requirements. Confirmation by legal counsel is necessary to determine whether this type of operational failure may be corrected by a retroactive plan amendment since the Rev. Proc. is not entirely clear on this point.

However, Rev. Proc. 2019-39 clearly states that a sponsor will not receive the benefit of the RAP, even if it adopts a retroactive plan amendment that in form appears to satisfy a 403(b) legal requirement, if the particular legal requirement is not also operationally effective during the whole RAP.

**Individually Designed 403(b) Plans**

**Remedial Amendment Period**

Rev Proc 2019-39 establishes a system of RAPs that begin after the conclusion of the initial RAP (March 31, 2020), and which is intended to be similar to the RAPs that apply to 401(k) and other qualified plans. Subsequent RAPs will depend on whether the 403(b) plan is new or existing, whether the plan is sponsored by a governmental entity, and the type of form defect.

With respect to nongovernmental 403(b) plans:

- For a form defect contained in a newly established 403(b) plan:
The RAP will begin on the date the plan is put into effect.

The RAP will end on the last day of the 2nd calendar year following the calendar year in which the plan is put into effect.

• For a form defect caused by an amendment to an existing 403(b) plan (e.g., a discretionary amendment):
  o The RAP will begin on the earlier of the date the plan amendment is adopted or put into effect.
  o The RAP will end on the last day of the 2nd calendar year following the calendar year in which the amendment is adopted or effective, whichever is later.

• For an existing 403(b) plan that has a form defect due to a change in the legal requirements:
  o The RAP will begin on the date the change is effective with respect to the Plan.
  o The RAP will end on the last day of the 2nd calendar year after the issuance of the Required Amendments List in which the change appears.

• For an existing 403(b) plan that has a form defect due to a provision that is integral to a 403(b) requirement that has changed:
  o The RAP will begin on the first date that the plan is operated in accordance with such provision.
  o The RAP will end on the last day of the 2nd calendar year after the issuance of the Required Amendments List in which the change appears.

Governmental 403(b) plans are subject to an extended RAP for each type of form defect, which is based in part on the timing of legislative sessions.

Rev. Proc. 2019-39 includes two special rules which modify the end date of the RAP:

• The end of a RAP is accelerated in the event of a plan termination, since the terminated plan must be amended to reflect all requirements in effect as of the date of termination.

• There is a limited extension for changes that are effective near the end of the initial RAP. In this case, the initial RAP is extended until the later of (i) March 31, 2020 or (ii) the end of the RAP that would apply under the rules that apply for subsequent RAPs. See section 7 of the Rev. Proc. for more details.

Finally, Rev. Proc. 2019-39 announces that like 401(k) and other qualified plans, the IRS will annually publish both a Remedial Amendment List and an Operational Compliance List. The Remedial Amendment List will be used to determine the end of the Remedial Amendment Period for adopting a plan amendment. The Operational Compliance List is intended to show the date by which a 403(b) plan must operationally comply with a requirement. Timely operational compliance will impact the plan's document compliance, because Rev. Proc. 2019-39 provides that a RAP may not be used to retroactively amend a plan prior to the date the plan operationally complies with the legal requirement.

Plan Amendment Deadlines

Rev. Proc. 2019-39 establishes the deadlines by which a plan amendment must be adopted. The deadline to amend an individually designed 403(b) plan to correct a form defect is based on the RAP rules described above. For a discretionary amendment that is effective during a plan year that begins on or after January 1, 2020, the deadline to amend the plan is the last day of the plan year in which the plan amendment is operationally put into effect. An amendment is considered to have been operationally put into effect when the plan is administered in a manner that is consistent with the intended discretionary amendment.

Governmental 403(b) plans are subject to an extended deadline to adopt both amendments to address form defects and discretionary amendments, which is based in part on the timing of legislative sessions.
Pre-Approved Plans

Recurring Pre-Approved 403(b) Plan Cycles

Rev. Proc. 2019-39 establishes a system of recurring pre-approved plan cycles for 403(b) plans. These cycles determine the timing for when the sponsor of a pre-approved 403(b) plan may submit the plan for a pre-approved plan letter (which is like the advisory and opinion letters issued for pre-approved qualified plans), when eligible employers must adopt a restated plan that has received a pre-approved plan letter, and the end of the RAP for the plan. The new system for pre-approved plans builds off the initial cycle provided under Rev. Proc. 2013-22, under which pre-approved plan letters were first issued.

Under the new system of recurring pre-approved 403(b) plan cycles, the sponsor of a pre-approved 403(b) plan sponsors will apply for a pre-approved plan letter during a 1-year submission period that will generally occur at the beginning of each cycle. Like the program for pre-approved qualified plans, the IRS announced that they intend to issue a cumulative list of plan changes that were not reviewed during the prior cycle for use by pre-approved 403(b) plan sponsors.

The IRS will announce the deadline by which eligible employers must adopt the newly approved plan as each cycle nears completion, but the IRS expects to provide approximately two years to adopt a newly approved plan. Procedures for filing for the pre-approved plan letter, and the deadline for submitting the pre-approved plan for review, will be announced prior to each submission period. The IRS announced the next submission period is not expected until at least 2023, but no further details regarding timing or filing procedures have been announced.

Pre-Approved 403(b) Plan Remedial Amendment Periods

Like the program for individually designed 403(b) plans, a RAP is established for pre-approved plans with regard to amendments required after March 31, 2020. The beginning of a RAP is the same as the date that would apply for individually designed 403(b) plans. The end of the next RAP for a pre-approved 403(b) plan is the end of the applicable pre-approved 403(b) plan cycle provided that an interim amendment is adopted timely (or there is a good faith determination that an amendment is not required). The IRS will issue guidance prior to the end of the next cycle regarding the end of the RAP.

Rev. Proc. 2019-39 provides a limited extension of the initial RAP that would otherwise end on March 31, 2020, with regard to a form defect that is related to:

- a new legal requirement or a change in an existing requirement (including provisions integral to the change), and an initial amendment is adopted by the later of (i) March 31, 2020 or (ii) the end of the calendar year following the calendar year in which the change in the 403(b) legal requirements is effective with respect to the plan.

- a discretionary amendment that occurs on or after January 1, 2018.

For these types of amendments, the initial RAP will end no earlier than the end of the next pre-approved 403(b) plan cycle. Prior to the end of the next pre-approved 403(b) plan cycle, the IRS will issue guidance for determining the end of the initial RAP for the defects described above.

Finally, the end of a RAP is accelerated in the event of a plan termination, since the terminated plan must be amended to reflect all requirements in effect as of the date of termination.

Interim and Discretionary Amendment Deadlines

To promote compliance during pre-approved 403(b) plan cycle, a plan sponsor or an adopting employer pre-approved must adopt an interim amendment to reflect a new legal requirement or a change in an existing requirement (including provisions integral to the change) that is effective with respect to the plan after March 31, 2020. The interim amendment must be adopted by the end of the calendar year following the calendar year in which the plan is required to comply with the change unless the IRS specifies a different date.

Rev. Proc. 2019-39 specifies that discretionary amendments must be adopted by the end of the plan year in which the amendment is operationally put into effect. An amendment is considered to have been operationally put into effect when the plan is administered in a manner that is consistent with the intended discretionary amendment.
Governmental 403(b) plans are subject to an extended deadline to adopt both interim and discretionary amendment, which is based in part on the timing of legislative sessions.

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1 Rev. Proc. 2019-39 uses the term form defect, rather than qualification failure which is used in the context of 401(k) and other qualified plans, since 403(b) plans are technically not subject to the tax qualification requirements that apply to 401(k) and other qualified plans.

2 Note that the end of the RAP for a pre-approved 403(b) plan differs from an individually designed 403(b) plan since as explained above, individually designed 403(b) plans are not subject to a recurring plan document compliance cycle and do not have access to a determination letter-type program.