

Operating Under the Written Plan Requirements and Common Issues Identified in 403(b) Plans

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Presenters

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The Written Plan Requirement - Background

- Initially required by final 403(b) regulations to be in place by 1/1/2009
 - Exception for an annuity contract or custodial agreement maintained by a church other than a retirement income account under 403(b)(9)
 - Church is defined in 1.403(b)-2(b)(5)

Notice 2009-3

- Notice 2009-3 provided transitional relief for 2009 if:
 - Written plan adopted on or before 12/31/2009. It must be intended to satisfy 403(b), including the regulations
 - During 2009, plan was operated in accordance with a reasonable interpretation of 403(b) and the regulation
 - On or before 12/31/2009, “best efforts” were made to retroactively correct operational failures during 2009 to confirm with the written plan

Pre-approved Plans

- Announcement 2009-34
- Comments received and analyzed
- Revised revenue procedure has been drafted and is in the clearance process

Pre-approved Plan Concerns?

- Employers should not be concerned that the 403(b) pre-approved and individually designed programs are not open
- Your focus should be;
 - Compliance with Notice 2009-3
 - Operation follows the written plan

403(b) Plans are not 401(a) Plans

- Not subject to Rev. Proc. 2007-44
 - Not required to submit under Cycles A, B, C, etc.
 - Not required to adopt interim amendments
 - Plan document can be amended to comply with changes in the law pursuant to the remedial amendment period
 - Must operate in accordance with changes in the law

Remedial Amendment Period

- Announcement 2009-89
- Retroactive to 1/1/2010 and employer reliance starting on 1/1/2010 if:
 - Conditions for 2009 relief under Notice 2009-3 are met, and sponsor
 - Adopts a pre-approved plan with a favorable determination letter or
 - Applies for an individual determination letter when available

Remedial Amendment Period (cont.)

- Remedial Amendment Period
 - Employers may correct form defects in their plan documents retroactive to 1/1/2010
- Employer Reliance
 - Employers will have reliance that their plan documents satisfy 403(b) and the regulations if they retroactively correct plan defects during the remedial amendment period
- New Plans Also Eligible for Remedial Amendment Period

Correction of Errors & Defects

- Employee Plans Compliance Resolution System (EPCRS) – Rev. Proc. 2008-50
 - Applies to 403(b) & 401(a) plans
- Does not include plan document errors, including the failure to have a written plan document and the failure to operate a plan pursuant to the terms of the plan document

Correction of Errors & Defects (cont.)

- New EPCRS will address 403(b) written plan requirement
 - Failure to have a written plan
 - Written plan defects
 - Failure to follow the terms of the written plan document
- Current EPCRS still available
 - Operational, Demographic and Employer Eligibility Failures as defined in 5.02 of Rev. Proc. 2008-50

Common Written Plan Errors

- Written plan not adopted on or before 12/31/2009
- Haste in adopting written plan resulted in errors
- Operation not following the written plan document

**IRS Audits –
403(b)
Operational Issues**

Locate & Review

- Plan documents
- Board resolution adopting plan
- Annuity contracts & custodial accounts
- Good faith notice to vendor Rev. Proc. 2007-71

Locate & Review (cont.)

- Employee handbooks & enrollment materials
- Information sharing agreements
- Collective bargaining agreements

Audit of Written Plan

- If you have not timely adopted a written plan
 - Adopt one now – Do not wait for new EPCRS Rev. Proc.
- What if the plan is under IRS audit?

Universal Availability-Elective Deferrals

- Are you excluding employees in operation from making elective deferrals?
 - What does your plan provide?
- If you have exclusions for <20 hours or <1000?
 - Are you monitoring the requirements
- Correction for failures
 - Rev. Proc. 2008-50 requires employer to make contributions

Excess Elective Deferrals

- Most common issue
- Optional provision
- 15 years of service (YOS) Catch-up
 - Does your plan allow-optional item?
 - Definition of YOS-Plan vs. Operation
 - Ordering rule-Plan vs. Operation

Excess Elective Deferrals (cont)

- Age 50 catch-up – Ordering rule
 - Optional items-does your plan allow?
- Remember double taxation on excess elective deferrals if not timely corrected.

Excess Elective Deferrals (cont.)

Post Severance Contributions

- What does your plan actually provide?
 - Operation must follow your plan
 - If not then non-compliance under the final regulations
- Elective deferrals of sick and vacation
 - Paid before later of 2 ½ months after severance or end of year of severance

Post Severance Contributions – Non-elective

- 5-year Post severance non-elective contributions
 - Plan must provide
 - Must not be elective!
- If elective, problems compound
- Watch treatment of vacation & sick leave

Correction-Excess Elective Contribution

- Excess elective deferrals
 - Amounts plus earnings must be distributed
 - Excess taxable in year of excess & year of distribution
- Current EPCRS provides for this correction

Application of Limits Under IRC 415-Overall Limit

- Excess is taxable and must be maintained in a separate account
- 403(b) is not aggregated with the defined contribution plan of the employer-Two 415 limits
- 403(b) is aggregated with defined contribution plan of employer controlled by the participant
 - Any excess is handled in the 403(b)

Other IRS Violations

- Plan Loans violate IRC 72(p)
- Hardship distribution failures
- Ineligible employers

Other IRS Violations (cont.)

- Late deposit of employee elective deferrals
 - ERISA has different standard
- Plan transfers
- Always look to the written plan for guidance

Plan or Contract Failure-403(b)

- Generally a contract failure
 - Exception excess contributions & nonforfeitability
- Failure to operate under plan terms
 - All contracts with respect to which the operational failure occurred
- Impacts all contracts
 - Non-Discrimination
 - Ineligible employer
 - Failure to have contracts issued pursuant to a written plan-All impacted contracts

Contract Aggregation-Failures

- IRC 403(b)(5)
 - All contracts for EE are aggregated
- 1.403(b)-2(b)(16)(i) – One contract
- 1.403(b)-3(b)(1)-Treated as one contract
- The entire contract (on aggregated basis) fails to satisfy 403(b)

Fiduciary Rules

- No fiduciary rules under the Internal Revenue Code
- ERISA plans follow ERISA fiduciary rules
- Non-ERISA plans
 - Look to state law for fiduciary rules

Retirement Plans Community Topics

- [Newsletters](#)
- [Published Guidance](#)
- [Forms/Pubs/Products](#)
- [Correcting Plan Errors](#)
- [Examinations/Enforcement](#)
- [Employee Plans FAQs](#)
- [Types of Plans](#)
- [Contact EP/Services](#)
- [More Topics...](#)

Tax Information for Retirement Plans Community



Cost-of-Living Increases

New retirement plan dollar limits for 2012.

EPCRS Information

Exam Process Guide

Phone forum information

User Fee Exemptions

New administrative rule for when determination letter applications filed by eligible employers are exempt from the user fee requirement.

Hybrid Defined Benefit Plan Guidance

Retirement Plans Phone Forums

Fix-It Guides – Common Problems, Real Solutions

SIMPLE IRA

With Video!

SARSEP

Coming Soon!

401(k)

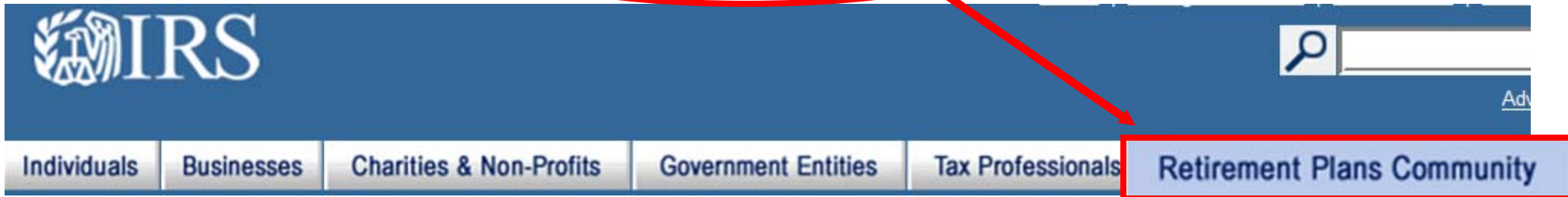
SEP

403(b)

-----Trends-----		-----Tips-----		
Potential Mistake	How to Find the Mistake	How to Fix the Mistake		How to Avoid the Mistake
		Corrective Action	Correction Program(s) Available	
1) Has your plan document been updated within the past few years to reflect recent law changes? (More)	Review annual cumulative list published close to year-end to see if plan made all required law changes (for example, Notice 2009-98). (More)	EPCRS VCP: Streamlined application available. See Appendix F and schedules 1 and 2 . Adopt amendments for missed law changes. (More)	VCP Audit CAP (More)	Resort to a calendar (tickler) that notes when you must complete amendments. Review your plan document annually. Maintain regular contact with the company that sold you the plan. (More)

How Can I Find Out More?

www.irs.gov/ep



newsletters

Employee Plans News

Retirement News for Employers

Governmental Plans Updates

Questions?

RetirementPlanQuestions@irs.gov