

2022 Cumulative List of Changes in Section 403(b) Requirements for Section 403(b) Pre-approved Plans

Notice 2022-8

I. PURPOSE

This notice sets forth the 2022 Cumulative List of Changes in Section 403(b) Requirements for Section 403(b) Pre-approved Plans (2022 Cumulative List). The 2022 Cumulative List will assist providers of section 403(b) pre-approved plans applying to the Internal Revenue Service (IRS) for opinion letters for the second remedial amendment cycle (Cycle 2) under the IRS's section 403(b) pre-approved plan program. Cycle 2 began on July 1, 2020. The 2022 Cumulative List identifies changes in the requirements of section 403(b) of the Internal Revenue Code (Code) that will be taken into account by the IRS with respect to a plan document submitted to the IRS for Cycle 2 and that were not taken into account during the first remedial amendment cycle (Cycle 1). Section 403(b) plans may be submitted for approval during the Cycle 2 on-cycle submission period, which begins May 2, 2022, and ends May 1, 2023.

The list of changes in section IV of this notice does not extend the deadline by which a section 403(b) pre-approved plan must be amended to comply with any change in the section 403(b) requirements (which are requirements of section 403(b), including requirements provided in the Code, regulations, and other guidance published in the Internal Revenue Bulletin). The general deadline for timely adoption of an interim or discretionary amendment is provided in section 12 of Rev. Proc. 2019-39,

2019-42 IRB 945, as modified by section 4 of Rev. Proc. 2020-40, 2020-38 IRB 575, and section 22 of Rev. Proc. 2021-37, 2021-38 IRB 385.

II. BACKGROUND

Rev. Proc. 2021-37 sets forth procedures for issuing opinion letters for section 403(b) pre-approved plans for Cycle 2. In section 13.02 of Rev. Proc. 2021-37, the IRS announced its intention to publish a cumulative list for each remedial amendment cycle to identify changes in the section 403(b) requirements that will be taken into account with respect to a plan document submitted to the IRS for that remedial amendment cycle and that were not taken into account by the IRS in its review during any prior remedial amendment cycle. A change in the section 403(b) requirements includes a statutory change or a change in the requirements provided in regulations or other guidance published in the Internal Revenue Bulletin.

To assist eligible employers in achieving operational compliance, the IRS intends to provide an Operational Compliance List periodically to identify changes in section 403(b) requirements that are effective during a calendar year. For the current Operational Compliance List, see <https://www.irs.gov/retirement-plans/operational-compliance-list>.

III. APPLICATION OF THE 2022 CUMULATIVE LIST

The 2022 Cumulative List set forth in section IV of this notice lists specific items the IRS has identified for review in determining whether the plan document for a section 403(b) pre-approved plan that has been submitted to the IRS for a Cycle 2 opinion letter has been properly updated.¹

¹ The 2022 Cumulative List includes items that are specific to section 403(b) plans, as well as items that, although not specific to section 403(b) plans, are applicable to section 403(b) plans. For example,

Except as provided in section IV of this notice, the IRS will not consider any of the following items in its review of any opinion letter application for Cycle 2:

1. Guidance (regulations and other guidance published in the Internal Revenue Bulletin) issued after November 1, 2021.
2. Statutes enacted after November 1, 2021.
3. Statutes, regardless of when they are enacted, that are first effective in 2022 or later for which there is no guidance identified in this notice.
4. Section 403(b) requirements that are first effective in 2023 or later, regardless of when the section 403(b) requirements are enacted or issued.

The 2022 Cumulative List sets forth only changes in section 403(b) requirements that were not taken into account during Cycle 1. However, in order to satisfy section 403(b) of the Code, a plan must comply with all relevant section 403(b) requirements, not only those on the 2022 Cumulative List.

IV. 2022 CUMULATIVE LIST OF CHANGES IN SECTION 403(b) REQUIREMENTS FOR SECTION 403(b) PRE-APPROVED PLANS

The 2022 Cumulative List sets forth items that were enacted or issued after October 1, 2012. However, if a plan was not reviewed during Cycle 1, the IRS will review the plan taking into account items on the 2022 Cumulative List, as well as the section 403(b) requirements that were reviewed during Cycle 1. The section 403(b) requirements reviewed during Cycle 1 included the final regulations under section 403(b) and any applicable requirements of the 2012 Cumulative List of Changes

because § 1.403(b)-6(d)(2) provides that a hardship distribution has the same meaning as a distribution on account of hardship under § 1.401(k)-1(d)(3) and is subject to the rules and restrictions set forth in § 1.401(k)-1(d)(3), the 2022 Cumulative List includes items that changed hardship distribution requirements under § 1.401(k)-1(d)(3).

in Plan Qualification Requirements set forth in Notice 2012-76, 2012-52 IRB 775.

1. Section 401(m):

a. Safe Harbor Plans

- Final regulations under section 401(k) and (m) that were published on November 15, 2013 (TD 9641, 78 FR 68735), (1) provide guidance on permitted mid-year reductions or suspensions of safe harbor nonelective contributions in certain circumstances for amendments adopted after May 18, 2009 and (2) revise the requirements for permitted mid-year reductions or suspensions of safe harbor matching contributions for plan years beginning on or after January 1, 2015.
- Notice 2016-16, 2016-7 IRB 318, permits mid-year changes to a section 401(k) safe harbor plan or section 401(m) safe harbor plan under certain circumstances and if certain conditions are satisfied.
- Notice 2020-52, 2020-29 IRB 79, clarifies the requirements that apply to a mid-year amendment to a safe harbor section 401(k) or 401(m) plan that reduces only contributions made on behalf of highly compensated employees. It also provides, in connection with the ongoing Coronavirus Disease 2019 pandemic, temporary relief (which requires plan language as a condition of obtaining the relief) from certain requirements that would otherwise apply to a mid-year amendment to a safe harbor section 401(k) or 401(m) plan adopted between March 13, 2020, and August 31, 2020, that reduces or suspends safe harbor contributions.
- Section 102 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), Pub. L. 116-94, 133 Stat. 2534, amends section 401(k)(13)(C)(iii) of the Code to increase the 10-percent cap for automatic enrollment safe harbor plans

(including certain section 401(m) safe harbor plans).

- Section 103 of the SECURE Act amends section 401(k) of the Code to (1) eliminate certain safe harbor notice requirements for plans (including certain section 401(m) safe harbor plans) that provide for safe harbor nonelective contributions and (2) add new provisions for the retroactive adoption of safe harbor status for those plans.
- Notice 2020-86, 2020-53 IRB 1786, provides guidance with respect to sections 102 and 103 of the SECURE Act.

b. Definition of Qualified Matching Contributions

- Proposed regulations under section 401(k) and (m) of the Code that were published on January 18, 2017 (82 FR 5477), amend the definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) to provide that QMACs and QNECs must satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, but need not meet these requirements when they are contributed to the plan. The proposed regulations apply only to taxable years beginning on or after the publication of final regulations, but taxpayers may choose to rely on the proposed regulations upon publication and for prior periods.
- Final regulations under section 401(k) and (m) that were published on July 20, 2018 (TD 9835, 83 FR 34469), amend the definitions of QMACs and QNECs to provide that QMACs and QNECs must satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, but need not meet these requirements when they are contributed to the plan.

2. Section 403(b)(7) and (11):

a. In-Plan Roth Rollovers

- Section 902 of the American Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat. 2313 (2013), adds section 402A(c)(4)(E) of the Code, which provides that rollovers from a plan account to the plan's designated Roth account may include a rollover of an otherwise nondistributable amount.
- Notice 2013-74, 2013-52 IRB 819, provides guidance regarding amounts transferred to a designated Roth account as described in section 402A(c)(4)(E) and also provides guidance that applies to all in-plan Roth rollovers under section 402A(c)(4).

b. Hardship Distributions

- Section 41113 of the Bipartisan Budget Act of 2018 (BBA), Pub. L. 115-123, 132 Stat. 64, in part, directs the Secretary of the Treasury to modify Treas. Reg. § 1.401(k)-1(d)(3)(iv)(E) to delete the 6-month prohibition on contributions after a hardship distribution and to make any other modifications necessary to carry out the purposes of section 401(k)(2)(B)(i)(IV) of the Code.
- Section 41114 of the BBA amends section 401(k) of the Code to modify the hardship distribution rules to expand the sources of hardship distributions to include elective contributions, qualified nonelective contributions, qualified matching contributions, and earnings on those contributions. The rules relating to hardship distributions of elective contributions from a section 401(k) plan generally apply to section 403(b) plans. However, because section 403(b)(11) of the Code was not amended by section 41114 of the BBA, earnings attributable to section 403(b) elective deferrals continue to be ineligible for hardship distribution.

- Proposed regulations under section 401(k) of the Code that were published on November 14, 2018 (83 FR 56763), amend the rules relating to hardship distributions from section 401(k) plans to reflect statutory changes affecting section 401(k) plans, including changes made by the BBA. Under the proposed regulations, the changes to the hardship distribution rules made by the BBA generally apply to distributions made in plan years beginning after December 31, 2018. However, the prohibition on suspending an employee's elective contributions and employee contributions as a condition of obtaining a hardship distribution may be applied as of the first day of the first plan year beginning after December 31, 2018, even if the distribution was made in the prior plan year. In addition, the revised list of safe harbor expenses for which distributions are deemed to be made on account of an immediate and heavy financial need may be applied to distributions made on or after a date that is as early as January 1, 2018.
- Final regulations under section 401(k) that were published on September 23, 2019 (TD 9875, 84 FR 49651), amend the rules relating to hardship distributions from section 401(k) plans to reflect statutory changes affecting section 401(k) plans, including recent changes made by the BBA.

c. Lifetime Income Investment Options

- Section 109 of the SECURE Act provides that section 403(b) plans may permit certain transfers and distributions of lifetime income investment options in cases in which the investment options are no longer authorized to be held as investment options under the plan.

d. Distribution of Individual Custodial Accounts Upon Plan Termination

- Section 110 of the SECURE Act provides that the Secretary of the Treasury shall

issue guidance providing that, if an employer terminates a plan under which amounts are contributed to a custodial account under section 403(b)(7) of the Code, the plan administrator or custodian may distribute an individual custodial account (ICA) in kind to a participant or beneficiary of the plan. It also provides that the distributed custodial account will be maintained by the custodian on a tax-deferred basis as a section 403(b)(7) custodial account, similar to the treatment of fully paid individual annuity contracts under Rev. Rul. 2011-7, until amounts are actually paid to the participant or beneficiary.

- Rev. Rul. 2020-23, 2020-47 IRB 1028, pursuant to section 110 of the SECURE Act, provides that, under the situations described in the revenue ruling, a section 403(b) plan may be terminated in accordance with the rules of § 1.403(b)-10(a) using a distribution of an ICA in kind to a participant or beneficiary, and such a distribution is not includible in gross income until amounts are actually paid to the participant or beneficiary out of the ICA, so long as the ICA maintains its status as a section 403(b)(7) custodial account.

e. Qualified Birth or Adoption Distributions

- Section 113 of the SECURE Act amends section 72(t)(2) of the Code to add a new exception to the 10-percent additional tax for any qualified birth or adoption distribution. An individual generally may recontribute a qualified birth or adoption distribution (not to exceed the aggregate amount of all qualified birth and adoption distributions made to the individual from the plan) to an applicable eligible retirement plan in which the individual is a beneficiary and to which a rollover may be made.
- Notice 2020-68, 2020-38 IRB 567, provides guidance with respect to the

SECURE Act, including section 113 of the SECURE Act.

3. Section 403(b)(8):

- Section 306 of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), Pub. L. 114-113, 129 Stat. 2242, amends section 408(p)(1)(B) of the Code to permit rollovers from a section 403(b) plan to a SIMPLE IRA.
- Section 41104 of the BBA adds section 6343(f) of the Code to hold an individual harmless in the case of a wrongful levy upon an eligible retirement plan. The eligible retirement plan may permit the contribution of any property or money returned to the individual as a result of the wrongful levy, and such contribution will be treated as a rollover.

4. Section 403(b)(9):

- Section 111 of the SECURE Act amends section 403(b)(9) of the Code to clarify that an employee described in section 414(e)(3)(B) may be included in a section 403(b)(9) retirement income account.

5. Section 403(b)(10):

- Final regulations under section 401(a)(9) that were published on July 2, 2014 (TD 9673, 79 FR 37633), provide a limited modification of the required minimum distribution rules for section 403(b) plans holding qualifying longevity annuity contracts.
- Section 114 of the SECURE Act amends section 401(a)(9)(C)(i)(I) of the Code to increase the age with respect to which the required beginning date for required minimum distributions is determined from age 70 ½ to age 72.
- Section 401 of the SECURE Act amends section 401(a)(9) of the Code to provide new required minimum distribution rules for designated beneficiaries.

6. Section 403(b)(12):

- Notice 2018-95, 2018-52 IRB 1058, provides transition relief from the “once-in-always-in” condition for excluding part-time employees under § 1.403(b)-5(b)(4)(iii)(B), including relief regarding plan language for section 403(b) pre-approved plans.

7. Section 415:

- Section 116 of the SECURE Act amends section 415(c) of the Code to treat difficulty of care payments that are excluded from gross income as compensation for determining retirement contribution limitations.
- Notice 2020-68 provides guidance with respect to the SECURE Act, including section 116 of the SECURE Act.

8. Definition of Spouse:

- *United States v. Windsor*, 570 U.S. 744 (2013). The Supreme Court found that section 3 of the Defense of Marriage Act (DOMA), which provides that, in determining the meaning of any Act of Congress or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife, is unconstitutional because it violates the principles of equal protection.
- Rev. Rul. 2013-17, 2013-38 IRB 201, provides that for Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex, and the IRS adopts a general rule recognizing a marriage of same-sex individuals that was

validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.

- Notice 2014-19, 2014-17 IRB 979, provides guidance on the application (including the retroactive application) of the decision in *United States v. Windsor*, and the holdings of Rev. Rul. 2013-17, to retirement plans qualified under section 401(a) of the Code.²
- Notice 2014-37, 2014-24 IRB 1100, provides guidance on a mid-year amendment to a section 401(k) safe harbor plan or section 401(m) safe harbor plan to reflect the outcome of *United States v. Windsor*, pursuant to Notice 2014-19.
- Final regulations under section 7701 that were published on September 2, 2016 (TD 9785, 81 FR 60609), define terms describing the marital status of taxpayers for federal tax purposes.

9. Disaster-related Rules:

- Section 502 of the Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. 115-63, 131 Stat. 1168, as amended by section 20201 of the BBA, provides special disaster-related rules for use of retirement funds.
- Section 11028 of the Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. 115-97, 131 Stat. 2054, provides special disaster-related rules for use of retirement funds.
- Section 20101 of the BBA provides special disaster-related rules for use of retirement funds.
- Section 202 of the Taxpayer Certainty and Disaster Tax Relief Act of 2019,

² For the application of Notice 2014-19 to section 403(b) plans, see Frequently Asked Question 5 <https://www.irs.gov/retirement-plans/application-of-the-windsor-decision-and-post-windsor-published-guidance-to-qualified-retirement-plans-faqs>.

Pub. L. 116-94, 133 Stat. 2534, provides special disaster-related rules for use of retirement funds.

- Section 2202 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281 (2020), provides special rules for coronavirus-related distributions and plan loans made to qualified individuals.
- Notice 2020-50, 2020-28 IRB 35, provides guidance relating to the application of section 2202 of the CARES Act for qualified individuals and eligible retirement plans.
- Section 302 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. 116-260, 134 Stat. 1182, provides special disaster-related rules for use of retirement funds.

10. Church Plan Clarification:

- Section 336 of the PATH Act amends section 414(c) of the Code to provide special rules for church plans for purposes of determining controlled groups, automatic enrollment arrangements, certain plan transfers and mergers, and investments in collective trusts.
- Notice 2018-81, 2018-43 IRB 666, which provides guidance under section 336(a) of the PATH Act, describes the manner in which taxpayers notify the IRS of revocation of an election to aggregate or disaggregate certain church-related organizations from treatment as a single employer under section 414(c)(2)(C) and (D).

V. DRAFTING INFORMATION

The principal author of this notice is Patrick Gutierrez of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes).

For further information regarding this notice, contact Employee Plans at (513) 975-6319

(not a toll-free number).