



**What You Need to Know about
the 403(b) Pre-Approved Plan Program
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Retirement Plan Resources

- Retirement Plans Website – www.irs.gov/retirement
- 403(b) Plans – from the Retirement Plans website, look to the left-hand navigation bar, select “Types of Retirement Plans,” and click on “403(b) Plans.”
- Newsletters – from the Retirement Plans website, select “Newsletters” in the left-hand navigation bar, choose “subscribe” and then select “Retirement News for Employers,” our newsletter for employers sponsoring retirement plans, and “Employee Plans News,” our newsletter for retirement plans professionals.



Scope of Presentation

- Background and Overview of Pre-Approved Plan Program
- Types of Pre-Approved Plans
- Required Provisions
- Plans of Churches / Mass Submitters
- Scope of a Favorable Letter / Employer Reliance
- Duties of a Pre-Approved Plan Sponsor
- How to Apply
- Additional Resources



Background

- A Code Section 403(b) plan is a retirement plan that is intended for individuals employed by public schools, 501(c)(3) organizations, and church ministers to save for retirement.
- After forty-three years, updated 403(b) regulations were adopted in 2007, generally effective January 1, 2009.



Background

- Updated regulations diminish the extent to which 403(b)s differ from other salary reduction arrangements
 - 401(k)s
 - 457(b) governmental eligible plans.
- Lack of regulations was causing many employers with a 403(b) plan difficulty in compliance.



Written Plan Document Requirement

- Historically, there was no Internal Revenue Code (IRC)-based written plan requirement.
- Originally, a written plan was to be in place by 1/1/09.
- Instead, transitional relief was provided for 2009.
 - Notice 2009-3



Written Plan, cont. - Transition Relief for 2009

- Notice 2009-3 provided transition relief for 2009 calendar year if:
 - Written plan was adopted on or before 12/31/09 and was intended to satisfy 403(b), including the regulations;
 - During 2009, plan was operated in accordance with a reasonable interpretation of 403(b) and the regulations; and
 - On or before 12/31/09, “best efforts” were made to retroactively correct operational failures during 2009 to conform with the written plan.



Remedial Amendment Period – Ann. 2009-89

- Announcement 2009-89 (dated 12/28/2009)
 - Intention to publish Revenue Procedures for
 - Obtaining opinion letters for prototype or other “pre-approved plans”
 - finalizing draft Revenue Procedure in Ann. 2009-34
 - Obtaining determination letter for individually designed plan*
 - Remedial amendment period beginning on 1/1/2010 if certain conditions are met



RAP, cont. – Ann. 2009-89, Requirements

- Remedial amendment period retroactive to January 1, 2010 and employer reliance starting on January 1, 2010, if:
 - You adopted a written plan document no later than December 31, 2009, [and](#)
 - Either,
 - Timely adopt a pre-approved plan with a favorable opinion letter [or](#)
 - Timely apply for an individual determination letter when available*
- Remedial Amendment Period
 - Employers may correct form defects in their plan documents retroactive to January 1, 2010



RAP, cont. – Ann. 2009-89, New Plans

- New Plans (Established On or After 1/1/10)
 - Will have employer reliance retroactive to plan's effective date:
 - If employer either timely adopts pre-approved plan with a favorable opinion letter, or
 - Timely applies for an individual determination letter* and
 - Corrects any form defects retroactive to plan's effective date



How did we get to a Pre-Approved Program?

- Ann. 2009-34 (issued April 14, 2009)
 - Announced **draft** revenue procedure for upcoming 403(b) prototype program and solicited comments
 - Draft Listing of Required Modifications (LRMs) also provided at this time giving potential plan sponsors and adopting employers sample plan provisions
- We received many comments regarding the draft revenue procedure and LRMs – many of these comments were integrated into the 403(b) Pre-Approved Program



How did we get to a Pre-Approved Program, cont.

- Rev. Proc. 2013-22 (issued on April 29, 2013)
 - Establishes the 403(b) Pre-Approved Program (Program)
 - For the first time, provides 403(b) plan sponsors the ability to obtain assurance from the IRS that the form of their written 403(b) plan document meets applicable requirements
 - Benefits of Program include lower cost and easier to administer plans
 - Includes a remedial amendment period



Main Changes from Draft Rev. Proc.

- Individually designed plan determination letter program is not contemplated by Rev. Proc. 2013-22.
- Eligible individually designed plans still have a remedial amendment period during which they are permitted to amend to correct, retroactively, form defects to satisfy § 403(b).
 - IRS will announce, in the future, the last day by which to amend.
- An individually designed plan eligible for RAP will not have reliance that it complies with § 403(b) unless it is timely restated as a pre-approved plan under the Program.



Main Changes, cont.

- Volume Submitter plans are included in addition to prototype plans
 - Now possible to obtain pre-approval for a plan without an adoption agreement
- Minor modifiers of mass submitter § 403(b) prototype plans permitted regardless of expected number of adopting employers
- Vesting schedules for employer contributions



Main Changes, cont.

- Program includes church-related organizations sponsoring a § 403(b)(9) Retirement Income Account plan, regardless of the number of eligible employers expected to adopt the plan



Types of Pre-Approved Plans

There are two general types:

1. 403(b) Prototype Plans,

- receive an opinion letter on its compliance with § 403(b),
- have certain required provisions (discussed later), and
- must be either:
 - A *standardized* prototype plan, or
 - A *nonstandardized* prototype plan; AND

2. 403(b) Volume Submitter Plans,

- receive an advisory letter on its compliance with § 403(b).



Types, cont. – 403(b) Prototype Plans – Plan Documents

A 403(b) prototype plan consists of:

1. a **basic plan document**, which contains all the nonelective provisions of the plan that apply to all adopting employers, AND
2. an **adoption agreement**, which contains all the available options an employer may select under the basic plan document.
 - The adoption agreement must specify whether the plan is a standardized or nonstandardized prototype plan.
 - Adoption agreements have additional required provisions (discussed later).
 - Each basic plan document and adoption agreement pair is considered a separate prototype plan, and requires a separate application under the Program.



Types, cont. – Prototype Plans - Standardized

A prototype plan is a **standardized** plan if, either

1. it permits only salary deferrals, or
2. if the plan permits an employer to elect any other contributions:
 - Those contributions are provided to all employees (except § 410(b) excluded groups);
 - All plan benefits, rights, and features are available to all employees;
 - Any nonelective employer contributions (other than matching) satisfy a designed-based safe harbor; and
 - Compensation is defined as “Total Compensation.”



Types, cont. – Prototype Plans, Nonstandardized

A **nonstandardized** prototype plan is any prototype plan that does *not* meet the requirements to be a standardized plan.

- For example, if the plan allows an employer to use a non-414(s) definition of compensation, or to use a non-design-based safe harbor to allocate its nonelective contributions.



Types, cont. – 403(b) Volume Submitter Plans, Plan Documents

A 403(b) volume submitter plan consists of:

1. a **specimen plan**, which is a model plan document (as opposed to the actual plan of an ER);
 - an adopting ER's actual plan must be *substantially similar* to the approved specimen plan; and
2. an **adoption agreement**, if applicable.
 - Adoption agreements are *not* required for volume submitter plans.
 - BUT, if one is used, it must comply with same requirements as adoption agreements for prototype plans (discussed later).
 - Each specimen plan and adoption agreement pair is considered a separate volume submitter plan, and requires a separate application under the Program.



Required Provisions

Plan must describe all material terms and conditions regarding:

- Eligibility.
- Contributions and Benefits.
- Applicable limitations.
- Timing and form of benefit distributions.
 - includes distribution events, hardship withdrawals, loans, etc.
- Available investment arrangements.



Req'd Provisions, cont. – Eligibility and Non-discrimination

Plan provisions must satisfy:

- Universal availability for elective deferrals
 - The 401(m) test (or terms satisfying a safe harbor), if plan permits matching or employee after-tax contributions.
 - The 401(a)(17) limit on compensation (for contributions other than elective deferrals).
- * Certain exceptions apply to churches, Qualified Church-Controlled Organizations (“QCCOs”), and governmental plans.



Req'd Provisions, cont. – Vesting and Limitations

- Vesting rules for employer contributions (if applicable).
 - Qualified plan vesting rules apply (except for non-ERISA volume submitter plans).
 - Separate accounting of non-vested portion of account is required.
 - 100% vesting upon termination.
- All applicable limits (including the required aggregations for 415 limits).



Req'd Provisions, cont. – Incorporation of Investment Contracts

- Plan must incorporate the terms of the investment arrangements by reference.
- Plan must provide that its terms govern over any inconsistent terms of the investment contracts.
- IRS does not review the investment arrangements.



Req'd Provisions, cont. – Coordination with Investment Contracts

- All required provisions must be in the plan document or the adoption agreement.
- Different investment arrangements can have different features (such as loans or forms of distribution).
- For example, the plan may provide that the forms of distribution are those offered under each investment arrangement.
 - Plan must still contain all legal requirements, such as the 401(a)(9) rules and events that permit distribution.



Req'd Provisions, cont. – Amendments

- Amendment procedure.
- Statement of prototype sponsor or volume submitter's obligation to notify employer of amendments or discontinuation of plan.



Req'd Provisions, cont. – Appendix

A Plan must contain an Appendix that:

- Identifies the parties responsible for various administrative functions.
- Lists all investment vendors offered.
- Includes sufficient information to identify the approved investment arrangements.



Req'd Provisions, cont. – Prototype Plan

- Provisions coordinating the 415 limits with other prototype plans of the employer and related employers.
- Description of amendments and other conditions that will cause loss of pre-approved status.



Req'd Provisions, cont. – Adoption Agreement

The Adoption Agreement must:

- Require the employer to indicate *the type* of employer it is for purposes of:
 - determining whether it is an “eligible employer”,
 - determining what non-discrimination rules apply.
- Allow the employer to add overriding language to coordinate 415 limits among aggregated plans.
- Contain a dated employer signature line.



Req'd Provisions, cont. – Adoption Agreement, cont.

The Adoption Agreement must also:

- Caution that the failure to properly fill out the adoption agreement can cause plan to fail to qualify under 403(b).
- State that it may be used only with one specific plan document (and identify that document).
- Include the prototype sponsor's name, address, and telephone number.



Req'd Provisions, cont. –

Non-Standardized Prototype Plan Adoption Agreement

The Adoption Agreement for a non-standardized prototype plan must state that:

- For non-elective contributions, the plan must satisfy the coverage and non-discrimination requirements of Sections 410(b) and 401(a)(4) on a continuing basis, unless the plan is a governmental plan, a church, or a QCCO.
- The opinion letter may not be relied upon with respect to satisfaction of those requirements.



Plans of Churches

- There are certain rules specifically for pre-approved 403(b) plans of “churches.” **However, this concept is more narrow than the “church plan” concept.**
- Types of “church” organizations
 - Churches
 - Church-related Organizations
 - Qualified Church-Controlled Organizations (QCCOs)
 - Non-Qualified Church-Controlled Organizations (Non-QCCOs)



Churches, cont.

- The Program now permits opinion and advisory letters to:
 - Plans containing provisions applicable only to churches, qualified church-controlled organizations (QCCOs), church-related organizations, or ministers.
 - Plans containing provisions acceptable only in a plan of a church or QCCO (e.g., not requiring universal availability).
- Churches and QCCOs may *not* need opinion or advisory letters for nondiscrimination and coverage.
- However, non-QCCOs must meet nondiscrimination and coverage rules.



Churches, cont. – 403(b)(9) RIAs

- Employers that are “church-related organizations” may adopt either:
 - a regular 403(b) pre-approved plan, or
 - a § 403(b)(9) Retirement Income Account plan.



Churches, cont. – 403(b)(9) RIAs

The Program includes “church-related organizations” sponsoring a § 403(b)(9) Retirement Income Account pre-approved plan.

- May be sponsored under the Program as either a prototype or volume submitter plan.
- BUT, you cannot have both 403(b)(9) accounts and non-403(b)(9) accounts in the same plan, so 403(b)(9) plans require a separate plan document.
- 403(b)(9) sponsors do not need written records of adopting employers.
- 403(b)(9) sponsors do not need 30 adopting employers.



Churches, cont. – 403(b)(9) RIAs

Required program provisions in every § 403(b)(9) Retirement Income Account plan:

- Intention to be a § 403(b)(9) Retirement Income Account
- Must satisfy the separate accounting, investment performance, and exclusive benefit requirements of § 1.403(b)-9(a)(2)(i)
- If life annuity benefits provided, must satisfy the present value and benefit guarantee requirements of § 1.403(b)-9(a)(5)



Mass Submitters

- A mass submitter may sponsor either a prototype or volume submitter plan if it –
 - Has an established place of business in the US where it can be reached every business day
 - Submits opinion or advisory letter applications on behalf of at least 30 prototype sponsors or 30 volume submitters each of which sponsors (on a word-for-word identical basis) the same basic plan document or specimen plan
- A person may sponsor a plan of a mass submitter regardless of the number of adopting employers.
 - Prototype plans may be sponsored as a *word-for-word identical adopter* or as a *minor modifier*
 - Volume submitter plans may be sponsored as a *word-for-word identical adopter*



Mass Submitters, cont.

- The plan of a mass submitter must include language designating the mass submitter as agent of the sponsor for amendments.
- Mass submitters and their sponsors are subject to different user fees than regular sponsors.



Scope of Favorable Letter

- An opinion or advisory letter will cover the form of the plan document meeting 403(b) requirements.
 - Subject to the limitations on employer reliance (discussed later).
 - The Service will only review the basic plan document or specimen plan and the adoption agreement, if applicable.
- An opinion or advisory letter will *not* cover:
 - any other document that may be incorporated by reference into the plan (such as the actual terms of a specific annuity contract); or
 - whether a plan is subject to ERISA or satisfies any ERISA requirements.



Scope, cont.

Opinion and advisory letters will *not* be issued for:

- TEFRA church DB plans;
- grandfathered plans under Rev. Rul. 82-102;
- fill-in provisions that don't have set parameters to ensure employer compliance with 403(b);
- plans that incorporate 415 or the ACP test by reference.



Employer Reliance – Govt Plans

A **governmental plan** may rely on an opinion or advisory letter of a prototype or volume submitter plan that it adopts:

- that the form of the plan satisfies 403(b), *but*
- the letter is *not* a determination that the plan is a governmental plan, and
- *cannot* rely on an advisory letter *to the extent* that the employer modifies the approved specimen plan



Employer Reliance – Church Plans

A plan of a **church or QCCO** may rely on an opinion or advisory letter of a prototype or volume submitter plan that it adopts:

- that the form of the plan satisfies 403(b), *but*
- the letter is *not* a determination that the adopting employer is a church or QCCO, and
- *cannot* rely on an advisory letter *to the extent* that the employer modifies the approved specimen plan



Employer Reliance – other 501(c)(3)s

A plan of other 501(c)(3)s may rely on an opinion or advisory letter of a prototype or volume submitter plan that it adopts:

- that the form of the plan satisfies 403(b), *but*
- *cannot* rely on an advisory letter *to the extent* that the employer modifies the approved specimen plan, and
- *cannot* rely that the plan's nonelective contributions satisfy:
 - the nondiscrimination requirements of 401(a)(4), or
 - the minimum coverage requirements of 410(b)

unless, (i) the plan is a standardized prototype plan and (ii) all of the employers in the adopting employer's controlled group are 403(b) eligible employers.



Employer Reliance – factual issues and 415

- **Factual issues** - regardless of the adopting employer (govt, church, or other 501(c)(3)), the opinion or advisory letter may *not* be relied upon for inherently factual issues.
- **IRC Section 415** - There is *no* reliance for 415 *if* the adopting employer or any related employers maintain another 403(b) plan,
 - *unless*, all the 403(b) plans are prototype plans.



Duties of a Pre-Approved Plan Sponsor

- Maintain a written record of all eligible employers who have adopted the plan.
 - List with names, addresses and EINs must be provided to IRS upon request.
 - Does not apply to 403(b)(9) retirement income accounts.
- Keep the plan qualified.
 - Timely amend for changes in law or guidance.
 - Apply for new opinion or advisory letters when required.



Duties, cont.

- Provide employers a copy of the plan, and all amendments, restatements, and opinion or advisory letters.
- Have procedures to comply with the requirements for notices to adopting employers.



Duties, cont. – Notice Requirements

Sponsor must notify adopting employers of:

- Plan amendments and restatements.
- The need to timely adopt the plan and any restatements.
- Adverse tax consequences if employer fails to timely adopt, or fails to operate plan in accordance with plan amendments.
- Known qualification problems.



Duties, cont. – Notice of Known Qualification Problems

- If the plan sponsor determines that an adopting employer's plan may no longer satisfy the 403(b) requirements, the sponsor must notify the employer.
- Notice is not required where the employer corrects the problem through EPCRS.
- Notification requirement applies only where the sponsor *has knowledge* of the problem.



Duties, cont. – Compliance

- Failing to comply with these requirements may result in:
 - Loss of eligibility to sponsor a pre-approved 403(b) plan.
 - Revocation of any opinion or advisory letters.
- Sponsor must comply with these duties until:
 - It notifies the IRS and adopting employers that it is abandoning the plan
 - It withdraws its application for pre-approval; or
 - The IRS revokes the opinion or advisory letter.



Adopting Employer's Responsibilities

An adopting employer must:

- Fill in adoption agreement correctly.
- If using a non-standardized plan, ensure that non-elective contributions satisfy 410(b) and 401(a)(4).
- Ensure that the plan's investment arrangements comply with 403(b) and are consistent with the plan.
- Operate plan in compliance with its terms.



How to Apply for an Opinion or Advisory Letter

- Applications may be submitted starting **June 28, 2013**.
- A separate application is required for each separate 403(b) plan.
 - For example, one basic plan document with three adoption agreements are considered three separate plans and would require three separate applications.



How to Apply, cont. – Basic Info

- **Application Form** - complete the “Application for Approval of § 403(b) Pre-Approved Plan” found at the end of Rev. Proc. 2013-22.
- **User Fee** - use the applicable user fee found in section 6.03 or 6.04 of Rev. Proc. 2013-8.
- **Address** -
 - Internal Revenue Service
 - Commissioner, TE/GE
 - Attention: SE:T:EP:RA
 - P.O. Box 27063
 - McPherson Station
 - Washington, DC 20038



How to Apply, cont. – Who may apply

- An application for a **prototype** plan may be submitted by:
 - a prototype sponsor,
 - a mass submitter for its mass submitter prototype plan, or
 - a mass submitter on behalf of either:
 - a word-for-word identical adopter, or
 - a minor modifierof the mass submitter's prototype plan
- An application for a **volume submitter** plan may be submitted by:
 - a volume submitter practitioner,
 - a mass submitter for its mass submitter volume submitter plan, or
 - a mass submitter on behalf of
 - a word-for-word identical adopterof the mass submitter's volume submitter plan



How to Apply, cont. – Mass Submitters

- **Mass Submitters** - must also submit applications on behalf of at least 30 word-for-word identical adopters of the mass submitter's plan.
 - The 30-identical-adopter requirement only needs to be met by one of mass submitter's plans.
 - Once the 30-identical-adopter requirement is met for one of its plans, the mass submitter can submit minor modifier applications for its prototype plans.



How to Apply, cont. – Sample Plan Language

- Sample plan provisions may be found at:
http://www.irs.gov/pub/irs-tege/403b_lrm0313.pdf.

Use of this language is not required but it is encouraged. It would be helpful if you identify in your cover letter if such language is being used.



How to Apply, cont. – Additional Issues

- **Failure to Disclose or Provide Accurate info** - may affect the reliance on the letter, including negating any reliance.
- **Additional Info** - Service may require additional info.
- **Deficient Plans** - Service may require revisions before the plan will be reviewed.
- **NOT Transferrable** - an opinion or advisory letter may not be transferred to another entity (does not apply to a simple change of name).
- **Withdrawal** - a sponsor may withdraw an application but must notify EP R&A and each employer who has already adopted the plan (such plans will then be deemed individually designed plan). EP R&A may refer approval concerns to EP Exams.



Abandonment of Sponsorship and Revocation of Favorable Letter

After a sponsor's plan is pre-approved,

- If a sponsor wants to **abandon** a pre-approved plan, it must (i) notify any employers that have adopted the plan (such plans will become individually designed plans, unless the employer adopts another pre-approved plan), and then (ii) notify EP R&A.
- The Service may **revoke** an opinion or advisory letter if it is found to be in error, but such revocation will generally not be retroactive.



Additional Resources

- “IRC 403(b) Tax-Sheltered Annuity Plans” at www.irs.gov
- IRS 403(b) video segments at www.irs.gov
- Revenue Procedure 2013-22 at www.irs.gov
- 403(b) Plan Fix-it Guide at www.irs.gov