

employee benefits lawflash

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New Opinion and Advisory Program for Pre-Approved 403(b) Plans

The IRS releases new procedures and sample plan language to assist 403(b) plan sponsors in obtaining pre-approval of 403(b) plan documents and to ensure documentary compliance with 403(b) requirements.

On March 28, the Internal Revenue Service (IRS) issued Revenue Procedure 2013-22,¹ which establishes long-awaited procedures for IRS pre-approval of Internal Revenue Code (IRC) section 403(b) plan documents. Under the new program established by Revenue Procedure 2013-22, 403(b) plan sponsors—including mutual funds, insurance companies, and professional service firms or similar entities—may obtain advance IRS approval of the form of their 403(b) plans. IRS pre-approval would provide hospitals, schools, and other eligible employers adopting the plan assurance that the plan's written terms comply with IRC section 403(b) and the final 403(b) regulations issued in 2007 (403(b) requirements), which added a written plan document requirement.²

The new procedures for 403(b) plans are similar in many respects to the procedures described in Revenue Procedure 2011-49³ for qualified plans under IRC section 401(a). However, unlike the pre-approved plan program for 401(a) qualified plans, an employer that adopts a pre-approved 403(b) plan will not be able to apply for an individual determination letter for the plan. The IRS has stated that, at this time, it does not intend to create a determination letter program for 403(b) plans.

The IRS also issued an information package⁴ that contains samples of plan provisions that have been found to satisfy certain 403(b) requirements. The information package is intended to assist 403(b) plan sponsors in preparing pre-approved plan documents and to accelerate the IRS's review and approval of such plans. To the extent that an employer sponsors an individually designed plan, the sample plan provisions included in the information package will serve as helpful guidance in ensuring that the employer's individually designed 403(b) plan document meets the 403(b) requirements.

This LawFlash highlights the key provisions of Revenue Procedure 2013-22 and the information package.

Requirements for Prototype 403(b) Plans

Under Revenue Procedure 2013-22, a prototype 403(b) plan consists of a basic plan document and an adoption agreement, both of which are intended to satisfy the 403(b) requirements. Prototype plan sponsors must submit both documents to the IRS for approval. Approval will be provided in the form of an opinion letter issued to the prototype plan sponsor by the IRS that the form of the documents meets such requirements.

The Revenue Procedure provides for two forms of prototype 403(b) plans: the "standardized" plan and the

1. View Revenue Procedure 2013-22 at <http://www.irs.gov/pub/irs-drop/rp-13-22.pdf>.

2. For a summary of the written plan document requirement and other requirements under the final IRC section 403(b) regulations, see our August 8, 2007, LawFlash, "Final Regulations Under Section 403(b)," available at [http://www.morganlewis.com/pubs/EB_403\(b\)_LF_08aug07.pdf](http://www.morganlewis.com/pubs/EB_403(b)_LF_08aug07.pdf).

3. View Revenue Procedure 2011-49 at <http://www.irs.gov/pub/irs-drop/rp-11-49.pdf>.

4. View the information package at http://www.irs.gov/pub/irs-tege/403b_lrm0313.pdf.

“nonstandardized” plan. A prototype 403(b) plan is a “standardized” plan if the only contributions the employer may elect to provide under the plan are elective deferrals or if the terms of the plan satisfy uniform coverage and nondiscrimination requirements with respect to any contributions under the plan other than elective deferrals. An eligible employer that adopts a “standardized” plan generally can rely directly on the opinion letter for the plan.

A “nonstandardized” plan, on the other hand, is a prototype 403(b) plan that is not a “standardized” plan. An eligible employer that adopts a “nonstandardized” plan can generally rely directly on the opinion letter for the plan if the plan is a governmental plan or the employer is a church or qualified church-controlled organization. In all other cases, an eligible employer that adopts a “nonstandardized” plan can generally rely directly on the opinion letter for the plan, except with respect to whether nonelective contributions under the plan satisfy the nondiscrimination requirements of IRC sections 401(a)(4) and 410(b).

Requirements for Volume Submitter 403(b) Plans

Under Revenue Procedure 2013-22, a “volume submitter 403(b) plan” refers to either a “specimen 403(b) plan” of a volume submitter practitioner or a plan of a client of the volume submitter practitioner that is substantially similar to the volume submitter’s approved specimen plan. A “specimen 403(b) plan” is a model plan document of a volume submitter (rather than the actual plan of an eligible employer) that is intended to comply with the 403(b) requirements. A “specimen 403(b) plan” may, but is not required to, include an adoption agreement. The IRS will provide approval in the form of an advisory letter issued to the volume submitter practitioner.

An adopting employer of a volume submitter 403(b) plan can rely directly on the advisory letter for the approved specimen plan, except to the extent that the employer’s plan is not identical to the approved specimen plan. The adopting employer can disregard any differences solely on account of the employer’s selection of options provided under the specimen plan, except with respect to the nondiscrimination requirements of IRC sections 401(a)(4) and 410(b) (unless those requirements do not apply to the plan, for example, because the only contributions under the plan are elective deferrals).

Requirements for All Pre-Approved 403(b) Plans

Under the new program, the IRS will review the basic plan document and adoption agreement, or the specimen plan, as applicable, but it will not review any investment arrangements or any other documents that may form a part of an eligible employer’s plan. Accordingly, the terms of the basic plan document and adoption agreement, or the volume submitter specimen plan, as applicable, must satisfy the 403(b) requirements independent of the terms of the investment arrangements or any other document that forms a part of the eligible employer’s plan.

Because every pre-approved 403(b) plan includes the investment arrangements under the plan in addition to the basic plan document and adoption agreement or the volume submitter specimen plan, every pre-approved 403(b) plan must incorporate, by reference, the terms of the investment arrangements under the plan. Although the IRS’s review is limited to the basic plan document and adoption agreement, or the volume submitter specimen plan, as applicable, the terms of the investment arrangements and other documents that are incorporated by reference must satisfy applicable law and may not contain any provisions that are inconsistent with the 403(b) requirements. Every pre-approved 403(b) plan must provide that the terms of the pre-approved plan will govern in the event of any conflict between the terms of the pre-approved plan and the terms of investment arrangements under the plan or any other document incorporated by reference into the plan.

Revenue Procedure 2013-22 provides a list of all of the provisions that must be included in every pre-approved 403(b) plan. One of those provisions requires each pre-approved 403(b) plan to give the prototype plan sponsor or volume submitter practitioner the authority and responsibility to amend the pre-approved plan on behalf of each adopting eligible employer in order to maintain the plan’s compliance with the 403(b) requirements.

Sample Language

In the information package, the IRS has published sample language that pre-approved 403(b) plan sponsors may use in preparing to submit their plans to the IRS for approval. The sample language has been written for prototype

403(b) plans. However, except for language that relates to requirements applicable only to prototype 403(b) plans, the sample language is also generally suitable for use in volume submitter specimen plans that include an adoption agreement. The sample language may also be appropriately modified to be suitable in volume submitter plans that do not include an adoption agreement. As noted above, the sample language may serve as a guidepost for employers that sponsor individually designed 403(b) plans to help ensure that their plan documents meet the 403(b) requirements.

The sample language is not automatically required in pre-approved 403(b) plans but should be used as a guide in drafting such plans. To expedite the review of their plans, pre-approved 403(b) plan sponsors are encouraged to use the IRS's sample language and to identify if such language is being used in their plan documents.

Procedures for Applying for Opinion or Advisory Letter

The IRS will accept applications from prototype and volume submitter plan sponsors as early as June 28, 2013, but not after April 30, 2014. A separate application is required for each adoption agreement that is offered for adoption by a prototype sponsor and each specimen plan of a volume submitter. The IRS is developing forms for these applications and will issue an announcement when the forms become available. Until such time as the forms are available, an application for an opinion or advisory letter for a 403(b) prototype or specimen plan may be made by submitting the plan to the IRS, along with a completed and signed "Application for Approval of § 403(b) Pre-approved Plan," as provided in the appendix to Revenue Procedure 2013-22. The applicable user fee, determined under Revenue Procedure 2013-8⁵ as if the application were for a qualified master and prototype plan or volume submitter plan under IRC section 401(a), must also be included with the application. Adopting employers will have at least one year after the IRS announces that it has ruled on all of the applications to adopt the pre-approved plans.

Maintenance of Pre-Approved 403(b) Plans

Revenue Procedure 2013-22 requires every prototype and volume submitter 403(b) plan sponsor to amend its plans to reflect changes in the IRC, regulations, revenue rulings, or other guidance issued by the IRS to retain their approved status and send copies of amendments to adopting employers. The IRS expects to issue future guidance to require every prototype and volume submitter 403(b) plan to be restated by the plan sponsors every six years. Upon issuance of a new opinion or advisory letter for the restated plan, adopting eligible employers would generally be required to adopt the restated plan. Although pre-approved plan sponsors are not required to monitor an adopting employer plan's compliance with the 403(b) requirements, all pre-approved plan sponsors are tasked with the duty to inform an adopting employer of its failure to satisfy the 403(b) requirements if the sponsor has knowledge that the employer's plan no longer satisfies those requirements.

Implications

The new procedures and information package provide helpful guidance for 403(b) plan sponsors to obtain IRS pre-approval of 403(b) plan documents and a process by which such pre-approved plan documents can continue to ensure documentary compliance with the 403(b) requirements in the future. In addition, the sample plan provisions included in the information package will help streamline the pre-approval process with the IRS for prototype documents. A pre-approved 403(b) plan document will likely be considered by smaller employers with relatively simple plan designs because of the assurance that the pre-approved plan document meets the 403(b) requirements. However, employers with more complex plan designs may instead continue to opt for an individually designed plan. To that end, the sample plan provision in the information package will provide a helpful resource for employers that sponsor individually designed 403(b) plans for purposes of ensuring that the employer's individually designed 403(b) plan document meets the 403(b) requirements. Of course, no matter whether an employer adopts a pre-approved 403(b) plan document or an individually designed plan document, operating the plan in accordance with the 403(b) requirements is a critical component to compliance.

5. View Revenue Procedure 2013-8 at http://www.irs.gov/irb/2013-01_IRB/ar13.html.

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