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IRS Releases Long-Awaited 403(b) Plan Approval Procedures – Decisions and Opportunities for Vendors and Employers

Nearly four years ago, the IRS asked for comments on a draft revenue procedures for pre-approved Code section 403(b) plans and on draft sample language for use in such plans. Yesterday, the Service officially announced this program in Rev. Proc. 2013-22, effective for applications filed on or after June 28, 2013.

Unfortunately, the new procedure also announces that the Service “does not contemplate the issuance of individual determination letters to sponsors of § 403(b) plans.” Essentially, the guidance appears to push individually designed plans into pre-approved plans if such plans want “reliance” that they satisfy the applicable document requirements. The IRS indicates that these limitations – which will unfavorably impact many public school, university and church 403(b) arrangements, among others – are necessary “to more efficiently direct its limited resources.”

We review the new procedure, and offer comments on major issues, below.

General Structure of Pre-Approved Plan Programs

Two types of pre-approved plans are allowed – 403(b) prototype plans, and 403(b) volume submitter (which includes mass submitter) plans.

A 403(b) prototype will, similar to a 401(a) prototype, consist of a basic plan document and an adoption agreement. Also, 403(b) prototypes may come in “standardized” and “nonstandardized” versions, where the standardized version satisfies uniform coverage and nondiscrimination rules by its terms, and the nonstandardized version does not. However, a governmental, church or qualifying church-controlled organization (“QCCO”) employer may rely on the opinion letter for a nonstandardized plan, since they are not subject to most nondiscrimination rules. A 403(b) volume submitter plan can have an integrated plan document *i.e.*, it need not have a separate adoption agreement.

While the Revenue Procedure indicates that the pre-approved 401(a) plan procedure, Rev. Proc. 2011-49, is the model for the 403(b) procedures, there are some differences. For example, an employer who adopts a pre-approved plan will not be able to get an individually designed letter, such as that which an adopter of a 401(a) volume submitter plan can get (*i.e.*, Form 5307). In addition, a 403(b) volume submitter plan must give the submitter practitioner the power to amend the plan – which is permitted, but not required, for 401(a) volume submitter plans.

Despite a number of comments to the contrary from the 403(b) community, the guidance issued by the IRS provides that the terms of the 403(b) prototype plan must override inconsistent provisions of investment arrangements under the plan. The Service will not review any investment documents as part of the approval process, but will allow the plan documents to condition certain terms, such as availability of loans, hardships and forms of distribution, on whether the underlying investment arrangement permits them, which may address some concerns.

Some Notable Changes

IRS made a number of changes to the 403(b) prototype process from the original proposal in Ann. 2009-34.

There will not be an individually designed determination letter program. It is not entirely clear whether individually designed plans may still get private letter rulings in the future as in the past, but that does not appear to be currently under consideration. We would hope that such an avenue would be provided given the complexity – including due to multiple vendors, formulas, and fiduciary structures – often faced by large 403(b) plans, for which many plan sponsors have made great efforts to develop individually designed plans to maximize operational compliance.

As anticipated, 403(b) pre-approved plans will be able to accommodate participation by churches and church-related organization employers. Also as anticipated, 403(b) pre-approved plans will be able to subject employer contributions to a vesting schedule. However, only certain volume submitter plans not subject to ERISA will be able to provide vesting schedules that do not comply with ERISA. In addition, a single volume submitter plan cannot allow use by both 403(b)(9) church retirement income account plans and other types of 403(b) plans. The 403(b)(9) specimen plan must have a separate document.

The Approval Process

Forms for IRS submissions are still being developed. However, an appendix to the procedure includes a brief application form. Filings must be made by April 30, 2014, in order to extend remedial amendment relief back to January 1, 2010 for employers adopting them.

The minimum number of expected employers for the sponsoring person to file for pre-approval is 30, though there is no minimum for church 403(b)(9) plans. However, grandfathered church defined benefit plans, and self-insured annuity plans under Rev. Rul. 82-102, are expressly ineligible to receive opinions or advisory letters.

Remedial Amendment Period

The Revenue Procedure states that a last day of the 403(b) remedial amendment period by which 403(b) plans must be amended will be announced in subsequent guidance. The IRS asks for comments on that subject, which should be submitted to it by October 28, 2013. Presumably, the date will tie into when pre-approval opinions begin to be issued.

Next Steps

Vendors will want to consider what types of plans they may wish to offer and on what terms. It will also be useful to evaluate the new model language to determine what is workable for drafting new prototype or volume submitter documents and what is not, and how it may fit with existing language being used. Proposed prototype and volume submitter plans will need to be submitted to the IRS by April 30, 2014.

Employers will also want to consider whether they wish to stay with individually designed plans or wait to see pre-approved plan documents. This is particularly true for larger plans with multiple investments or complicated provisions, and for some church and governmental plans which may not fit neatly into prototypes and volume submitter plans. Some churches may wish to consider preparing their own volume submitter plan.

Groom has been working with 403(b) plans and their investment providers, plan administrator, other vendors and plan sponsors since the inception of ERISA, and is well-positioned to help clients with these and the other questions that will arise in this new world for 403(b) plans. Please call your Groom attorney or any of the attorneys listed on this alert for assistance with your 403(b) plan.

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