



IRS Guidance on Initial and Recurring 403(b) Remedial Amendment Periods

Attorneys with Groom Law Group provide an extensive explanation of the IRS' new guidance on 403(b) plan remedial amendment periods.

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Since the finalization of the updated 403(b) regulations in 2009 introduced a written plan document requirement for 403(b) plans generally effective for 2010, the IRS has been gradually issuing guidance on the timing requirements for adopting and amending 403(b) plans.

Originally, the IRS intended to issue guidance on obtaining determination letters for both pre-approved and individually designed plans. However, with [the elimination of determination letters](#) for most individually designed 401(a) plans, the IRS dropped the option of issuing determination letters for individually designed 403(b) plans as well.

In Revenue Procedure 2013-22, as modified by Revenue Procedure 2014-28 and Revenue Procedure 2017-18, the IRS opened the first cycle for IRS review of pre-approved 403(b) plans, and it issued the first batch of approval letters to pre-approved plan sponsors in 2017. Those Revenue Procedures also established [a remedial amendment period](#) under which the sponsor of a 403(b) plan could retroactively correct a plan form defect (i.e., a plan provision that did not satisfy the requirements of Code section 403(b) or the absence of a plan provision necessary to satisfy Code section 403(b)) by adopting a pre-approved plan or amending an individually designed plan, as applicable. Revenue Procedure 2017-18 provides that this "initial remedial amendment period" ends on March 31, 2020.

With the approaching expiration of the initial remedial amendment period, [Revenue Procedure 2019-39 establishes a recurring remedial amendment period](#) for 403(b) plans and extends the initial remedial amendment period beyond March 31, 2020, for certain form defects. Guidance is also provided on the timing of subsequent amendments to both individually designed plans and pre-approved plans. The Revenue Procedure further establishes a pre-approved plan cycle for 403(b) plans and provides that the IRS will issue future guidance on the remedial amendment period rules for 403(b) plans.

Recurring Remedial Amendment Periods for Individually Designed Plans

The Revenue Procedure establishes a recurring remedial amendment period for individually designed 403(b) plans for form defects occurring after the initial remedial amendment period ends on March 31, 2020. Form defects are generally defects regarding Code requirements in the language of the plan document, and are to be distinguished from discretionary amendments. Generally, regarding a form defect, the remedial amendment period begins on: (1) for a new 403(b) plan, the date the plan is effective; (2) for an amendment to an existing 403(b) plan, the earlier of the date the amendment is adopted or put into effect; (3) for changes to a 403(b) plan requirement, the date such change is effective; and (4) for an amendment integral to changes to a 403(b) plan requirement, the date on which the plan was operated in accordance with the change.



the failure described above occurred. For governmental plans, the recurring remedial amendment period ends on the later of the second plan year following the calendar year in which the failure occurred or 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after the end of the calendar year in which the failure occurred. However, for the termination of an individually designed 403(b) plan, the remedial amendment period ends at plan termination and, as such, any retroactive or corrective plan amendments must be adopted in connection with the plan's termination.

Observation: With these remedial amendment rules, the IRS appears to be trying to conform the timing of 403(b) amendments to the timing rules for 401(a) plans.

The recurring remedial amendment period is not applicable where it is not possible to amend a plan retroactively such that all plan provisions necessary to satisfy Code section 403(b) related to the form defect are made effective for the whole remedial amendment period. A 403(b) plan may also not be retroactively amended for a taxable year prior to the taxable year of a sponsoring employer for which the plan was adopted. However, a 403(b) plan may generally still be corrected under [Revenue Procedure 2019-19](#)—regarding the Employee Plans Compliance Resolution System (EPCRS) to the extent it may not be corrected under the new Revenue Procedure.

Effective for plan years beginning on or after January 1, 2020, a discretionary amendment for a non-governmental plan must be adopted by the end of the plan year in which the amendment is put into effect. For a governmental plan, a discretionary amendment must be adopted by the later of the plan year in which the amendment is put into effect or 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the amendment is put into effect.

Limited Extension of Initial March 31, 2020, Remedial Amendment Period

The Revenue Procedure extends the initial March 31, 2020, remedial amendment period to the later of March 31, 2020, or the end of the applicable recurring remedial amendment period (without regard to the requirement that such failure occur after March 31, 2020). For example, for a discretionary amendment that fails to meet the 403(b) requirements and is effective January 1, 2018, for a nongovernmental 403(b) plan, the initial remedial amendment period will end December 31, 2020. However, for a form defect that is related to a Code section 403(b) change effective prior to 2019, such that it was not set forth in the required amendments list, the initial March 31, 2020, remedial amendment period remains the same.

Required Amendments List and Operational Compliance List

Starting with the 2019 required amendments list, expected to be issued later this year, each annual required amendments list will include changes in the Code section 403(b) requirements that are effective during the plan year in which the list is published. Each annual required amendments list will be used to determine the date on which the remedial amendment period discussed above ends. Generally, a change will only be listed on the remedial amendment list after guidance addressing the change has been issued. However, a required amendment may be listed in the remedial list prior to guidance being issued where it is not anticipated that guidance addressing the change will be necessary.



the IRS will also begin to include changes to the Code section 403(b) requirements that are effective during a calendar year. A plan must still maintain operational compliance with any items effective but not listed on the operational compliance list.

Pre-approved Plan Cycles

Following the expiration of the March 31, 2020, initial remedial amendment period, the Revenue Procedure establishes a 403(b) plan pre-approved plan cycle system similar to the 401(a) pre-approved plan cycles. Under this cycle system, a 403(b) plan will be permitted to apply for a pre-approved determination letter during a one-year period beginning at the start of the cycle. Guidance will be issued in advance of the commencement of each cycle.

Initial cycles will be broken into “cycle 1” and “cycle 2.” The period covered by the initial remedial amendment period ending March 31, 2020 (without taking into consideration any extensions) is considered cycle 1. An entity that sponsors a 403(b) plan as a word-for-word adopter or minor modifier of a plan that received a letter during cycle 1 is considered to have a cycle 1 plan (even if such entity applies for a letter after March 31, 2020). Cycle 2 begins immediately after March 31, 2020. The submission period for cycle 2 is not expected to begin until 2023, and the IRS intends to issue additional guidance, including a cumulative list, prior to the commencement of cycle 2.

Recurring Remedial Amendment Period for Pre-approved Plans

The Revenue Procedure also establishes a recurring remedial amendment period for pre-approved 403(b) plans to establish deadlines for the adoption of interim amendments, similar to 401(a) pre-approved plans. Under this recurring remedial amendment period, a pre-approved plan that does not meet the Code 403(b) requirements solely because of a form defect will be considered to satisfy the Code 403(b) requirements if it corrects the form defect prior to the last day of the remedial amendment period. The beginning of the remedial amendment period tracks the applicable timing for individually designed plans, as discussed above. However, the remedial amendment period will end no earlier than the end of cycle 2—i.e., in 2023—provided that an interim amendment is timely adopted (see below) and made in good faith to comply with the Code 403(b) requirements.

For purposes of the recurring remedial amendment period, an interim amendment is one used to correct form defects related to 403(b) plan requirements. The recurring remedial amendment period will also apply in cases where the plan sponsor makes a good faith determination that no interim amendment is required and the IRS later disagrees.

As with individually designed plans, the termination of a pre-approved 403(b) plan ends the recurring remedial amendment period such that any corrective plan amendment must be adopted in connection with the plan termination. Similarly, the inability to use the recurring remedial amendment periods for certain amendments tracks the provisions for individually designed plans, but such amendments are generally eligible for correction under EPCRS.

Pre-approved Plan Amendment Deadlines

The deadline for amending a pre-approved 403(b) plan under the Revenue Procedure depends on whether the amendment is an interim amendment or discretionary amendment. For interim amendments, a pre-approved 403(b) plan



following the calendar year in which the change is effective with respect to the plan.

Effective for plan years beginning on or after January 1, 2020, for discretionary amendments to a non-governmental pre-approved 403(b) plan, a plan is considered to have timely adopted an amendment if the amendment is adopted by the end of the plan year in which it is operationally put into effect.

For governmental pre-approved 403(b) plans, an interim amendment must be adopted by the later of the end of the calendar year following the calendar year in which the change is effective with respect to the plan or 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the amendment is effective. A discretionary amendment must be adopted by the later of the end of the plan year in which it is operationally put into effect or 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the amendment is effective.

However, the timing requirements discussed above do not apply where a statutory provision or IRS guidance provides otherwise—i.e., sets forth an earlier or later amendment deadline to adopt a discretionary or interim amendment.

Limited Extension of Initial Remedial Amendment Period for Cycle 1 Plans

For pre-approved 403(b) plans, the initial remedial amendment period is generally extended at least to the end of cycle 2 if a timely amendment is adopted (or a good faith determination is made that no amendment is needed) intending in good faith to correct a form defect relating to a change in the 403(b) requirements (pending further IRS guidance). This extension does not apply to any form defect not related to a change in the 403(b) requirements that occurred before January 1, 2018, and, as such, any such form defect occurring before January 1, 2018, must be corrected by the initial remedial amendment period of March 31, 2020.

Key Take-Aways

For now, most 403(b) plans will still need to be amended retroactive to the later of January 1, 2010 or the effective date of the plan by March 31, 2020, whether by amending an individually designed plan or by adopting a pre-approved plan. Going forward, the new guidance is helpful in generally conforming the amendment deadlines to the rules for amending 401(a) plans of similar type, whether for individually designed plans or pre-approved plans, and whether changes are on account of changes to the law, including interim amendments to pre-approved plans, or discretionary amendments.

Also helpfully, the IRS has indicated that 403(b) plans will also be addressed in the annual required amendments list and operational compliance list. While 403(b) plans may have some problems in getting used to such a formalistic amendment regime as 401(a) plans have had to learn over the years, at least there are now rules.

John Barlow's practice focuses on taxation issues relating to qualified retirement plans of public companies and governmental entities and the preservation of a plan's tax-qualified status. Barlow also has experience working with multiemployer pension and welfare plans.

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