

## IRS Announces Opening of the Second 403(b) Pre-Approved Plan Cycle

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### Background on the 403(b) Pre-Approved Plan Program

In 2013, the IRS began accepting prototype and volume submitter 403(b) plans (now referred to collectively as “pre-approved” plans) in the first-ever 403(b) remedial amendment submission cycle (“Cycle 1”). The approval letters for those pre-approved plans were sent out by the IRS around March, 2017, and eligible employers using them were to have adopted those new documents by June 30, 2020 (known as the end of the “Initial Remedial Amendment Period”). Since that time, many employers have adopted such IRS-approved 403(b) plan documents. In addition, in the SECURE Act of 2019, Congress clarified that employees of qualified church controlled organizations and non-qualified church controlled organizations (known as “QCCOs and “Non-QCCOs”) could participate in church 403(b)(9) retirement income account plans. This clarification was particularly important because many church-related colleges, hospitals, universities and nursing homes are Non-QCCOs.

Like the pre-approved plan document program for 401(a) and 401(k) plans, the 403(b) pre-approved plan document program is intended to be on a regular 6-year cycle. Many 403(b) plan providers and eligible employers, particularly QCCOs and Non-QCCOs, have been wondering when the second cycle (“Cycle 2”) would begin and what changes it might include. The IRS has now issued guidance on Cycle 2 for 403(b) plans, and included additional related information, in new Rev. Proc. 2021-37. As expected, many of these provisions conform the 403(b) pre-approved plan document program more closely to that for 401(a) pre-approved plans, including replacing “volume

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submitter” and “prototype” plan terminology with the single designation of “pre-approved” plans (which includes two categories, standardized and nonstandardized). A pre-approved plan can be in either a single plan document format or a basic plan document with adoption agreement.

## Key Provisions of the 403(b) Cycle 2 Guidance

The following summarizes some of the key information the IRS has announced for Cycle 2.

### New Cycle Dates

The filing period for 403(b) pre-approved plans under Cycle 2 will commence May 2, 2022, and end on May 1, 2023.

### Amendments to 403(b) Pre-approved Plans

An adopting employer of a 403(b) pre-approved nonstandardized plan that makes amendments that are “not extensive” will lose reliance on the plan’s opinion letter, but can file a Form 5307 to request a determination letter, similar to a 401(a) pre-approved plan. The adopter of either a standardized or nonstandardized 403(b) plan may also file a Form 5307 for a determination letter after adding language to satisfy Code section 415 due to the required aggregation of plans. However, if other amendments cause the plan to be treated as individually designed, the adopter may not file for a determination letter using Form 5307.

### New 403(b) Cumulative List

Before the filing period for Cycle 2 begins, the IRS will issue a cumulative list of changes required to be added to plan documents since Cycle 1.

### Filing of Minor Modifiers to Mass Submitter Plans

Applications for a minor modifier adopter of a mass submitter’s 403(b) plan document will no longer be accepted after the cycle’s employer adoption window begins (which is the approximately two-year period, to be announced by the IRS, during which the employer must adopt an updated and approved pre-approved plan for reliance).

### Hardship Safe Harbors

Nonstandardized plans may provide for either safe harbor or non-safe harbor hardship distributions.

### QCCOs and Non-QCCOs

An employee of a QCCO or Non-QCCO is permitted to participate in a 403(b)(9) pre-approved plan. Additionally, a Cycle 1 403(b) pre-approved plan that is intended to be a 403(b)(9) retirement income account plan may make a good-faith amendment to permit the participation of employees of QCCOs and Non-QCCOs retroactive to the beginning of Cycle 2 (July 1, 2020). Such an amendment does not affect the adopting employer’s reliance on the Cycle 1 opinion letter for the plan. In the case of Non-QCCOs, the plan must provide that the nondiscrimination requirements of Code section 403(b)(12) will

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apply to any employee other than an employee of the QCCO or church, and an adopting employer will have until the end of the Cycle 2 employer adoption window to adopt a 403(b) pre-approved plan that so provides. Each adopting employer (in the adoption agreement, for example), must identify whether it is a Non-QCCO, QCCO or a church.

## Remedial Amendment Period for Form Defects

The expiration date of the remedial amendment period for good faith interim amendments to cure “Form Defects” (generally, provisions that fail to satisfy 403(b); i.e., other than discretionary amendments) first occurring after June 30, 2020, is the period that expires at the later of (1) the end of the cycle that includes the date on which the remedial amendment period would have ended if the plan were an individually designed plan, or (2) the end of the first cycle in which an application for an opinion letter that considers the Form Defect may be submitted.

## Limited Extension of the Initial Remedial Amendment Period

The deadline for adoption of the initial amendment that qualifies the plan for the extension of the Initial Remedial Amendment Period for certain Form Defects is delayed until the later of (i) June 30, 2020, or (ii) the end of the second calendar year following the calendar year in which the change in 403(b) requirements is effective with respect to a plan.

## Interim Amendment Deadline

The amendment deadline for adoption of an interim amendment (i.e., to satisfy section 403(b), not a discretionary amendment) to a 403(b) pre-approved plan that is not a governmental plan is the end of the second calendar year following the calendar year in which the change in 403(b) requirements is effective. For a governmental 403(b) plan, the plan amendment must be adopted by the later of (1) the second calendar year following the calendar year in which the change in 403(b) requirements is effective, or (2) 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 plan amendment becomes effective.

## Request for Comments

The Treasury Department and the IRS invite further comments on the 403(b) opinion letter program.

## Final Observations

Providers of existing 403(b) pre-approved plan documents that wish to continue them will want to begin to prepare for Cycle 2 filings. Experience with existing plan documents suggests that some “clean-up” of the existing plan documents will occur, as well as the inclusion of relevant provisions of the SECURE Act and CARES Act. The clarification of the inclusion of QCCOs and Non-QCCOs in 403(b)(9) plan documents may make those documents more useful as well. However, drafting in earnest may have to wait until we see the new 403(b) cumulative list and an updated Listing of Required Modifications (LRMs) for 403(b) plans.

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Another interesting development is that the Revenue Procedure also notes that the IRS is exploring a limited individually designed 403(b) plan determination letter program similar to that available for 401(a) plans, subject to resource availability. While it is too early to know if the resources will be available to start an individually designed 403(b) plan determination letter program and which plans will be eligible to use the program, some plan sponsors, particularly of large plans with unique features, might prefer an IRS-approved individually designed plan to a pre-approved one.

If you have any questions concerning Cycle 2 for pre-approved plans, please contact your regular Groom lawyer.

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