

## IRS Provides Guidance for Late Pre-Approved Plan Restatements

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As employers using a pre-approved plan document are aware, a plan restatement must be adopted by the end of the two-year window following the 6-year remedial amendment period cycle. With the Cycle 3 deadline for defined contribution plans coming up – July 31, 2022 – guidance on what to do if the plan sponsor misses a restatement deadline is particularly welcome. We discuss the recent IRS guidance below.

### A. Defined Benefit Plans

For 401(a) defined benefit plans, the two-year restatement window for the most recent recurring plan amendment cycle (Cycle 2) ended July 31, 2020 (*see* Announcement 2018-05 and Notice 2020-35). A plan for which a restatement was not adopted by the Cycle 2 deadline is no longer a pre-approved plan – such plan becomes an individually designed plan for the period between the restatement deadline and the date the restatement is actually adopted. Further, the employer loses its status as a prior adopter for failing to timely adopt a pre-approved plan for the cycle immediately preceding the opening of the current cycle.

In the event of such a conversion to an individually designed plan, the plan must be reviewed to ensure any prior interim and discretionary amendments made while the plan was a pre-approved plan meet the requirements of Code section 401(a). Any form defects found will need to be corrected, with the rules applicable to remedial amendment periods for individually designed plans governing the determination of the failure period (*see* Rev. Proc. 2016-37, section 5).

### B. 403(b) Plans

Similarly, employers sponsoring a 403(b) plan were given a 3-year window to restate their 403(b) plans to become a pre-approved plan for Cycle 1, with the adoption window ending on June 30, 2020 (*see*

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Revenue Procedure 2017-18 and Notice 2020-35). As this was the first cycle for 403(b) pre-approved plans, a plan that failed to adopt a restatement by June 30, 2020 never became a pre-approved plan and would be an individually designed plan for the period between the restatement deadline and the date the restatement is adopted. As above, the plan should be reviewed for Code compliance, in this case with section 403(b).

## C. Description of Correction

The IRS has confirmed in a May 23 website posting that such individually designed plans that fail to meet the applicable Code requirements can be corrected under the Employee Plans Compliance Resolution System of Revenue Procedure 2021-30 (“EPCRS”). Specifically, self-correction is available so long as the plan satisfies all requirements for the self-correction program, including timing requirements and the requirement for a favorable prior letter.

Specifically, the IRS clarified that a defined benefit plan meets the requirement of a “prior letter” through the plan’s reliance on an opinion or advisory letter from the prior adoption of a pre-approved plan, as such letter is equivalent to a determination letter (*see* Rev. Proc. 2015-36, section 19.04). For 403(b) plans, as there was no option to apply for a determination letter, and no prior option to apply for an opinion (or advisory) letter, the prior letter requirement is satisfied if the employer had a written plan document in place in 2009 (or in the year the plan was first adopted, if later). Importantly, a Voluntary Correction Program (“VCP”) application would only be necessary to correct the failure if the defect has been ongoing for more than three years.

## D. Observations

This IRS clarification – allowing correction of these late adoptions without requiring a corresponding VCP filing – is very helpful. Further, while the IRS did not specifically address pre-approved defined contribution plans, for which the deadline to adopt a restatement for the current cycle is July 31, 2022, it is reasonable to conclude that this guidance will apply to those plans as well.

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