

December 11, 2009

MEMORANDUM TO CLIENTS

RE: IRS Offers Initial Remedial Amendment Period Guidance for 403(b) Plans

Signaling what will be coming down the pike soon for 403(b) plans, the IRS has issued Announcement 2009-89 to provide some information in advance of the anticipated 403(b) "pre-approved" or prototype program, which it says will be out "in a few months", and will be followed by an individual determination letter program.

The principal information in the Announcement regards a new remedial amendment period that will be extended up to the adoption of an IRS-approved 403(b) plan. The Announcement provides that if a written 403(b) plan that is intended to satisfy the requirements of Section 403(b) and the regulations is adopted on or before December 31, 2009 (as required), then, under the forthcoming revenue procedures, if the employer sponsoring the plan either adopts a pre-approved plan that has received a favorable opinion letter or applies for an individual determination letter when available, the employer will have a remedial amendment period in which to amend the plan to correct any form defects retroactive to January 1, 2010. Further, in such a case, the employer will have reliance, beginning January 1, 2010, that the form of its written plan satisfies the requirements of § 403(b) and the regulations retroactive to January 1, 2010. For an employer that first establishes a 403(b) plan after December 31, 2009, a similar rule will allow compliance retroactive to that plan's effective date.

The original IRS Announcement 2009-34 and Notice 2009-3 suggested such rules would be issued, but it is helpful to have it confirmed, and also to have it extended to individually designed plans. This Announcement does not set out specific time frames for when prototype or individually designed plans have to be submitted to the IRS, and how long the employers have to adopt them once approved, but indicates those will be established when the prototype plan revenue procedure comes out.

The Announcement also provides that the model plan in Rev. Proc. 2007-71 may continue to be relied upon during this remedial amendment period to the extent set forth in that revenue procedure.

Finally, the Announcement provides that employers may rely on it prior to publication of the revenue procedure for pre-approved 403(b) plans, so that, in the interim, employers should not request rulings or determination letters on the form of their 403(b) plan.

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If you have questions, please contact any of the Groom attorneys listed below:

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