

## New 403(b) Plan Determination Letter Program

**PUBLISHED:** November 17, 2022

Continuing a recent trend to more closely align 403(b) plans with tax-qualified 401(k) plans, the Internal Revenue Service (“IRS”) recently issued [Revenue Procedure 2022-40](#) (November 7, 2022) to create a limited determination letter program for individually designed 403(b) plans. For the first time ever, 403(b) plan sponsors can request an IRS determination letter for their “individually designed” 403(b) plans on initial plan qualification, on plan termination, or in other limited circumstances to be established by the IRS. The program opens June 1, 2023, with a staggered schedule for initial plan qualification requests.

### Background

When the 403(b) regulations were finalized in 2009, they imposed a written plan document requirement for 403(b) plans. While the IRS began approving plan documents for “pre-approved” 403(b) plans in 2013, no mechanism was available for the IRS to review and approve individually designed 403(b) plan documents. (Although some may recall that years ago, the IRS used to issue private letter rulings on 403(b) plans.) Revenue Procedure 2022-40 fills that void by providing a method for individually designed 403(b) plan sponsors to seek review of their plan documents.

### Determination Letter Program

Under Revenue Procedure 2022-40, an individually designed 403(b) plan can apply to the IRS for a determination letter for initial plan qualification and on plan termination. The availability of the program in other circumstances will need to be established in future IRS guidance. For example, Revenue Procedure 2022-40 does not extend the 403(b) plan determination letter program to plan mergers in connection with corporate transactions, as with the tax-qualified plan program, although IRS may have assumed that

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corporate transactions (and related plan mergers) are less common for entities that sponsor 403(b) plans.

The Revenue Procedure provides helpful guidance on when a plan is eligible to apply for “initial” plan qualification, by including examples of when a plan is (or is not) considered to have previously filed for a determination letter on Form 5300. For example, a determination letter issued pursuant to a Form 5307 filing for a pre-approved plan no longer precludes a subsequent Form 5300 filing under this program. This new guidance applies to all individually designed qualified and 403(b) plans seeking a determination letter on initial plan qualification.

Applications for a determination letter upon plan termination must be filed by the later of (1) one year from the effective date of the termination, or (2) one year from the date on which the action terminating the plan is taken, but in no event later than 12 months from the date of distribution of substantially all plan assets in connection with such termination.

403(b) plans applying for an initial determination letter will be eligible to file on a staggered basis over the next three years depending on the sponsoring employer’s EIN:

<b>If the EIN of the Plan Sponsor ends in:</b>	<b>A determination letter application may be submitted beginning on:</b>
1, 2, or 3	June 1, 2023
4, 5, 6, or 7	June 1, 2024
8, 9, or 0	June 1, 2025

The scope of the IRS’s review for ongoing plans will include the requirements provided on all Required Amendments Lists issued on or before the last day of the second calendar year preceding the year in which the application is submitted. For example, for 403(b) plans eligible to apply on June 1, 2023 that submit applications before the end of 2023, the IRS will review requirements reflected on the Required Amendments Lists for 2021 and prior years. The IRS will also review any other section 403(b) requirements that are not included on a Required Amendments List, but which were in effect on or before the last day of the second calendar year preceding the year in which the application is submitted. For terminating plans, the review will encompass any amendments required to be adopted to reflect section 403(b) requirements that apply at the time of termination, regardless of whether they are included on a Required Amendments List. Receipt of a favorable letter confirms the IRS’s approval of the plan document’s terms and could help streamline any inquiry relating to prior plan documents in the event of an audit.

Finally, pre-TEFRA defined benefit church 403(b)(9) retirement income accounts and 403(b) defined benefit plans grandfathered under Revenue Ruling 82-102 will not be eligible to be submitted for a determination letter.



## Another Key Takeaway from Revenue Procedure 2022-40

In addition to creating a determination letter program that is almost on par with that available to tax-qualified plans, Revenue Procedure 2022-40 conforms the tax-qualified plan remedial amendment periods for disqualifying provisions in new plans to align with those periods outlined in Revenue Procedure 2019-39 for new 403(b) plans (*e.g.*, the last day of the second calendar year following the calendar year in which the plan was put into effect for non-governmental plans).

If you have questions on the expansion of the determination letter program, or need assistance with preparing a determination letter application, please reach out to your regular Groom attorney.

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