

IRS Makes Way for 403(b) Prototype Plans

by B. David Joffe

In Announcement 2009-34, the Internal Revenue Service (IRS) has indicated its intention to establish a program for the preapproval of prototype plans under Section 403(b) of the Internal Revenue Code (Code). Once adopted, the program will allow many employers that sponsor 403(b) plans to adopt a prototype plan and have reliance on an opinion letter issued by the IRS regarding the acceptability under Code Section 403(b) of the form of the plan. To date, the IRS has not offered such a program, which is used by many employers for tax-qualified plans such as 401(k) plans.

The Announcement includes a draft revenue procedure that contains the IRS's proposed procedures for issuing opinion letters. The IRS has also posted draft sample plan language on its website for use in drafting prototype plans. Before the procedure and language are finalized, the IRS is seeking public comments by June 1, 2009.

Prior Guidance

Final regulations under Code Section 403(b) were published on July 26, 2007. These regulations are a comprehensive update of the Section 403(b) regulations and are generally effective January 1, 2009. Under the regulations, sponsors of Section 403(b) plans are required to maintain a written plan. Plan sponsors can meet this requirement if they adopt a written plan by no later than December 31, 2009, that satisfies the requirements under the regulations.

In Revenue Procedure 2007-71, the IRS previously provided guidance regarding compliance with the regulations and published model plan language that may be used by public schools. The IRS indicated that other eligible employers may use the model language as sample language to comply with one or more of the requirements imposed by the regulations. The new procedure will not modify the existing guidance for public schools. Therefore, absent further notice, public schools as well as other eligible employers may continue to use the model language.

Opinion Letter Program

Although the program is new for 403(b) plans, the procedures and rules of this program are generally similar to those that apply for master and prototype plans qualified under Code Section 401(a), except for differences related to the requirements of § 403(b). The program for 403(b) prototype plans will allow employee benefits practitioners and financial organizations, such as mutual funds and insurance companies, to obtain advance approval of the form of a 403(b) prototype plan. Employers can then adopt the pre-approved prototype plan.

Generally, under the draft revenue procedure, a 403(b) prototype plan is a plan document prepared by a vendor (or other person) who expects the plan to be adopted by at least 30 employers, along with an adoption agreement to be completed by each adopting employer. Employers who adopt these 403(b) prototype plans will generally have assurance that the form of the plan meets the requirements under Code Section 403(b) and the final regulations.

Determination Letter Program

The IRS also indicated in the Announcement that it intends to establish a determination letter program for 403(b) plans at a later date which would allow eligible employers to obtain determination letters for individually designed plans. This will be helpful for employers that have customized plan designs which do not fit within the prototype. For example, the draft revenue procedure does not permit 403(b) prototype plans to include vesting schedules. It will also be particularly helpful for governmental and nonelecting church plans that are not subject to certain requirements under Code Section 403(b) or features which will be included in the prototype.

If you have any questions about the new guidance, please contact [B. David Joffe](#) or one of the other Employee Benefits & Executive Compensation attorneys at [Bradley Arant Boulton Cummings LLP](#).

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