



**What You Need to Know about  
the 403(b) Pre-Approved Plan Program  
Phone Forum, June 25, 2013**

Anne Bolling – IRS Employee Plans

Patrick Gutierrez – IRS Employee Plans

Jason Levine – IRS Employee Plans



# Retirement Plan Resources

---

- Retirement Plans Website – [www.irs.gov/retirement](http://www.irs.gov/retirement)
- 403(b) Plans – from the Retirement Plans website, look to the left-hand navigation bar, select “Types of Retirement Plans,” and click on “403(b) Plans.”
- Newsletters – from the Retirement Plans website, select “Newsletters” in the left-hand navigation bar, choose “subscribe” and then select “Retirement News for Employers,” our newsletter for employers sponsoring retirement plans, and “Employee Plans News,” our newsletter for retirement plans professionals.



# Scope of Presentation

---

- Background and Overview of Pre-Approved Plan Program
- Types of Pre-Approved Plans
- Required Provisions
- Plans of Churches / Mass Submitters
- Scope of a Favorable Letter / Employer Reliance
- Duties of a Pre-Approved Plan Sponsor
- How to Apply
- Additional Resources



# Background

---

- A Code Section 403(b) plan is a retirement plan that is intended for individuals employed by public schools, 501(c)(3) organizations, and church ministers to save for retirement.
- After forty-three years, updated 403(b) regulations were adopted in 2007, generally effective January 1, 2009.



# Background

---

- Updated regulations diminish the extent to which 403(b)s differ from other salary reduction arrangements
  - 401(k)s
  - 457(b) governmental eligible plans.
- Lack of regulations was causing many employers with a 403(b) plan difficulty in compliance.



# Written Plan Document Requirement

---

- Historically, there was no Internal Revenue Code (IRC)-based written plan requirement.
- Originally, a written plan was to be in place by 1/1/09.
- Instead, transitional relief was provided for 2009.
  - Notice 2009-3



## Written Plan, cont. - Transition Relief for 2009

---

- Notice 2009-3 provided transition relief for 2009 calendar year if:
  - Written plan was adopted on or before 12/31/09 and was intended to satisfy 403(b), including the regulations;
  - During 2009, plan was operated in accordance with a reasonable interpretation of 403(b) and the regulations; and
  - On or before 12/31/09, “best efforts” were made to retroactively correct operational failures during 2009 to conform with the written plan.



## Remedial Amendment Period – Ann. 2009-89

---

- Announcement 2009-89 (dated 12/28/2009)
  - Intention to publish Revenue Procedures for
    - Obtaining opinion letters for prototype or other “pre-approved plans”
      - finalizing draft Revenue Procedure in Ann. 2009-34
    - Obtaining determination letter for individually designed plan\*
  - Remedial amendment period beginning on 1/1/2010 if certain conditions are met



## RAP, cont. – Ann. 2009-89, Requirements

---

- Remedial amendment period retroactive to January 1, 2010 and employer reliance starting on January 1, 2010, if:
  - You adopted a written plan document no later than December 31, 2009, [and](#)
  - Either,
    - Timely adopt a pre-approved plan with a favorable opinion letter [or](#)
    - Timely apply for an individual determination letter when available\*
- Remedial Amendment Period
  - Employers may correct form defects in their plan documents retroactive to January 1, 2010



## RAP, cont. – Ann. 2009-89, New Plans

---

- New Plans (Established On or After 1/1/10)
  - Will have employer reliance retroactive to plan's effective date:
    - If employer either timely adopts pre-approved plan with a favorable opinion letter, or
    - Timely applies for an individual determination letter\* and
    - Corrects any form defects retroactive to plan's effective date



# How did we get to a Pre-Approved Program?

- Ann. 2009-34 (issued April 14, 2009)
  - Announced **draft** revenue procedure for upcoming 403(b) prototype program and solicited comments
  - Draft Listing of Required Modifications (LRMs) also provided at this time giving potential plan sponsors and adopting employers sample plan provisions
- We received many comments regarding the draft revenue procedure and LRMs – many of these comments were integrated into the 403(b) Pre-Approved Program



# How did we get to a Pre-Approved Program, cont.

---

- Rev. Proc. 2013-22 (issued on April 29, 2013)
  - Establishes the 403(b) Pre-Approved Program (Program)
  - For the first time, provides 403(b) plan sponsors the ability to obtain assurance from the IRS that the form of their written 403(b) plan document meets applicable requirements
  - Benefits of Program include lower cost and easier to administer plans
  - Includes a remedial amendment period



# Main Changes from Draft Rev. Proc.

---

- Individually designed plan determination letter program is not contemplated by Rev. Proc. 2013-22.
- Eligible individually designed plans still have a remedial amendment period during which they are permitted to amend to correct, retroactively, form defects to satisfy § 403(b).
  - IRS will announce, in the future, the last day by which to amend.
- An individually designed plan eligible for RAP will not have reliance that it complies with § 403(b) unless it is timely restated as a pre-approved plan under the Program.



## Main Changes, cont.

---

- Volume Submitter plans are included in addition to prototype plans
  - Now possible to obtain pre-approval for a plan without an adoption agreement
- Minor modifiers of mass submitter § 403(b) prototype plans permitted regardless of expected number of adopting employers
- Vesting schedules for employer contributions



## Main Changes, cont.

---

- Program includes church-related organizations sponsoring a § 403(b)(9) Retirement Income Account plan, regardless of the number of eligible employers expected to adopt the plan



# Types of Pre-Approved Plans

---

There are two general types:

## 1. 403(b) Prototype Plans,

- receive an opinion letter on its compliance with § 403(b),
- have certain required provisions (discussed later), and
- must be either:
  - A *standardized* prototype plan, or
  - A *nonstandardized* prototype plan; AND

## 2. 403(b) Volume Submitter Plans,

- receive an advisory letter on its compliance with § 403(b).



## Types, cont. – 403(b) Prototype Plans – Plan Documents

A 403(b) prototype plan consists of:

1. a **basic plan document**, which contains all the nonelective provisions of the plan that apply to all adopting employers,  
AND
2. an **adoption agreement**, which contains all the available options an employer may select under the basic plan document.
  - The adoption agreement must specify whether the plan is a standardized or nonstandardized prototype plan.
  - Adoptions agreements have additional required provisions (discussed later).
  - Each basic plan document and adoption agreement pair is considered a separate prototype plan, and requires a separate application under the Program.



## Types, cont. – Prototype Plans - Standardized

A prototype plan is a **standardized** plan if, either

1. it permits only salary deferrals, or
2. if the plan permits an employer to elect any other contributions:
  - Those contributions are provided to all employees (except § 410(b) excluded groups);
  - All plan benefits, rights, and features are available to all employees;
  - Any nonelective employer contributions (other than matching) satisfy a designed-based safe harbor; and
  - Compensation is defined as “Total Compensation.”



## Types, cont. – Prototype Plans, Nonstandardized

---

A **nonstandardized** prototype plan is any prototype plan that does *not* meet the requirements to be a standardized plan.

- For example, if the plan allows an employer to use a non-414(s) definition of compensation, or to use a non-design-based safe harbor to allocate its nonelective contributions.



## Types, cont. – 403(b) Volume Submitter Plans, Plan Documents

---

A 403(b) volume submitter plan consists of:

1. a **specimen plan**, which is a model plan document (as opposed to the actual plan of an ER);
  - an adopting ER's actual plan must be *substantially similar* to the approved specimen plan; and
2. an **adoption agreement**, if applicable.
  - Adoption agreements are *not* required for volume submitter plans.
  - BUT, if one is used, it must comply with same requirements as adoption agreements for prototype plans (discussed later).
  - Each specimen plan and adoption agreement pair is considered a separate volume submitter plan, and requires a separate application under the Program.



# Required Provisions

---

Plan must describe all material terms and conditions regarding:

- Eligibility.
- Contributions and Benefits.
- Applicable limitations.
- Timing and form of benefit distributions.
  - includes distribution events, hardship withdrawals, loans, etc.
- Available investment arrangements.



## Req'd Provisions, cont. – Eligibility and Non-discrimination

---

Plan provisions must satisfy:

- Universal availability for elective deferrals
  - The 401(m) test (or terms satisfying a safe harbor), if plan permits matching or employee after-tax contributions.
  - The 401(a)(17) limit on compensation (for contributions other than elective deferrals).
- \* Certain exceptions apply to churches, Qualified Church-Controlled Organizations (“QCCOs”), and governmental plans.



## Req'd Provisions, cont. – Vesting and Limitations

---

- Vesting rules for employer contributions (if applicable).
  - Qualified plan vesting rules apply (except for non-ERISA volume submitter plans).
  - Separate accounting of non-vested portion of account is required.
  - 100% vesting upon termination.
- All applicable limits (including the required aggregations for 415 limits).



## Req'd Provisions, cont. – Incorporation of Investment Contracts

---

- Plan must incorporate the terms of the investment arrangements by reference.
- Plan must provide that its terms govern over any inconsistent terms of the investment contracts.
- IRS does not review the investment arrangements.



## Req'd Provisions, cont. – Coordination with Investment Contracts

---

- All required provisions must be in the plan document or the adoption agreement.
- Different investment arrangements can have different features (such as loans or forms of distribution).
- For example, the plan may provide that the forms of distribution are those offered under each investment arrangement.
  - Plan must still contain all legal requirements, such as the 401(a)(9) rules and events that permit distribution.



## Req'd Provisions, cont. – Amendments

---

- Amendment procedure.
- Statement of prototype sponsor or volume submitter's obligation to notify employer of amendments or discontinuation of plan.



## Req'd Provisions, cont. – Appendix

---

A Plan must contain an Appendix that:

- Identifies the parties responsible for various administrative functions.
- Lists all investment vendors offered.
- Includes sufficient information to identify the approved investment arrangements.



## Req'd Provisions, cont. – Prototype Plan

---

- Provisions coordinating the 415 limits with other prototype plans of the employer and related employers.
- Description of amendments and other conditions that will cause loss of pre-approved status.



## Req'd Provisions, cont. – Adoption Agreement

---

The Adoption Agreement must:

- Require the employer to indicate *the type* of employer it is for purposes of:
  - determining whether it is an “eligible employer”,
  - determining what non-discrimination rules apply.
- Allow the employer to add overriding language to coordinate 415 limits among aggregated plans.
- Contain a dated employer signature line.



## Req'd Provisions, cont. – Adoption Agreement, cont.

---

The Adoption Agreement must also:

- Caution that the failure to properly fill out the adoption agreement can cause plan to fail to qualify under 403(b).
- State that it may be used only with one specific plan document (and identify that document).
- Include the prototype sponsor's name, address, and telephone number.



## Req'd Provisions, cont. –

### Non-Standardized Prototype Plan Adoption Agreement

---

The Adoption Agreement for a non-standardized prototype plan must state that:

- For non-elective contributions, the plan must satisfy the coverage and non-discrimination requirements of Sections 410(b) and 401(a)(4) on a continuing basis, unless the plan is a governmental plan, a church, or a QCCO.
- The opinion letter may not be relied upon with respect to satisfaction of those requirements.



# Plans of Churches

---

- There are certain rules specifically for pre-approved 403(b) plans of “churches.” **However, this concept is more narrow than the “church plan” concept.**
- Types of “church” organizations
  - Churches
  - Church-related Organizations
  - Qualified Church-Controlled Organizations (QCCOs)
  - Non-Qualified Church-Controlled Organizations (Non-QCCOs)



## Churches, cont.

---

- The Program now permits opinion and advisory letters to:
  - Plans containing provisions applicable only to churches, qualified church-controlled organizations (QCCOs), church-related organizations, or ministers.
  - Plans containing provisions acceptable only in a plan of a church or QCCO (e.g., not requiring universal availability).
- Churches and QCCOs may *not* need opinion or advisory letters for nondiscrimination and coverage.
- However, non-QCCOs must meet nondiscrimination and coverage rules.



## Churches, cont. – 403(b)(9) RIAs

---

- Employers that are “church-related organizations” may adopt either:
  - a regular 403(b) pre-approved plan, or
  - a § 403(b)(9) Retirement Income Account plan.



## Churches, cont. – 403(b)(9) RIAs

---

The Program includes “church-related organizations” sponsoring a § 403(b)(9) Retirement Income Account pre-approved plan.

- May be sponsored under the Program as either a prototype or volume submitter plan.
- BUT, you cannot have both 403(b)(9) accounts and non-403(b)(9) accounts in the same plan, so 403(b)(9) plans require a separate plan document.
- 403(b)(9) sponsors do not need written records of adopting employers.
- 403(b)(9) sponsors do not need 30 adopting employers.



## Churches, cont. – 403(b)(9) RIAs

---

Required program provisions in every § 403(b)(9) Retirement Income Account plan:

- Intention to be a § 403(b)(9) Retirement Income Account
- Must satisfy the separate accounting, investment performance, and exclusive benefit requirements of § 1.403(b)-9(a)(2)(i)
- If life annuity benefits provided, must satisfy the present value and benefit guarantee requirements of § 1.403(b)-9(a)(5)



# Mass Submitters

---

- A mass submitter may sponsor either a prototype or volume submitter plan if it –
  - Has an established place of business in the US where it can be reached every business day
  - Submits opinion or advisory letter applications on behalf of at least 30 prototype sponsors or 30 volume submitters each of which sponsors (on a word-for-word identical basis) the same basic plan document or specimen plan
- A person may sponsor a plan of a mass submitter regardless of the number of adopting employers.
  - Prototype plans may be sponsored as a *word-for-word identical adopter* or as a *minor modifier*
  - Volume submitter plans may be sponsored as a *word-for-word identical adopter*



## Mass Submitters, cont.

---

- The plan of a mass submitter must include language designating the mass submitter as agent of the sponsor for amendments.
- Mass submitters and their sponsors are subject to different user fees than regular sponsors.



# Scope of Favorable Letter

---

- An opinion or advisory letter will cover the form of the plan document meeting 403(b) requirements.
  - Subject to the limitations on employer reliance (discussed later).
  - The Service will only review the basic plan document or specimen plan and the adoption agreement, if applicable.
- An opinion or advisory letter will *not* cover:
  - any other document that may be incorporated by reference into the plan (such as the actual terms of a specific annuity contract); or
  - whether a plan is subject to ERISA or satisfies any ERISA requirements.



## Scope, cont.

---

Opinion and advisory letters will *not* be issued for:

- TEFRA church DB plans;
- grandfathered plans under Rev. Rul. 82-102;
- fill-in provisions that don't have set parameters to ensure employer compliance with 403(b);
- plans that incorporate 415 or the ACP test by reference.



# Employer Reliance – Govt Plans

---

A **governmental plan** may rely on an opinion or advisory letter of a prototype or volume submitter plan that it adopts:

- that the form of the plan satisfies 403(b), *but*
- the letter is *not* a determination that the plan is a governmental plan, and
- *cannot* rely on an advisory letter *to the extent* that the employer modifies the approved specimen plan



# Employer Reliance – Church Plans

---

A plan of a **church or QCCO** may rely on an opinion or advisory letter of a prototype or volume submitter plan that it adopts:

- that the form of the plan satisfies 403(b), *but*
- the letter is *not* a determination that the adopting employer is a church or QCCO, and
- *cannot* rely on an advisory letter *to the extent* that the employer modifies the approved specimen plan



# Employer Reliance – other 501(c)(3)s

---

A plan of other 501(c)(3)s may rely on an opinion or advisory letter of a prototype or volume submitter plan that it adopts:

- that the form of the plan satisfies 403(b), *but*
- *cannot* rely on an advisory letter *to the extent* that the employer modifies the approved specimen plan, and
- *cannot* rely that the plan's nonelective contributions satisfy:
  - the nondiscrimination requirements of 401(a)(4), or
  - the minimum coverage requirements of 410(b)

*unless*, (i) the plan is a standardized prototype plan and (ii) all of the employers in the adopting employer's controlled group are 403(b) eligible employers.



## Employer Reliance – factual issues and 415

---

- **Factual issues** - regardless of the adopting employer (govt, church, or other 501(c)(3)), the opinion or advisory letter may *not* be relied upon for inherently factual issues.
- **IRC Section 415** - There is *no* reliance for 415 *if* the adopting employer or any related employers maintain another 403(b) plan,
  - *unless*, all the 403(b) plans are prototype plans.



## Duties of a Pre-Approved Plan Sponsor

---

- Maintain a written record of all eligible employers who have adopted the plan.
  - List with names, addresses and EINs must be provided to IRS upon request.
  - Does not apply to 403(b)(9) retirement income accounts.
- Keep the plan qualified.
  - Timely amend for changes in law or guidance.
  - Apply for new opinion or advisory letters when required.



## Duties, cont.

---

- Provide employers a copy of the plan, and all amendments, restatements, and opinion or advisory letters.
- Have procedures to comply with the requirements for notices to adopting employers.



## Duties, cont. – Notice Requirements

---

Sponsor must notify adopting employers of:

- Plan amendments and restatements.
- The need to timely adopt the plan and any restatements.
- Adverse tax consequences if employer fails to timely adopt, or fails to operate plan in accordance with plan amendments.
- Known qualification problems.



## Duties, cont. – Notice of Known Qualification Problems

---

- If the plan sponsor determines that an adopting employer's plan may no longer satisfy the 403(b) requirements, the sponsor must notify the employer.
- Notice is not required where the employer corrects the problem through EPCRS.
- Notification requirement applies only where the sponsor *has knowledge* of the problem.



## Duties, cont. – Compliance

---

- Failing to comply with these requirements may result in:
  - Loss of eligibility to sponsor a pre-approved 403(b) plan.
  - Revocation of any opinion or advisory letters.
- Sponsor must comply with these duties until:
  - It notifies the IRS and adopting employers that it is abandoning the plan
  - It withdraws its application for pre-approval; or
  - The IRS revokes the opinion or advisory letter.



# Adopting Employer's Responsibilities

---

An adopting employer must:

- Fill in adoption agreement correctly.
- If using a non-standardized plan, ensure that non-elective contributions satisfy 410(b) and 401(a)(4).
- Ensure that the plan's investment arrangements comply with 403(b) and are consistent with the plan.
- Operate plan in compliance with its terms.



## How to Apply for an Opinion or Advisory Letter

---

- Applications may be submitted starting **June 28, 2013.**
- A separate application is required for each separate 403(b) plan.
  - For example, one basic plan document with three adoption agreements are considered three separate plans and would require three separate applications.



## How to Apply, cont. – Basic Info

---

- **Application Form** - complete the “Application for Approval of § 403(b) Pre-Approved Plan” found at the end of Rev. Proc. 2013-22.
- **User Fee** - use the applicable user fee found in section 6.03 or 6.04 of Rev. Proc. 2013-8.
- **Address** -
  - Internal Revenue Service
  - Commissioner, TE/GE
  - Attention: SE:T:EP:RA
  - P.O. Box 27063
  - McPherson Station
  - Washington, DC 20038



# How to Apply, cont. – Who may apply

---

- An application for a **prototype** plan may be submitted by:
  - a prototype sponsor,
  - a mass submitter for its mass submitter prototype plan, or
  - a mass submitter on behalf of either:
    - a word-for-word identical adopter, or
    - a minor modifierof the mass submitter's prototype plan
- An application for a **volume submitter** plan may be submitted by:
  - a volume submitter practitioner,
  - a mass submitter for its mass submitter volume submitter plan, or
  - a mass submitter on behalf of
    - a word-for-word identical adopterof the mass submitter's volume submitter plan



## How to Apply, cont. – Mass Submitters

---

- **Mass Submitters** - must also submit applications on behalf of at least 30 word-for-word identical adopters of the mass submitter's plan.
  - The 30-identical-adopter requirement only needs to be met by one of mass submitter's plans.
  - Once the 30-identical-adopter requirement is met for one of its plans, the mass submitter can submit minor modifier applications for its prototype plans.



## How to Apply, cont. – Sample Plan Language

---

- Sample plan provisions may be found at:  
[http://www.irs.gov/pub/irs-tege/403b\\_lrm0313.pdf](http://www.irs.gov/pub/irs-tege/403b_lrm0313.pdf).

Use of this language is not required but it is encouraged. It would be helpful if you identify in your cover letter if such language is being used.



## How to Apply, cont. – Additional Issues

---

- **Failure to Disclose or Provide Accurate info** - may affect the reliance on the letter, including negating any reliance.
- **Additional Info** - Service may require additional info.
- **Deficient Plans** - Service may require revisions before the plan will be reviewed.
- **NOT Transferrable** - an opinion or advisory letter may not be transferred to another entity (does not apply to a simple change of name).
- **Withdrawal** - a sponsor may withdraw an application but must notify EP R&A and each employer who has already adopted the plan (such plans will then be deemed individually designed plan). EP R&A may refer approval concerns to EP Exams.



## Abandonment of Sponsorship and Revocation of Favorable Letter

---

After a sponsor's plan is pre-approved,

- If a sponsor wants to **abandon** a pre-approved plan, it must (i) notify any employers that have adopted the plan (such plans will become individually designed plans, unless the employer adopts another pre-approved plan), and then (ii) notify EP R&A.
- The Service may **revoke** an opinion or advisory letter if it is found to be in error, but such revocation will generally not be retroactive.



## Additional Resources

---

- “IRC 403(b) Tax-Sheltered Annuity Plans” at [www.irs.gov](http://www.irs.gov)
- IRS 403(b) video segments at [www.irs.gov](http://www.irs.gov)
- Revenue Procedure 2013-22 at [www.irs.gov](http://www.irs.gov)
- 403(b) Plan Fix-it Guide at [www.irs.gov](http://www.irs.gov)