



## IRS issues guidance on 403(b) plan remedial amendment periods

### Who's affected

This information applies to sponsors of 403(b) plans.

### Background and summary

In 2013, the IRS published [Revenue Procedure 2013-22](#), providing a program for pre-approval of 403(b) plans and establishing a remedial amendment period during which 403(b) plan sponsors could retroactively correct plan defects. A plan defect is a provision or the absence of a required provision that causes the plan document to not satisfy the 403(b) rules. Under the guidance, the first day of the initial remedial amendment period was January 1, 2010. The IRS later announced in [Revenue Procedure 2017-18](#) that the last day of the initial remedial amendment period is scheduled to be March 31, 2020.

With the last day of the initial remedial amendment period approaching, the IRS issued [Revenue Procedure 2019-39](#) on September 30, establishing recurring remedial amendment periods for 403(b) plans and extending the initial remedial amendment period for certain plan defects. The guidance also establishes timing on subsequent amendments to both individually designed and pre-approved 403(b) plans and establishes recurring pre-approved cycles during which a plan may be submitted for IRS approval.

### Action and next steps

Revenue Procedure 2019-39 is effective September 30, 2019. Employers that maintain 403(b) plans should read the information contained in this Pension Analyst. If Prudential Retirement currently provides document services for your plan, we will contact you with respect to your plan restatement. If you have questions about how this guidance affects your plan, please contact your Prudential Retirement representative.

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## Individually designed plans

### Recurring remedial amendment periods for individually designed plans

Revenue Procedure 2019-39 establishes a recurring remedial amendment period for individually designed 403(b) plans for certain plan defects occurring after the end of the initial remedial amendment period on March 31, 2020. For plan defects, the remedial amendment period first begins on:

- For a new 403(b) plan, the date the plan is effective;
- For an amendment to an existing 403(b) plan (that is not related to a change in 403(b) requirements or one that is integrally related), the earlier of the date the amendment is adopted or put into effect;
- For changes to a 403(b) plan requirement, the date the change is effective; and
- In the case of a plan defect with respect to a provision integral to changes to a 403(b) plan requirement, the first date on which the plan was operated in accordance with the provision.

For non-governmental plans, the recurring remedial amendment period generally ends on the last day of the second calendar year following the calendar year in which the failure occurred. For governmental plans, the recurring remedial amendment period generally ends on the later of the second calendar year following the calendar year in which the failure occurred or 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after the end of the calendar year in which the failure occurred.

For terminating plans, the recurring remedial amendment period ends at plan termination. Accordingly, any retroactive remedial plan amendments or other required plan amendments for a terminating plan must be adopted in connection with the plan termination regardless of whether such requirements are included on the IRS Required Amendments List.

If it is not possible to amend a plan retroactively so that all plan provisions necessary to satisfy the Code section 403(b) related to the plan defect are made effective in operation for the whole remedial amendment period, then the recurring remedial amendment period does not apply. The guidance also does not permit a plan to be made retroactively effective for a taxable year prior to the taxable year in which the plan was adopted. In addition, the guidance does not allow a plan defect to be corrected after the expiration of the applicable remedial amendment period. However, a plan may still be able to correct such failures under the [IRS' Employee Plans Compliance Resolution System](#).

### Plan amendment deadlines for individually designed plans

Except as otherwise provided, an amendment to an individually designed plan made with respect to a plan defect first occurring after March 31, 2020, must be adopted by the end of the remedial amendment period. Effective for plan years beginning on or after January 1, 2020, a discretionary amendment for non-governmental plans must be made by the end of the plan year the amendment is operationally put into effect. For a governmental plan, a discretionary amendment must be adopted by the later of the end of the plan year in which the amendment is put into effect or 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment is operationally put into effect.

### Limited extension of initial remedial amendment period

Under the guidance, in certain situations the initial remedial amendment period for a plan defect first occurring on or before March 31, 2020 is extended to the later of:

- March 31, 2020; or
- The end of the applicable recurring remedial amendment period.

For example, if a discretionary amendment that fails to satisfy Section 403(b) requirements is adopted and made effective on January 1, 2018, with respect to a non-governmental 403(b) plan, the initial remedial amendment period with respect to the plan defect will end on December 31, 2020. If the amendment had been adopted and made effective on January 1, 2017, the initial remedial amendment period would end on March 31, 2020.

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## Required Amendments List

Beginning in 2019, each Required Amendments List will include changes in Section 403(b) requirements that are effective during the plan year in which the list is published. The list will be used to determine the date that the remedial amendment period ends for the changes included on the list. A change will generally be included on the list after guidance with respect to the change has been issued. However, the Treasury department and IRS have discretion to include a change in Section 403(b) requirements on a list in other circumstances, such as when it is anticipated that no guidance would be issued regarding the change.

## Pre-approved plans

### Pre-approved plan cycle system

Revenue Procedure 2019-39 establishes a system of pre-approved plan cycles following the expiration of the initial remedial amendment period on March 31, 2020. Under this system, during a one-year submission period at the beginning of each cycle, a plan will be permitted to apply for a pre-approved letter. Guidance on the procedures for applying for a 403(b) pre-approved plan letter and the timing of each cycle will be issued prior to the opening of each submission period. When the IRS review of the plans that had been submitted is near completion, the IRS will announce the date by which an adopting employer must adopt a newly approved plan. This deadline is expected to be a uniform date that will apply to all adopting eligible employers. It is expected that this deadline will provide virtually all employers approximately two years to adopt a newly approved plan.

The period covered by the initial remedial amendment period ending March 31, 2020 (without regard to the extension) is considered cycle 1. A word-for-word identical adopter or minor modifier of a cycle 1 plan is considered to have a cycle 1 plan even if a letter is applied for after March 31, 2020. Cycle 2 begins immediately after March 31, 2020. The submission period to apply for a cycle 2 letter is not expected to begin until 2023. Before the beginning of the submission period, the IRS will issue additional guidance on the recurring pre-approved plan cycles, specific procedures for applying for a cycle 2 letter, and the requirements and procedures for an employer to adopt a pre-approved plan. As part of this additional guidance, the IRS intends to provide a cumulative list of changes in 403(b) requirements. The IRS anticipates the system of 403(b) pre-approved plan cycles will continue beyond cycle 2.

### Recurring remedial amendment periods for pre-approved plans

The guidance also establishes a system of recurring remedial amendment periods for pre-approved 403(b) plans to establish deadlines for the adoption of interim amendments for plan defects occurring after March 31, 2020. Under this system, a plan that does not meet the Section 403(b) requirements solely as a result of a plan defect will be considered to have satisfied those requirements if it corrects the plan defect on or before the last day of the remedial amendment period.

The beginning of the remedial amendment period is the same as that for [individually-designed plans](#). The end of the remedial amendment period is no earlier than the end of cycle 2, provided the amendment is adopted timely and in good faith with the intent of complying with the 403(b) requirements. The IRS intends to issue guidance prior to the end of cycle 2 that will provide additional rules for determining the end of this remedial amendment period.

For a change to the Section 403(b) requirements, generally an eligible employer must adopt an interim amendment by the [plan amendment deadline for pre-approved plans](#). The remedial amendment period also applies in cases where the plan sponsor determines in good faith that no amendment is required because the change to Section 403(b) requirements does not affect provisions of the plan document and the IRS later finds that an amendment is required. In this situation, the plan would still be eligible for the remedial amendment period to correct the plan defect.

For terminating plans, the recurring remedial amendment period ends at plan termination. Accordingly, any retroactive remedial plan amendments or other required plan amendments for a terminating plan must be adopted in connection with the plan termination regardless of whether such requirements are included on a Required Amendments List.

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If it is not possible to amend a plan retroactively so that all plan provisions necessary to satisfy the Code section 403(b) related to the plan defect are made effective in operation for the whole remedial amendment period, then the recurring remedial amendment period does not apply. The guidance also does not permit a plan to be made retroactively effective for a taxable year prior to the taxable year in which the plan was adopted. In addition, the guidance does not allow a plan defect to be corrected after the expiration of the applicable remedial amendment period. However, a plan may still be able to correct such failures under the [IRS' Employee Plans Compliance Resolution System](#).

## Plan amendment deadline for pre-approved plans

For non-governmental plans, interim plan amendments must be adopted by the end of the calendar year after the calendar year the change is effective. Effective for plan years beginning on or after January 1, 2020, a discretionary amendment for non-governmental plans must be made by the end of the plan year the amendment is operationally put into effect.

For governmental plans, an interim amendment must be adopted by the later of the end of the calendar year following the calendar year in which the change is effective, or 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment becomes effective.

A discretionary amendment under a governmental plan must be adopted by the later of the end of the plan year in which the amendment is put into effect or 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment is operationally put into effect.

## Limited extension of initial remedial amendment period for cycle 1 plans

The initial remedial amendment period for pre-approved plans is generally extended to the end of cycle 2 if a timely amendment is adopted that is intended in good faith to correct a plan defect related to a change in the Section 403(b) requirements. However, this extension does not apply to any plan defect not related to a change in the Section 403(b) requirements that occurred before January 1, 2018. Any such plan defect must be corrected by March 31, 2020.

## Next steps

With the publication of this revenue procedure, 403(b) plans now have a review and approval process similar to 401(a) plans. The IRS expects to issue additional guidance before the next cycle plans are required to be submitted for review.

Prudential Retirement is currently working on Prudential's pre-approved 403(b) plan restatement. Sponsors of 403(b) plans that use Prudential Retirement's plan document services will receive information regarding this restatement in the upcoming months.

If you have any questions regarding the effect of this guidance on your plan, please contact your Prudential Retirement representative for assistance.

### Pension Analyst by Prudential Retirement

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