



June 2013

PENSION ANALYST

Important information—Plan administration and operation



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IRS establishes program for pre-approved 403(b) plans

Who's affected

These developments affect sponsors of 403(b) plans.

Background and summary

In 2007, the Internal Revenue Service (IRS) [issued final 403\(b\) regulations](#). These regulations required employers offering 403(b) plans to adopt written plans by January 1, 2009, to formally satisfy the requirements of the final rules.

Since there previously had not been a plan document requirement for 403(b) plans, the IRS had not established any type of determination letter program for these plans. However, the IRS had occasionally issued private letter rulings regarding various 403(b) plan issues.

Recently, the IRS published [Revenue Procedure 2013-22](#) establishing a program for issuing opinion and advisory letters for 403(b) pre-approved plans. Under the program, the IRS will accept applications for opinion and advisory letters regarding prototype and volume submitter plans starting June 28, 2013. Applications must be filed by April 30, 2014.

Revenue Procedure 2013-22 also provides guidance regarding:

- Standardized and nonstandardized prototype plans;
- Volume submitter plans;
- Required plan provisions; and
- Reliance on opinion and advisory letters.

At the same time, the IRS issued an [information package](#) that contains sample plan language that 403(b) plan sponsors may use in preparing to submit their plans for IRS approval.

Action and next steps

Revenue Procedure 2013-22 is effective April 29, 2013. Employers that maintain 403(b) plans should read the information contained in this *Pension Analyst*. If Prudential Retirement currently provides document services for your 403(b) plan, we will contact you with respect to restating your plan to a pre-approved document. If you do not currently use Prudential's document services but are interested in doing so, please contact your Prudential Retirement representative. If you have questions about how this guidance affects your plan, please contact your Prudential Retirement representative for assistance.

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Background

Revenue Procedure 2013-22 establishes a program for the pre-approval of 403(b) plans. The program offers employers that maintain a 403(b) plan an alternative to adopting an individually-designed plan. Since the IRS is not yet establishing a determination letter program for individually-designed 403(b) plans, only employers that adopt pre-approved plans that have opinion or advisory letters will have assurance that their documents satisfy the section 403(b) written plan document requirements.

Prototype plans

A prototype plan document provider will submit a prototype plan to the IRS for approval that the plan document satisfies the requirements of section 403(b). The IRS will approve the plan document by issuing an opinion letter.

A prototype plan is a two-part document. The first part is called the basic plan document and contains provisions that apply to the plan of any employer that uses the document to adopt a written 403(b) plan. An employer may not change the provisions of the basic plan document.

The second part of the document is called the adoption agreement. The adoption agreement is the part of the plan document that is completed and signed by an employer to establish a written plan. The adoption agreement includes elections and options from which an employer may choose to customize the features of the plan.

There are two forms of 403(b) prototype plans under this revenue procedure: a “standardized plan” and a “nonstandardized plan.” A standardized plan allows an employer to offer only elective deferral contributions or its terms satisfy the uniform coverage and nondiscrimination requirements with respect to any contributions (other than elective deferrals) under the terms of the plan, such as employer matching or nonelective contributions. A nonstandardized plan is a prototype plan that is not a standardized plan.

Reliance on opinion letter

Employers that adopt a standardized plan can rely directly on the opinion letter that the form of the plan (i.e., the document) satisfies the 403(b) requirements and that the plan satisfies the 403(b) nondiscrimination requirements provided certain requirements are met. Employers that adopt a nonstandardized plan can rely on the opinion letter only if the plan is a governmental plan, or the employer is a church or a qualified church-controlled organization.

All other eligible employers that adopt nonstandardized plans can generally rely directly on the plan’s opinion letter that the document satisfies 403(b) requirements and the nondiscrimination requirements for elective deferrals; they do not have assurance that the plan satisfies the nondiscrimination requirements applicable to contributions that are not elective deferrals.

Volume submitter plans

The second type of pre-approved plan is a volume submitter plan, which is an approved specimen plan. A volume submitter plan may or may not have an adoption agreement. The IRS will approve the volume submitter document by issuing an advisory letter.

An employer that adopts a volume submitter plan can rely directly on the advisory letter that the form of the plan satisfies the 403(b) requirements, with two exceptions. The adopting employer cannot rely on the advisory letter with respect to modifications made to the specimen plan that are not pre-approved options offered under the plan. In addition, there is no reliance that the plan satisfies the nondiscrimination requirements applicable to contributions that are not elective deferrals.

If the differences between the terms of the approved volume submitter plan and the adopting employer's plan are extensive or complex, the IRS may consider the employer's plan to be an individually-designed plan rather than a pre-approved plan. Since the IRS has not yet offered a determination letter program for individually-designed plans, there is not yet any way to get IRS approval of such a plan document.

Required plan provisions

In reviewing prototype and volume submitter plans, the IRS will not review any investment arrangements or any other documents that may form a part of the employer's plan. The terms of the pre-approved plan must be independent of investment arrangements (such as annuity contracts) offered under the plan.

Every pre-approved plan must provide that in the event of a conflict between the terms of the pre-approved plan and the terms of the investment arrangement, the terms of the plan will govern.

The revenue procedure describes provisions that must be included in every 403(b) pre-approved plan. Some of these provisions include the following:

- The plan must contain all the material terms and conditions for eligibility, benefits, limits, investment arrangements under the plan, and the time and form under which benefits will be distributed.
- The plan must satisfy the universal availability requirement with respect to elective deferrals, unless the employer is a church or qualified church controlled organization (QCCO).
- The plan must limit the amount of compensation for contribution purposes unless the employer is a church or QCCO.
- The plan must describe the terms for all plan provisions relating to benefits, including hardship distributions and other distributable events, loans, plan-to-plan transfers, contract exchanges, contributions and rollovers.
- The plan may provide for a vesting schedule for nonelective employer contributions rather than full and immediate vesting. Nonelective employer contributions and earnings must vest at least as rapidly as the minimum vesting rules under section 401(a) for qualified plans.
 - However, a volume submitter plan document that is intended for use for plans that are not subject to the ERISA vesting rules, such as governmental plans, non-electing church plans and QCCOs, is not required to include these vesting provisions.
- The plan must provide for an appendix that identifies the parties responsible for the various administrative functions under the plan, including approved investment providers.

The IRS published sample plan language that satisfies the requirements of the final 403(b) regulations. This sample plan language is available at http://www.irs.gov/pub/irs-tege/403b_lrm0313.pdf.

Retroactive remedial amendment provision

An employer may retroactively correct plan defects to satisfy the requirements of the 2007 final regulations by adopting a 403(b) pre-approved plan or by timely amending the plan. A plan defect is a provision or the absence of a required provision that causes the plan to not satisfy the 403(b) requirements. Under the remedial amendment provision, employers must amend the plan to correct any defects retroactively to the first day of the plan's remedial amendment period. The first day of the remedial amendment period is the later of:

- January 1, 2010; or
- The effective date of the plan.

Model plan language for public schools

In November 2007, the IRS published [model plan language](#) for public schools to use to either adopt a written 403(b) plan or amend an existing plan document when their program limits contributions to pre-tax elective deferrals. Public school plan sponsors that adopted the entire model plan were assured that the written plan satisfies the 403(b) requirements, without having to request a formal IRS private letter ruling. Additionally, the IRS in 2007 extended the use of the model language as sample language to other eligible employers. Public schools and other eligible employers may continue to use this language.

Next steps

With the publication of this revenue procedure, 403(b) plans now have a program that is similar to the pre-approved plan program for qualified plans.

Once a 403(b) plan document provider has received an opinion letter or advisory letter for its plan, the IRS will provide time for employers to adopt the pre-approved plan, which will be at least one year after all applications have been reviewed by the IRS. The IRS expects future guidance to require the restatement of every pre-approved 403(b) plan by the pre-approved plan document provider every six years. Upon issuance of a new opinion or advisory letter for the restated plan, adopting eligible employers would generally be required to adopt the restated plan (by completing a new adoption agreement, in the case of a prototype plan).

Prudential Retirement is currently working on their 403(b) plan document to develop a pre-approved plan to comply with the requirements of this revenue procedure. Communications regarding our pre-approved 403(b) plan document will be sent to you in the near future regarding what steps will need to be taken to adopt Prudential's pre-approved 403(b) plan and our restatement timetable.

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

Pension Analyst by Prudential Retirement

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