

## Employee Benefits Plan Newsletter

### IRS to Issue Advisory and Opinion Letters for 403(b) Plans

According to the IRS, opinion and advisory letters (i.e., for prototype and volume submitter type of plans, respectively) are expected to be issued for 403(b) plans in the second quarter of 2017. Over 460 plans were submitted to the IRS seeking approval.

The issuance of the approval letter is important to adopting employers of these plans since 403(b) plans previously never had the opportunity to receive a determination letter like a qualified retirement plan [e.g., a 401(k) plan] which is intended to satisfy IRC Section 401(a), or rely on an opinion or advisory letter received by a prototype or volume submitter plan document preparer. A 403(b) plan was only able to receive a private letter ruling which rarely occurred.

#### Avoid Unintended Consequences

Based on our discussions with plan document preparers who submitted their 403(b) plan to the IRS for approval, they will be populating their pre-approved plan documents with the plan provisions of the former plan document and providing them to plan sponsors for review and a fresh signature. Sponsors will be required to carefully review the plan provisions to ensure all the provisions of the plan are “carried-over” exactly into the new plan. Failures (commonly referred to as scrivener’s errors) that are identified by the IRS on their examinations, or during compliance reviews of plans, can cause unintended complications involving monetary corrections and use of significant resources and, in the case of an IRS finding, the potential of monetary corrections involving a closing agreement. These unintended consequences further point to the importance of sponsors giving serious consideration to using an expert to assist them with the review of the plan document.

#### Ability to Self-Correct for 403(b) Plans

Perhaps because of the impending issuance of opinion and advisory letters, the IRS has recently issued meaningful information for 403(b) plan sponsors involving the ability to self-correct plan provisions that violate IRC Section 403(b) written plan rules by adopting plan amendments by March 31, 2020. This correction period is known as the “remedial amendment period” (RAP). During the RAP, sponsors of both types of 403(b) pre-approved plans are eligible to correct plan provisions that fail to meet IRC Section 403(b) requirements [including those under the 403(b) regulations and subsequent guidance] either by:

- Adopting a 403(b) pre-approved plan by March 31, 2020, that has a 2017 opinion or advisory letter, or
- Amending their individually designed plan by March 31, 2020.

Correcting plan provisions may involve:

- Adding required provisions, or correcting defective provisions.

For most situations, the correction must be retroactive to the later of January 1, 2010, or the plan's effective date. In addition, if the plan was administered based on the defective provision, this also must be retroactively corrected.

However, the IRS distinguishes that in order to take advantage of the RAP, a sponsor must have timely adopted a written 403(b) plan by December 31, 2009 (or the effective date of the plan, if later). Plans that failed to meet the original adoption date must correct a plan's written terms violation(s) by utilizing the IRS Voluntary Correction Program (VCP), which is a part of the [Employee Plans Compliance Resolution System](#) (EPCRS) described in [Rev. Proc. 2016-51](#). By correcting through VCP, the sponsor would be treated as having adopted a written plan by the required deadline.

### Contact Us

The Employee Benefit Services Group at PKF O'Connor Davies is available to assist employers with 403(b) plans, as well as provide representation during IRS examinations. We provide a full spectrum of compliance services for qualified and non-qualified employee benefit plans. For more information, please email Tim Desmond at [tdesmond@pkfod.com](mailto:tdesmond@pkfod.com) or Louis F. LiBrandi at [lilibrandi@pkfod.com](mailto:lilibrandi@pkfod.com) or telephone 212.286.2600.

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