

IRS Announces Remedial Amendment Period for 403(b) Plan Documents

January 2010

The Internal Revenue Service (IRS) has formally announced (in Announcement 2009-89) a remedial amendment period for 403(b) plan documents that were adopted by plan sponsors by December 31, 2009 and were intended to satisfy the requirements of Internal Revenue Code (Code) section 403(b) in accordance with IRS Notice 2009-3. A remedial amendment period permits a plan sponsor to retroactively correct deficiencies in its plan documents with respect to satisfying the requirements of Code section 403(b), including the final 403(b) regulations, and applicable subsequent guidance.

Hewitt Comment: *A remedial amendment period does not permit retroactive correction of failures to administer a 403(b) plan in compliance with Code section 403(b), the final 403(b) regulations, and related guidance. Correction of such operational failures may be corrected through the Employee Plans Compliance Resolution System, currently described in IRS Revenue Procedure 2008-50.*

Forthcoming Revenue Procedures

As previously indicated in Announcement 2009-34, the IRS expects to publish a Revenue Procedure that will establish an opinion letter process for 403(b) prototype plans, which will permit a vendor to obtain pre-approval from the IRS that the plan language satisfies the requirements of Code section 403(b). The IRS expects to publish this Revenue Procedure in the next few months, which will reflect comments received on the draft Revenue Procedure included in Announcement 2009-34. Subsequently, the IRS intends to publish a Revenue Procedure that will permit 403(b) plan sponsors using custom drafted, rather than prototype, plan documents to obtain a determination from the IRS that such individually designed plan document language satisfies the requirements of Code section 403(b). The forthcoming Revenue Procedures will address the timing and other details about adopting a pre-approved prototype plan and applying for a determination letter. Meanwhile, plan sponsors should not request rulings or determination letters on their plan documents until the forthcoming Revenue Procedures are released.

Remedial Amendment Period for Plans Existing on December 31, 2009

Announcement 2009-89 for the first time provides 403(b) plans with a remedial amendment period similar to that which has been available to 401(k) and other tax-qualified retirement plans. If a 403(b) plan sponsor has adopted a written plan document that is intended to satisfy the requirements of Code section 403(b) by December 31, 2009 and the plan sponsor either:

- Adopts a prototype plan that has received an IRS opinion letter to the effect that the prototype plan language satisfies the requirements of Code section 403(b), or
- Applies for an individual determination letter from the IRS to the effect that the plan language satisfies the requirements of Code section 403(b) when such determination letter program is made available,

then the plan sponsor will have a remedial amendment period during which the plan document previously adopted by December 31, 2009 can be corrected for any language deficiencies, either by amendment or

adoption of a prototype plan retroactive to January 1, 2010. A plan sponsor meeting these requirements will, in addition, have reliance that the plan document satisfies the requirements of Code section 403(b) beginning January 1, 2010.

Remedial Amendment Period for Plans Adopted After December 31, 2009

A 403(b) plan first established after December 31, 2009 can also have reliance that the plan document satisfies the requirements of Code section 403(b) beginning on the effective date of the plan, if the plan sponsor either adopts a pre-approved prototype plan or applies for an individual determination letter and corrects any deficiencies in the plan documents retroactive to the plan's effective date, provided that the plan receives a favorable determination letter from the IRS or the prototype plan has a favorable opinion letter from the IRS, as applicable.

More Information

For more information, please see:

- IRS Announcement 2009-89, available at: <http://www.irs.gov/pub/irs-drop/a-09-89.pdf>
- Hewitt's summary of IRS Announcement 2009-34 and the IRS draft Revenue Procedure: [IRS Announces 403\(b\) Plan Document Approval Process](#)
- Hewitt's summary of IRS Notice 2009-3: [IRS Delays Deadline for 403\(b\) Plan Documents](#)
- IRS Revenue Procedure 2008-50, which describes the Employee Plans Compliance Resolution System, available at: http://www.irs.gov/irb/2008-35_IRB/ar10.html