

MEMO# 33780

September 21, 2021

IRS Updates Guidance on Procedures for Pre-Approved 403(b) Plans and Amendment Deadline for DC Pre-Approved Plans

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: IRS Updates Guidance on Procedures for Pre-approved 403(b) Plans and Amendment Deadline for DC Pre-approved Plans

The IRS has issued Revenue Procedure 2021-37^[1] and Revenue Procedure 2021-38^[2] updating the procedures for its pre-approved plan programs. Rev. Proc. 2021-37 announces the opening of Cycle 2 for submissions of 403(b) pre-approved plans and modifies the 403(b) pre-approved plan program. Rev. Proc. 2021-38 modifies the deadline for 401(a) pre-approved plans to adopt interim amendments.

Rev. Proc. 2021-37

With Rev. Proc. 2021-37, the IRS announces the opening of the second 403(b) pre-approved plan cycle.^[3] The IRS will accept applications for opinion letters under this program from May 2, 2022 through May 1, 2023.

The Rev. Proc. also makes a number of changes to the procedures for the 403(b) pre-approved plan program. Many of these changes are aimed at making the program more similar to the 401(a) pre-approved plan program. Significant changes are described below.

Type of plan

The Rev. Proc. simplifies the 403(b) pre-approved plan program by eliminating the distinction between prototype and volume submitter plans (the program now provides for standardized plans and nonstandardized plans).

Form of plan

The Rev. Proc. provides that a 403(b) pre-approved plan may take the form of either a single plan document or a basic plan document with an adoption agreement.

Cumulative list

The Rev. Proc. announces that the IRS will issue a Cumulative List of Changes in the 403(b) requirements identifying the 403(b) requirements that the IRS will take into account in reviewing 403(b) pre-approved plans submitted for Cycle 2.

Hardship distributions

The Rev. Proc. allows any nonstandardized plan to provide for either safe harbor or non-safe harbor hardship distributions.

Employees of church-related organizations

The Rev. Proc. allows employees of certain church-related organizations to participate^[4] and includes special rules for amending a plan approved under Cycle 1 to permit these additional employees to participate, retroactive to the beginning of Cycle 2.

Applications by adopting employers for determination letters

The Rev. Proc. makes the program's provisions regarding reliance on an opinion letter more similar to the provisions applicable under the 401(a) pre-approved plan program, by allowing adopting employers to apply for a determination letter^[5] using Form 5307 in the following limited circumstances: (1) an adopting employer of a nonstandardized plan that makes amendments to the plan that are not extensive, or (2) an adopting employer of any 403(b) pre-approved plan (whether a standardized plan or a nonstandardized plan) that adds language to satisfy the requirements of Internal Revenue Code section 415 due to the required aggregation of plans. These applications must be submitted during the "employer adoption window" (a period that will be announced by IRS and will last approximately two years).

Minor modifier of mass submitter plan

Applications for a minor modifier^[6] adopter of a Mass Submitter's 403(b) pre-approved plan with respect to a cycle will no longer be accepted after that cycle's employer adoption window begins.

Deadline for adopting interim amendments

The Rev. Proc. extends the plan amendment deadline for making interim amendments with respect to a change in 403(b) requirements, for most plans, until the end of the second calendar year following the calendar year in which the change in 403(b) requirements is effective with respect to the plan. A later deadline is provided for a 403(b) pre-approved plan that is a governmental plan.^[7] As described below, Rev. Proc. 2021-38 makes a similar change applicable to 401(a) pre-approved plans.

Remedial amendment period for form defects

The program permits an employer to retroactively correct a form defect (a provision or absence of a provision that causes a plan to fail the 403(b) requirements) by timely amending its plan. The expiration date of the remedial amendment period to correct a form

defect that first occurs after June 30, 2020, is the later of (1) the end of the cycle that includes the date on which the remedial amendment period would have ended if the plan were an individually designed plan, or (2) the end of the first cycle in which an application for an opinion letter that considers the form defect may be submitted.

Extension of the initial remedial amendment period

In Rev. Proc. 2019-39, IRS provided a limited extension of the initial remedial amendment period, provided that the employer amends the plan to correct a form defect that occurs in Cycle 1. In Rev. Proc. 2021-37, IRS provides that the limited extension of the initial remedial amendment period ends on the last day of the cycle in which an application for an opinion letter that considers the form defect may be submitted.

Rev. Proc. 2021-37 extends the deadline for adopting an initial amendment that is required under certain circumstances in order for the limited extension of the initial remedial amendment period to apply. To be considered timely, the date by which the initial amendment must be adopted is extended to the later of (1) June 30, 2020, or (2) the end of the second calendar year following the calendar year in which the change in 403(b) requirements is effective with respect to the plan.

Effective date

The Rev. Proc. is effective on July 1, 2020 (the first day of Cycle 2) and applies to applications for opinion letters submitted with respect to Cycle 2 and subsequent cycles.

Comments

The IRS and Treasury Department invite comments on how to further improve the 403(b) opinion letter program.

Rev. Proc. 2021-38

The IRS also issued Rev. Proc. 2021-38, which extends the deadline for adopting an interim amendment for a pre-approved 401(a) plan to match the deadline for interim amendments with respect to 403(b) pre-approved plans, as set forth in Rev. Proc. 2021-37.

Previously, the deadline for adopting an interim amendment was determined in part by the employer's tax-filing deadline.[\[8\]](#) Rev. Proc. 2021-38 amends Rev. Proc. 2016-37[\[9\]](#) to require adoption of an interim amendment by the end of the second calendar year after the calendar year in which the change in qualification requirements is effective with respect to the plan. A special rule continues to apply to governmental plans—the adoption deadline for interim amendments is the later of (i) the deadline described above, or (ii) 90 days after the close of the third regular legislative session of the legislative body with authority to amend the plan that begins on or after the date the amendment becomes effective.

The new timing rules under Rev. Proc. 2021-38 apply to provisions that are effective with respect to a plan after December 31, 2020.

endnotes

[1] Revenue Procedure 2021-37 is available at <https://www.irs.gov/pub/irs-drop/rp-21-37.pdf>.

[2] Revenue Procedure 2021-38 is available at <https://www.irs.gov/pub/irs-drop/rp-21-38.pdf>.

[3] The first cycle opened in 2013, the year the IRS announced the pre-approval program for 403(b) plans. See ICI Memorandum No. 27160, dated April 5, 2013, available at <https://www.ici.org/memo27160>.

[4] Previously, the program was limited to churches or conventions or associations of churches. Section 111 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) clarifies that employees of certain church-controlled tax-exempt organizations are eligible for participation in a section 403(b)(9) Retirement Income Account (a program provided by a church or a convention or association of churches). This includes employees of a Qualified Church-Controlled Organization (QCCO), as defined in Internal Revenue Code section 3121(w)(3)(B), and Non-QCCOs. For a summary of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, available at <https://www.ici.org/memo32118>.

[5] Generally, an adopting employer that makes amendments to the pre-approved plan loses the ability to rely on the IRS opinion letter received by the plan.

[6] There are simplified provisions for providers who offer a pre-approved plan from a "Mass Submitter." The provider must obtain an opinion letter (the Mass Submitter submits an application on behalf of each provider); however, if the provider is offering a plan that is word-for-word identical to a plan of the Mass Submitter, the provider does not need to submit a copy of the plan. If the Mass Submitter submits, on behalf of a provider, a plan with minor modifications to the Mass Submitter's plan, then a copy of the plan must be submitted, but it will not require an in-depth IRS technical review.

[7] A governmental plan must adopt interim amendments by the later of (1) the end of the second calendar year following the calendar year in which the change in 403(b) requirements is effective with respect to the plan, or (2) ninety 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.

[8] Previously, there was a special rule for determining the tax-filing deadline applicable to a tax-exempt employer. Now that the amendment deadline no longer relies on the tax-filing deadline, this special provision is deleted.

[9] See ICI Memorandum No. 30015, dated July 6, 2016, available at https://www.ici.org/my_ici/memorandum/memo30015.

should not be considered a substitute for, legal advice.