

Relief From Immediate Compliance With 2009 § 403(b) Written Plan Requirement

Notice 2009-3

This notice provides relief during 2009 for sponsors of § 403(b) plans with respect to the requirement to have a written § 403(b) plan in place by January 1, 2009. This notice also briefly describes other programs the Service intends to establish relating to § 403(b) plans.

Background

Final regulations under § 403(b) were published on July 26, 2007 (72 Fed. Reg. 41128) (the final regulations). Effective January 1, 2009, sponsors of § 403(b) plans are generally required to maintain a written plan that satisfies, in both form and operation, the requirements of the final regulations. Although many sponsors of § 403(b) plans have already adopted a written § 403(b) plan, the Service and Treasury are aware that some sponsors may not have a written § 403(b) plan in place by January 1, 2009.

Further, there is no current program under which a plan sponsor can obtain assurance that the written form of its plan satisfies § 403(b), other than through a private letter ruling. The Service and Treasury have therefore concluded that compliance with the final regulations would be facilitated by the establishment of both pre-approved and individually designed plan programs and that transition relief should be provided to all § 403(b) plan sponsors who have made appropriate efforts to comply with the written plan requirement in the final regulations.

Relief for 2009

The Service will not treat a § 403(b) plan as failing to satisfy the requirements of § 403(b) and the final regulations during the 2009 calendar year, provided that:

- (1) on or before December 31, 2009, the sponsor of the plan has adopted a written § 403(b) plan that is intended to satisfy the requirements of § 403(b) (including the final regulations) effective as of January 1, 2009;
- (2) during 2009, the sponsor operates the plan in accordance with a reasonable interpretation of § 403(b), taking into account the final regulations; and
- (3) before the end of 2009, the sponsor makes its best efforts to retroactively correct any operational failure during the 2009 calendar year to conform to the terms of the written § 403(b) plan, with such correction to be based on the general principles of

correction set forth in the Service's Employee Plans Compliance Resolution System (EPCRS) at section 6 of Rev. Proc. 2008-50 (2008-35 I.R.B. 464).

The relief under this notice applies solely with respect to the 2009 calendar year, and may not be relied on with respect to the operation of the plan or correction of operational defects in any prior or subsequent year.

Upcoming Guidance

As part of the establishment of the prototype program, the Service will publish a request for comments on a draft revenue procedure on obtaining Service approval of prototype § 403(b) plans that will be adopted by eligible employers, and on sample plan language for drafting prototype plans. The Service also intends to establish a determination letter program for individually designed § 403(b) plans once the § 403(b) prototype program is established. The programs described in the revenue procedure will also provide for a retroactive remedial amendment of § 403(b) plans for years after 2009. The Service will also modify EPCRS to include additional § 403(b) issues.

Effect on Other Documents

Section 6 of Rev. Proc. 2007-71, regarding the date amendments are adopted, is modified.

Drafting Information

The principal authors of this notice are Angelique Carrington and James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1-877-829-5500 (a toll free number) or e-mail Ms. Carrington or Mr. Flannery at RetirementPlanQuestions@irs.gov.