

Time to Review §403(b) Plans for Compliance with IRS Requirements

February 28, 2019

Given the increased scrutiny that the Internal Revenue Service (IRS) is giving to §403(b) plans and an upcoming deadline for adopting a "safe harbor plan," now is a good time for sponsors of §403(b) plans to ensure that their plan documentation meets current IRS requirements.

The IRS has established a pre-approved plan program under which a plan sponsor has until March 31, 2020, to retroactively adopt a plan document which the IRS has already opined complies with the requirements of Internal Revenue Code (Code) §403(b). A plan sponsor should analyze whether a pre-approved plan document works administratively and structurally with its objectives. The IRS has indicated that it does not intend to establish a determination letter program for individually designed §403(b) plans. Accordingly, if a plan sponsor decides not to use a pre-approved document, then it becomes especially important for the sponsor to take other steps to confirm legal and operational compliance to reduce the risk that the IRS will find the plan noncompliant upon audit.

Pre-Approved Plan Program

A §403(b) plan is a form of deferred compensation plan which may be established for the benefit of employees of certain tax-exempt and educational entities. Plan sponsors were initially required to adopt a written plan document by December 31, 2009. However, at that time, the IRS provided little guidance for plan sponsors to use to ensure that their documents met Code §403(b)'s requirements.

In 2013, the IRS announced the establishment of a §403(b) pre-approved plan program which permitted vendors to submit plans to the IRS for approval and employers to subsequently adopt such pre-approved plans. In conjunction with the establishment of this pre-approved plan program, the IRS established a corresponding remedial amendment period during which certain plan sponsors could retroactively amend their plans (including through restatements on pre-approved plans) back to January 1, 2010 (or the plan's effective date, if later). In 2017, the IRS announced that this remedial amendment period will end on March 31, 2020.

If a plan sponsor retroactively adopts a pre-approved plan by March 31, 2020 (the last day of the remedial amendment period), it will automatically be deemed to have corrected any form defects in the plan document it previously adopted and will be deemed to be in compliance with the applicable legal provisions back to January 1, 2010 (or the plan's effective date, if later). Stated differently, a plan that did not satisfy the requirements of Code §403(b) in form on any day during the remedial amendment period will be considered to have satisfied those requirements if, on or before March 31, 2020, all provisions of the plan that are necessary to satisfy Code §403(b) have been adopted and made effective in form and operation from the beginning of the remedial amendment period.

Action Steps

The complexity of plan design options for §403(b) plans has drastically increased since 2009. Thus, in conjunction with the adoption of a pre-approved plan, plan sponsors should take the remedial amendment period opportunity to also self-audit their plan operations and design structure, and:

- Carefully review their plan provisions to ensure that they mirror how the plan is being administered and operated (if discrepancies exist, documentation or operational amendments will be required);

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- Determine whether any operational changes are desired (e.g., updates to eligibility or contributions);
- Ensure any previously adopted amendments are incorporated into the restated plan document;
- Review investment options; and
- Review custodial agreements, annuity contracts, and service agreements.

Modifications to §403(b) plan structures may be desired and/or required. While many §403(b) plan vendors are offering to assist plan sponsors with the migration of their existing documents onto the pre-approved plans, plan sponsors should have the documents reviewed by their own legal counsel to ensure consistency with terms and intent. Additionally, the provisions of pre-approved plans can vary among designers and as such, it is important for plan sponsors to confirm that any chosen pre-approved plan meets their organization's business and administrative objectives.

If a plan sponsor decides, for any reason, not to adopt a pre-approved plan, we still recommend a thorough review of current 403(b) plan documents to confirm that they are consistent with current IRS guidance and plan administration.

Plan sponsors with questions regarding the §403(b) plan pre-approved program or alternatives should contact their Miller Canfield attorney.