

IRS ESTABLISHES REMEDIAL AMENDMENT PERIODS FOR CORRECTING 403(B) PLAN DOCUMENT DEFECTS

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As we have previously reported, the IRS has made significant changes in the past few years to the way retirement plan sponsors ensure their documents comply with the Code. In 2017, the IRS confirmed that it would not issue determination letters for individually designed 403(b) plans when it opened the first three year remedial amendment period (“RAP”) for 403(b) plans. [Click here to review the article.](#)

This first 403(b) RAP expires on March 31, 2020, leaving sponsors of individually designed 403(b) plans little time to adopt necessary amendments and to correct document defects, retroactive to January 1, 2010. Plan sponsors may take one of two approaches – restate the plan onto a pre-approved plan document, or restate the plan as an individually designed plan.

In anticipation of the upcoming closure of the first 403(b) RAP, the IRS has issued Revenue Procedure 2019-39, setting forth subsequent RAPs for the correction of plan document defects occurring after March 31, 2020. How this guidance will impact 403(b) plan sponsors depends on whether the 403(b) plan is maintained on a pre-approved or individually designed format.

Pre-Approved Plan Cycles

The sponsors of pre-approved 403(b) plan products will apply for IRS opinion and advisory letters, seeking approval of the form of the plan document during pre-approved plan “Cycles.” Cycle 2 for pre-approved 403(b) plans commences immediately after March 31, 2020 (the last day of Cycle 1). The IRS anticipates the submission window for Cycle 2 will begin in 2023. Future guidance will be issued concerning submission deadlines and timeframes for pre-approved plans to be adopted by employers. The IRS will also provide a cumulative list of the changes in the 403(b) plan requirements resulting from changes in statutes or regulations since the prior Cycle. Respecting the amendment process for pre-approved plans, employers will be only peripherally involved, as adopting employers.

Individually Designed Plan 403(b) RAP

Attorneys

Peter Bradley
Michael Flanagan
Richard Kaiser
Ryan Murphy
Amy Walters

Practices & Industries

Employee Benefits

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An amendment to an individually designed 403(b) plan to address a form defect occurring after March 31, 2020 must be made by the end of the 403(b) RAP. With respect to individually designed plans, the 403(b) RAP varies depending on whether the plan is governmental or non-governmental, and whether the plan document changes are made to a new plan, an existing plan or due to changes regarding or integral to the legal requirements respecting 403(b) plans. Individually designed plan sponsors will be able to track changes in the 403(b) plan document requirements by reviewing the Required Amendments List to be issued annually starting in 2019.

The measurement of the 403(b) RAP for non-governmental plans

The 403(b) RAP for individually designed non-governmental plans is measured from a starting date based on the following:

- New Plan – The date the plan is put into effect.
- Amendment to Existing Plan – The earlier of the date the amendment is adopted or effective.
- Change in 403(b) Requirements – The date the change in the requirements becomes effective.

The 403(b) RAP for individually designed non-governmental plans ends for each situation as follows:

- New Plan – The last day of the second calendar year following the calendar year in which the plan is put in effect.
- Amendment to Existing Plan – The last day of the second calendar year following the calendar year in which the amendment was adopted or effective, whichever is later.
- Change in 403(b) Requirements – The last day of the second calendar year following the calendar year in which the change in the requirements first appears in the Required Amendments List.

The measurement of the 403(b) RAP for governmental plans

The 403(b) RAP for individually designed governmental plans is measured from a starting date based on the following:

- New Plan – The date the plan is put into effect.
- Amendment to Existing Plan – The earlier of the date the amendment is adopted or effective.
- Change in 403(b) Requirements – The date the change in the requirements becomes effective.

The 403(b) RAP for individually designed governmental plans ends for each situation as follows:

- New Plan – The later of:
 - o The last day of the second calendar year following the calendar year in which the plan is put in effect, or
 - o Ninety (90) days after the close of the third regular legislative session of the legislative body with authority to amend the plan that begins after the end of the plan's initial plan year.
- Amendment to Existing Plan – The later of:

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- o The last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later, or
 - o Ninety (90) days after the close of the third regular legislative session of the legislative body with authority to amend the plan that begins after the calendar year in which the amendment is adopted or effective, whichever is later.
- Change in 403(b) Requirements – The later of:
 - o The last day of the second calendar year following the calendar year in which the change in the requirements first appears in the Required Amendments List, or
 - o Ninety (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 change in the requirements first appears in the Required Amendments List.

The amendment deadline for discretionary amendments to individually designed 403(b) plans

The deadline for discretionary amendments is as follows:

- Non-governmental 403(b) plan – The end of the plan year in which the plan amendment is put into operation (e.g., the plan is administered in accordance with the new plan provision).
- Governmental 403(b) plan – The later of:
 - o The end of the plan year in which the plan amendment is put into operation, or
 - o Ninety (90) days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment is put into operation.

The 403(b) RAP for terminating plans

The 403(b) RAP is shortened for terminating plans. Any required amendments that apply on the date of termination must be adopted in conjunction with the plan termination, regardless of whether the requirements have been included on an issued Required Amendments List.

Limited Extension to the first 403(b) RAP for certain plan document defects

Out of concern that plan sponsors of individually designed plans be given sufficient time to correct 403(b) plan document defects occurring near the end of the first 403(b) RAP (March 31, 2020), the IRS permits a limited extension. Respecting form defects occurring on or before March 31, 2020, plan sponsors will have until the later of March 31, 2020, or the end of the subsequent 403(b) RAP to correct the plan document defect. However, a form defect related to a change in the 403(b) legal requirements that was effective before 2019 must be corrected by March 31, 2020, even though the requirement did not appear in a Required Amendments List.

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In summary, plan amendment deadlines for 403(b) plans have now been formalized in a procedure that designates specific timeframes during which a 403(b) plan document can be retroactively amended so that all of its provisions satisfy the legal requirements for 403(b) plans. Failure to correct a 403(b) plan document defect before the end of the applicable 403(b) RAP will require correction under the Employee Plans Compliance Resolution System (“EPCRS”) as provided in Revenue Procedure 2019-19.

(Revenue Procedure 2019-39, 2019-42 IRB)