

# 403(B) PLAN UPDATE: IRS PUBLISHES TWO ISSUE SNAPSHOTS

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The IRS Tax Exempt and Government Entities (TE/GE) Division has oversight responsibilities for employee plans, including retirement plans, IRAs, and related trusts. TE/GE has a Knowledge Management team that periodically issues summaries called “Issue Snapshots” that provide helpful insights on specific operational aspects of employee plans. The Issue Snapshots not only provide valuable insights to plan sponsors, but they provide issue indicators and audit tips that suggest the subjects in the Issue Snapshots that might be areas of emphasis in future audits.

Two new and notable Issue Snapshots were recently published that are relevant to eligible tax-exempt employers that sponsor and maintain 403(b) retirement plans. The first of the recent 403(b) Issue Snapshots provides a summary of the universal availability requirements applicable to elective deferral features that may be offered by 403(b) plans. See [www.irs.gov/retirement-plans/issue-snapshot-403b-plan-the-universal-availability-requirement](http://www.irs.gov/retirement-plans/issue-snapshot-403b-plan-the-universal-availability-requirement). Under that requirement, all employees of an employer sponsoring the plan must be eligible to make elective deferrals if any employee has the right to do so, with certain limited exceptions. The employee groups that may be excluded from eligibility to make elective deferrals without violating the universal availability requirement generally are employees who normally work less than 20 hours per week, certain students performing services, certain non-resident aliens, and employees who are eligible to make elective deferrals under another 401(k), 403(b) or 457(b) plan sponsored by the same employer. A 403(b) plan that broadly excludes any employee who works less than full-time, for example, is likely to run afoul of the universal availability requirement. Compliance with the universal availability requirement will be a focal point in any IRS audit of a 403(b) plan that allows for elective deferrals.

The second of the recent 403(b) Issue Snapshots shines a light on a lesser known issue for 403(b) plans that relates to the Code Section 415 limitation on annual additions (annual additions may not exceed the lesser of 100% of compensation, or \$58,000 for 2021). See [www.irs.gov/retirement-plans/issue-snapshot-403b-plan-application-of-irc-section-415c-when-a-403b-plan-is-aggregated-with-a-section-401a-defined-contribution-plan](http://www.irs.gov/retirement-plans/issue-snapshot-403b-plan-application-of-irc-section-415c-when-a-403b-plan-is-aggregated-with-a-section-401a-defined-contribution-plan). Contributions made to all defined contribution plans of the employer generally are combined in applying the 415 limitation. However, 403(b) plan participants are each considered to have exclusive control over their own annuity contracts (see Treas. Reg. Section 1.415(f)-1(f)(1)).

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Because the participant is considered to control and maintain the annuity contract, contributions to the 403(b) annuity contract generally would not be aggregated with contributions to any *other* qualified defined contribution plan (e.g., profit sharing or 401(k) plan) of the tax-exempt employer – and there are instances in which an eligible tax-exempt employer might choose to maintain both a 403(b) plan and a qualified 401(a) plan. But there also is an important exception to this 403(b) plan aggregation rule where a particular employee is deemed to control a *separate* employer that sponsors another qualified defined contribution plan. For example, a professor covered by a 403(b) plan sponsored by university employing the professor might also have a wholly owned separate business (e.g., consulting business or medical practice) that sponsors its own, separate qualified defined contribution plan. If the professor is the sole owner of a separate, unrelated business, any contributions made on the professor's behalf to the plan maintained by that business and the contributions to the university's 403(b) plan would have to be aggregated for purposes of satisfying the 415 limitation on annual additions. If an eligible employer that sponsors a 403(b) plan allows for outside employment, the Issue Snapshot suggests there is an expectation the 403(b) plan sponsor will have procedures for informing employees about the special 403(b) aggregation rule applicable to participant-controlled employers. A 403(b) plan sponsor that allows outside employment also would be well advised to request that each employee provide information regarding outside employment with unrelated employers controlled by the employee, as well as information regarding any contributions made to plans sponsored by any such participant-controlled employer.